IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN GERALD WIDICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52841

FILED

OCT 16 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 trafficking in a controlled substance. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. The district court sentenced appellant Allen Gerald Widick to a prison term of ten years to life.

On appeal, Widick contends that the district court erred by (1) failing to reduce or modify his sentence based on Widick's substantial assistance in accordance with NRS 453.3405(2) and (2) considering impalpable or highly suspect evidence during sentencing.

Substantial assistance

Widick contends that the district court made three errors when considering whether to reduce or modify his sentence based on his substantial assistance: the district court (1) failed to properly follow the provisions of NRS 453.3405(2) and the guidelines provided in Parrish v. State, 116 Nev. 982, 12 P.3d 953 (2000); (2) abused its discretion by ignoring strong and uncontroverted evidence that Widick provided substantial assistance; and (3) violated the equal protection clause by denying Widick any modification or reduction in sentence.

NRS 453.3405(2) gives the district court authority to reduce or suspend the sentence of a person convicted of certain controlled substance offenses if the court "finds that the convicted person rendered substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, coconspirators or principals or of any other person involved in trafficking in a controlled substance." The decision to grant a sentence reduction under NRS 453.3405(2) is discretionary. See Matos v. State, 110 Nev. 834, 838, 878 P.2d 288, 290 (1994).

Failure to follow provisions and guidelines

Widick contends that the district court erred by failing to follow the provisions of NRS 453.3405(2) and the guidelines as set forth in Parrish. Specifically, Widick contends that once the district court found that he had provided substantial assistance, it was required to suspend or reduce his sentence.

In Parrish, the district court sentenced Parrish to the maximum sentence without expressing whether Parrish had rendered substantial assistance or had simply declined to exercise its discretion to reduce or modify his sentence. 116 Nev. at 987, 12 P.3d at 956. This court held that once evidence is presented in the district court concerning whether a defendant has rendered substantial assistance, the district court is required to expressly state its finding concerning whether substantial assistance has been provided. Id. at 991-92, 12 P.3d at 959. And if the district court finds that substantial assistance has been rendered but chooses not to reduce or modify the sentence, it must articulate the reason on the record. Id. Contrary to Widick's contention, the district court may choose not to exercise its discretion and modify or reduce a sentence but must articulate its reasons for doing so.

In the present case, following an oral motion by Widick, the district court heard testimony from several ATF agents that Widick had assisted in the apprehension of drug and arms dealers. The district court articulated on the record that Widick had rendered substantial assistance but declined to exercise its discretion to reduce or modify Widick's sentence because of his long criminal record and criminal conduct subsequent to rendering substantial assistance.

Regarding Widick's record before he provided substantial assistance, Detective John Silver testified Widick had been caught with stolen mail and checks and had been arrested for being in possession of 28 to 30 grams of methamphetamine. Widick's sister testified that Widick and his girlfriend were living with her but that arrangement ended following Widick's substantial assistance and he returned to doing drugs. Detective Silver testified that after Widick offered substantial assistance, he was arrested for being in the possession of drug paraphernalia. Detective Silver and Detective Joseph Lever testified that in all encounters with Widick he fled or attempted to flee, endangering the public and officers in pursuit.

We conclude that the district court properly followed this court's edict as set forth in Parrish in articulating its findings and reasons for not exercising its discretion to reduce or modify Widick's sentence in accordance with NRS 453.3405(2).

Ignoring Widick's substantial assistance

Widick contends that the district court ignored evidence of his substantial assistance, during which he risked his life to help ATF agents apprehend drug and arms dealers. In particular, Widick contends that the district court's reasons for refusing to modify his sentence were vague and

that it did not sufficiently consider the nature and magnitude of Widick's assistance to law enforcement. We disagree. Although evidence was presented demonstrating that Widick rendered substantial assistance, significant testimony was also presented demonstrating that, subsequent his substantial assistance to the ATF, Widick became involved in drugs and other criminal activity. This evidence supported the district court's refusal to exercise its discretion in reducing or modifying his sentence and the district court's explanation of its refusal to exercise its discretion met the requirements of Parrish, 116 Nev. at 991-92, 12 P.3d at 959. Therefore, we conclude that the district court did not err in this regard.

Equal Protection violation

Widick contends that the district court violated the equal protection clause by declining to modify or reduce his sentence. Specifically, Widick contends that the district court treated him "unequally to those other persons who had proven they had performed substantial assistance."

To establish a successful equal protection claim, the defendant initially "has the burden of proving 'the existence of purposeful discrimination'" against a class of persons. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)). In other words, the defendant must show "that the decisionmakers in his case acted with discriminatory purpose." Id. That is, the decisionmaker "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Id. at 298 (internal quotations omitted).

We conclude that Widick has not met his initial burden of proving purposeful discrimination by the district court or articulated an

identifiable group to which he belongs. Thus, the district court did not violate Widick's equal protection rights.

Consideration of impalpable or highly suspect evidence

Widick contends that the district court considered impalpable or highly suspect evidence during his sentencing hearing. Specifically, Widick contends that the district court erred in considering testimony during sentencing regarding a pending criminal case that arose after he pleaded guilty in the present case, criminal conduct for which he was never charged, and his past criminal record.

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). "The sentencing proceeding is not a second trial and the court is privileged to consider facts and circumstances which clearly would not be admissible at trial." Id. at 93-94, 545 P.2d at 1161. The district court "may consider any reliable and relevant evidence," including other criminal conduct which a defendant was never charged with or convicted. See NRS 176.015(6); See Silks, 92 Nev. at 94 n.2, 545 P.2d at 1161 n.2.

Widick challenges three pieces of evidence as impalpable or highly suspect and improperly considered by the district court.

First, Widick contends that Detective Silver should not have been allowed to testify regarding an incident where Widick was suspected of dealing drugs. In particular, Detective Silver testified that officers had

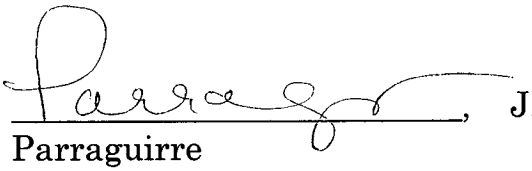
entered a residence in search of Widick and found him hiding in a closet in the basement. Nearby, police officers found seven grams of methamphetamine, a scale, and baggies. Also during the event, police officers searched Widick's car and discovered drug paraphernalia, stolen mail, and counterfeit checks. Although Widick acknowledged ownership of the scale to police officers, he was charged only with possession of paraphernalia and for failing to change his registered address and not other drug related offenses stemming from the event. We conclude that this evidence, even that which did not garner charges for Widick, was not impalpable or highly suspect and therefore was properly considered by the district court.

Second, Widick argues that the district court improperly considered testimony from Detective Lever as to another incident in which Widick was found in a hotel room with stolen mail. Although Widick was not charged with any offenses related to this incident, we conclude that district court did not err by considering this evidence at sentencing.

Third, Widick contends that the district court improperly considered impalpable testimony by Detective Silver and Detective Lever as to their caution when approaching Widick during different incidents because of a belief that he may be armed. However, while providing substantial assistance, Widick assisted in the arrest of two arms dealers, demonstrating that he had access to weapons. Police officers further testified that they had confiscated a weapon during a criminal pursuant in which the registered owner had informed them that he had sold the weapon to Widick. We conclude that this evidence was not impalpable or highly suspect and was properly considered by the district court.

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
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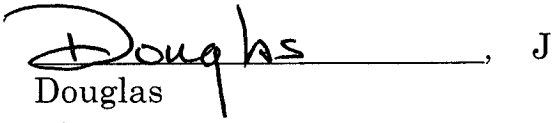

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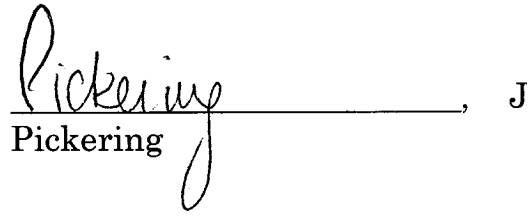

_____, J.
Pickering

cc: Hon. Robert H. Perry, District Judge
Marc Picker
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk