

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT JAMES YARBER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53079

**FILED**

**NOV 02 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 attempted murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Robert Yarber to serve a prison term of 96 to 240 months, plus an equal and consecutive term for the use of a deadly weapon.

Yarber contends that the district court erred in failing to state on the record that it considered the factors identified in NRS 193.165(1) in determining the length of sentence to impose for the deadly weapon enhancement. We agree, however, we conclude that such error does not warrant reversal.

NRS 193.165(1) requires the district court to consider five enumerated factors when imposing a sentence for a deadly weapon enhancement: "(a) The facts and circumstances of the crime; (b) The criminal history of the person; (c) The impact of the crime on any victim; (d) Any mitigating factors presented by the person; and (e) Any other

relevant information.” The district court is also required to state on the record that it has considered these factors “in determining the length of the additional penalty.” NRS 193.165(1). This court recently held that compliance with NRS 193.165(1) requires the district court to articulate findings on the record with regard to each factor. Mendoza-Lobos v. State, 125 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 49, October 29, 2009).

Here, the district court failed to articulate findings on the record regarding each of the factors enumerated in NRS 193.165(1). Thus, the district court committed error. However, each of the factors specified in NRS 193.165(1) were discussed during Yarber’s sentencing hearing. Specifically, a representative from the Division of Parole and Probation informed the court of Yarber’s prior convictions, the State, defense counsel and Yarber each relayed the facts and circumstances surrounding the crime, the victim spoke about the impact of the crime on himself and his family, and Yarber presented numerous facts in mitigation and facts for the court to otherwise consider.<sup>1</sup> Before pronouncing Yarber’s sentence, the district court stated on the record that it had considered the arguments of counsel, as well as the statements of Yarber and the victim in making the sentencing determination. Thus, it is apparent that the district court considered all the factors set forth in NRS 193.165(1). And it

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<sup>1</sup>Yarber informed the court of his issues with mental illness, that he was extremely intoxicated during the commission of the crime, that he had great remorse for what he had done and that he had turned himself in to the police after the incident and had otherwise been completely cooperative.

does not appear from the record that the district court's failure to articulate findings regarding each enumerated factor had any bearing on its sentencing determination. Accordingly, we conclude the error, which Yarber did not object to at sentencing, did not affect Yarber's substantial rights and does not warrant reversal. Grey v. State, 124 Nev. \_\_\_, \_\_\_, 178 P.3d 154, 163 (2008); Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 178 P.3d 465, 477 (2008).

To the extent Yarber argues that the district court abused its discretion in imposing his sentence, we conclude that this argument is without merit. We have 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). 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). 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)).

Yarber has not alleged that the district court relied on impalpable or highly suspect evidence, or that the relevant statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statutes. See NRS 193.165(1);

NRS 193.330(1)(a)(1); NRS 200.030. Accordingly, we conclude that the district court did not abuse its discretion.

Having considered Yarber's contentions and concluded that they do not warrant relief, we

ORDER the judgment of conviction AFFIRMED.

Hardesty, C.J.  
Hardesty

Parraguirre, J.  
Parraguirre

Douglas, J.  
Douglas

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

cc: Hon. Janet J. Berry, District Judge  
Washoe County Public Defender  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk