

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMARR ROWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51789

FILED

SEP 09 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a plea of nolo contendere, of two counts of burglary. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge. The district court adjudicated appellant Lamarr Rowell a habitual criminal and sentenced him to two concurrent prison terms of ten years to life.

On appeal, Rowell contends that (1) his guilty plea was invalid because it was entered unknowingly and involuntarily; (2) the burglary statute is vague and overbroad and violates due process; (3) the district court's denial of credit for time served violated NRS 176.055; and (4) the habitual criminal statute violates the Eighth Amendment because it is cruel and unusual.

Validity of guilty plea

Rowell contends that his guilty plea was invalid because it was entered unknowingly and involuntarily because (1) he did not make any statements that would constitute an admission of guilt and (2) he did not understand the elements of the offense of burglary.

This court does not permit a defendant to challenge the validity of a guilty plea on direct appeal from the judgment of conviction.

See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986). “Instead, a defendant must raise a challenge to the validity of his or her guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea, or by initiating a post-conviction proceeding.” Id. at 272, 721 P.2d at 368. Therefore, we conclude that Rowell’s challenge to his guilty plea may not be entertained on direct appeal.

The burglary statute

Rowell contends that NRS 205.060, the burglary statute, is vague and overbroad and violates due process. Specifically, Rowell contends that the statute does not (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited or (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner.

Generally, the entry of a guilty plea waives any right to appeal from events which preceded that plea. See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). “[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process [A defendant] may not thereafter raise independent claims relating to deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Id. (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)). However, NRS 174.035(3) presents an exception to the rule. It allows a defendant pleading guilty to reserve in writing the right to appeal an adverse determination on a specified pretrial motion, provided he or she has the consent of the district court and the State.

Prior to trial, Rowell announced that he would plead guilty to two charges of burglary without negotiations. The district court indicated

that it would allow Rowell to preserve the right to appeal the denial of his motion to dismiss the information based on the constitutionality of the burglary statute. However, Rowell did not obtain the State's consent nor did he reserve in writing the right to appeal the adverse determination. Under these circumstances, we conclude that the denial of Rowell's motion to dismiss was not properly preserved for appeal and we decline to consider its merits.¹

Credit for Time Served

Rowell contends that the district court's denial of credit for time served violated NRS 176.055. Citing Kuykendall v. State, 112 Nev. 1285, 926 P.2d 781 (1996), Rowell contends that the district court should have granted him 247 days rather than the 79 days it did grant him because he was incarcerated. Rowell was arrested for the present case, and, after spending 79 days in confinement, he was sentenced and began serving a prison sentence in another case.

NRS 176.055(1) states, in part, "whenever a sentence of imprisonment . . . is imposed, the court may order that credit be allowed against the duration of the sentence . . . for the amount of time which the defendant has actually spent in confinement before conviction, unless [the] confinement was pursuant to a judgment of conviction for another offense." Here, the additional credit that Rowell seeks relates to a conviction for another offense—Rowell was convicted in case no. C235435

¹To the extent that the district court and stand-by counsel's assurances to Rowell that he could appeal the motion to dismiss is interpreted as conditionally preserving the right to appeal, we conclude that this claim has not been preserved because the requirements for exemption under NRS 174.035(3) have not been met.

and began that sentence after the 79 days spent in confinement related to the present case. Kuykendall does not address apportionment of jail credit where time spent in jail is pursuant to two separate judgments of conviction. Kuykendall, 112 Nev. 1285, 926 P.2d 781. Accordingly, Rowell has failed to show that he is entitled to additional credit beyond the 79 days. Thus, the district court did not err in failing to credit Rowell additional time served.

Habitual criminal statute

Rowell contends that the habitual criminal statute violates the Eighth Amendment because it is cruel and unusual and the district court abused its discretion because the habitual criminal adjudication was based on the number of previous convictions that were non-violent and stale.

The district court has broad discretion to dismiss a habitual criminal allegation. See NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 153 (2007). The habitual criminal statute, however, “makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.” Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). This court explained that “Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal.” Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000); see also O'Neill, 123 Nev. at 15-16, 153 P.3d at 42-43 (holding that once district court has declined to exercise its discretion to dismiss allegation of habitual criminality, only factual findings district judge may make must relate solely to existence and validity of prior conviction).

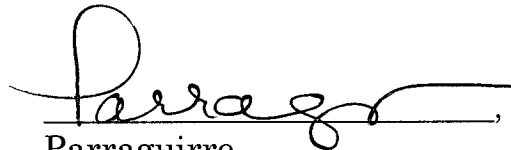
This court has consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court will refrain from interfering with the sentence imposed “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Moreover, regardless of its severity, a sentence that is within the statutory limits is not “cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.” Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348-49, 871 P.2d 950, 953 (1994).

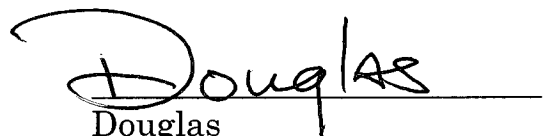
In the instant case, Rowell does not allege that the district court relied on impalpable or highly suspect evidence, and the relevant statutes are not unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes. See NRS 205.060(2) (setting forth that burglary is a felony); NRS 207.010(1)(b)(2) (setting forth a sentence of 10 years to life for large habitual criminal adjudication). Further, our review of the sentencing hearing transcript reveals that the district court understood its sentencing authority and the discretionary nature of habitual criminal adjudication. The prosecutor noted that Rowell’s extensive criminal history included ten prior felony convictions within ten years and provided the district court with certified copies of seven prior judgments of conviction. The district court noted that it considered the crime in this instance, entering a school

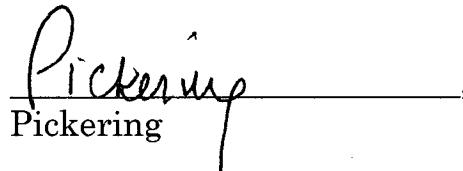
with the intent of taking a teacher's wallet, to be very serious and chose not to dismiss the habitual criminal allegations. Thus, we conclude that the district court did not abuse its discretion, and Rowell's sentence was not a cruel or unusual punishment.

Having considered Rowell's contentions and determined that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Jennifer Togliatti, District Judge
Law Offices of Martin Hart, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk