

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES GRAY, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52140

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

On September 23, 2005, appellant James Gray was convicted, pursuant to a jury verdict, of one count of false imprisonment by using a person as a human shield. The district court adjudicated Gray as a habitual criminal and sentenced him to serve a prison term of 72-180 months. On direct appeal, this court concluded that the State presented sufficient evidence to prove beyond a reasonable doubt that Gray was guilty of the crime charged. However, this court also determined that Gray was entitled to a new sentencing hearing because the State failed to properly file a notice of habitual criminality and charge him in the indictment as a habitual criminal. Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 163-64 (2008). On remand, the district court declined to adjudicate Gray as a habitual criminal, see NRS 207.010(2), and resentenced him to a prison term of 60-156 months. This timely appeal followed.

Gray contends that the district court abused its discretion at the resentencing hearing. Specifically, Gray claims his right to due process was violated and that he is entitled to another sentencing hearing

because the sentence imposed by the district court (1) was “significantly higher” than the Division of Parole and Probation’s recommendation of 48-120 months, (2) “shows a presumption of vindictiveness” by not following the Division’s recommendation, and (3) was based on “inaccurate” information regarding his criminal history.¹ We disagree.

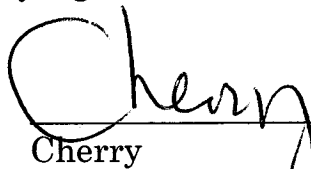
The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). This court has consistently afforded the district court wide discretion in its sentencing decision. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The district court’s discretion, however, is not limitless. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Nevertheless, we 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 palpable or highly suspect evidence.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience. Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).


¹Defense counsel argued at the resentencing hearing that one of Gray’s felony convictions in California (assault with a deadly weapon not a firearm, great bodily injury likely) would have been treated as a misdemeanor in Nevada. This is the basis for Gray’s claim on appeal that the PSI contained “inaccurate” information.


In the instant case, Gray has failed to demonstrate that the district court relied on impalpable or highly suspect evidence or allege that the relevant sentencing statute is unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statute. See NRS 200.460(4) (category B felony punishable by a prison term of 1-15 years). At the resentencing hearing, the prosecutor reviewed the violent and "frightening" nature of Gray's offense as detailed by the trial testimony of the witnesses. We also note that Gray has a lengthy and extensive criminal history including two felony convictions in California, six misdemeanor convictions, four revoked terms of parole, one revoked term of probation, and numerous arrests without disposition. And in light of the above, we are not persuaded by Gray's argument that the sentence imposed was vindictive solely because the district court exercised its discretion and chose not to follow the sentencing recommendation of the Division. Therefore, we conclude that the district court did not abuse its discretion at the resentencing hearing.

Having considered Gray's contention and concluded that it is without merit, we

ORDER the amended judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk