

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS HUGH HENRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53016

FILED

JUN 18 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of burglary, possession of burglary tools, and unlawful use of a hotel key. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court adjudicated appellant Marcus Hugh Henry as a habitual criminal and sentenced him to serve a prison term of 60-150 months and two concurrent jail terms of 12 months.

Henry contends that the district court abused its discretion at sentencing by adjudicating him as a habitual criminal pursuant to NRS 207.010(1)(a). Specifically, Henry claims that because he "didn't physically injure the victims, and their [sic] being no actual loss to the victims," his sentence amounts to cruel and unusual punishment. See Nev. Const. art. 1, § 6; see also U.S. Const. amend. VIII. We disagree with Henry's contention.

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, cert. denied, ___ U.S. ___, 128 S. Ct. 153 (2007). The

decision to adjudicate an individual as a habitual criminal, however, is not an automatic one. See Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). “[T]he district court may dismiss a habitual criminal allegation when the prior convictions are stale or trivial or in other circumstances where a habitual criminal adjudication would not serve the purpose of the statute or the interests of justice.” Hughes v. State, 116 Nev. 327, 331, 996 P.2d 890, 892 (2000) (emphasis added). 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, 116 Nev. at 333, 996 P.2d at 893; see also O’Neill, 123 Nev. at 15-16, 153 P.3d at 42-43 (holding that once a district court has declined to exercise its discretion to dismiss an allegation of habitual criminality, the only factual findings the district judge may then make must relate solely to the existence and validity of the prior convictions).

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 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).

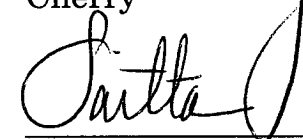
In the instant case, Henry does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes. See NRS 207.010(1)(a); NRS 205.080(1); NRS 205.900(1). 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 Henry’s extensive criminal history included nine prior felony convictions, and argued for sentencing under the “large” habitual criminal statute. See NRS 207.010(1)(b). The State provided the district court with certified copies of six prior judgments of conviction. Prior to making its determination not to dismiss the habitual criminal allegation, the district court described Henry as “a menace to society” and, as noted above, chose to sentence him under the “small” habitual criminal statute. Based on the

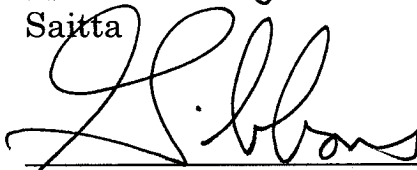
foregoing, we conclude that the district court did not abuse its discretion in deciding to adjudicate Henry as a habitual criminal.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jackie Glass, 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