IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA LOUIS OWENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52186

FILED

JAN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of attempted lewdness of a child under the age of 14 years. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. The district court sentenced appellant Joshua Louis Owens to serve a prison term of 24-60 months.

Owens contends that the district court abused its discretion at sentencing by imposing a term of incarceration rather than probation. Owens claims that the instant case is his "first felony conviction, and although he had been on probation for a prior Gross Misdemeanor, for which he was revoked, he had never been terminated from probation." Citing to the dissents in Tanksley v. State, 113 Nev. 844, 850-53, 944 P.2d 240, 244-45 (1997) (Rose, J., dissenting) and Sims v. State, 107 Nev. 438, 441-46, 814 P.2d 63, 65-68 (1991) (Rose, J., dissenting), and the concurrence in Santana v. State, 122 Nev. 1458, 1464-65, 148 P.3d 741, 745-46 (2006) (Rose, C.J., concurring), for support, Owens argues that this court should review the sentence imposed by the district court to determine whether justice was done. We conclude that Owens' contention is without merit.

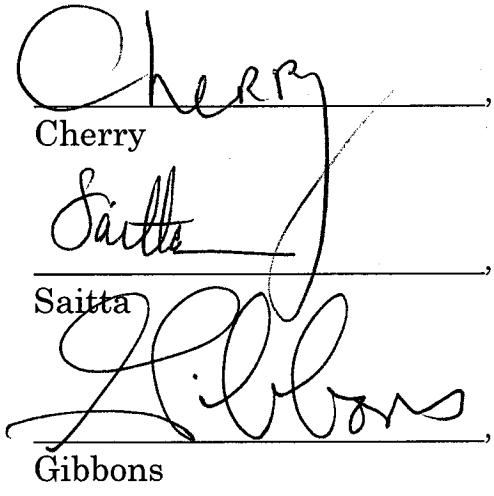
This court has consistently afforded the district court wide discretion in its sentencing decision. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The district court's discretion, however, is not limitless. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Nevertheless, we 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 impalpable 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).

In the instant case, Owens does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes. See NRS 193.330(1)(a)(1) (attempt to commit a category A felony punishable by a prison term of 2-20 years); NRS 201.230(2). At the sentencing hearing, the State agreed not to oppose probation, however, the Division of Parole and Probation recommended a prison term of 36-96 months. According to the presentence investigation report prepared by the Division, Owens' criminal history included 12 misdemeanor and 2 gross misdemeanor convictions over an 8-year period. Additionally, the stepmother of the minor-victim informed the district court that Owens knew about the victim's traumatic history of abuse prior to perpetrating the offense and subsequently asked for the maximum sentence. We also

note that it is within the district court's discretion to impose probation. See NRS 176A.100(1)(c). And finally, to the extent that Owens implies that the district court failed to exercise its discretion by following the recommendation of the Division of Parole and Probation and imposing a term of incarceration, we disagree. Therefore, we conclude that the district court did not abuse its discretion at sentencing.

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Washoe County Alternate Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk