IN THE SUPREME COURT OF THE STATE OF NEVADA

JON R. BARNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53538

FILED

OCT 21 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 third-offense driving under the influence. Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge. The district court sentenced appellant Jon R. Barnett to serve a prison term of 14-48 months.

Substitute Counsel

Barnett contends that the district court erred by not appointing substitute counsel sua sponte after he expressed dissatisfaction at his arraignment with his court-appointed public defender. Barnett claims that the attorney-client relationship had irreparably broken down and the district court's failure to appoint substitute counsel "on its own motion" violated his Sixth Amendment constitutional rights. See U.S. Const. amend. VI; Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). Barnett, however, does not ask to withdraw his guilty plea, but instead, specifically requests a remand for the appointment of new counsel and a new sentencing hearing. We conclude that Barnett's contention is without merit.

There is no constitutional guarantee to a meaningful relationship between a criminal defendant and his counsel. Morris v. Slappy, 461 U.S. 1, 14 (1983); see also U.S. Const. amend. VI; Nev. Const. art. 1, § 8. The right to choose one's own counsel is not absolute, and a defendant is not entitled to reject his court-appointed counsel and request alternate counsel at public expense without demonstrating adequate cause. Gallego v. State, 117 Nev. 348, 362, 23 P.3d 227, 237 (2001). "Good cause for substitution of counsel cannot be determined 'solely according to the subjective standard of what the defendant perceives.'" Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985) (quoting McKee v. Harris, 649 F.2d 927, 932 (2d Cir. 1981)). In reviewing a ruling on a motion for substitute counsel, this court considers the extent of the alleged conflict, the timeliness of the defendant's motion, and the adequacy of the district court's inquiry. See Young, 120 Nev. at 968, 102 P.3d at 576; see also Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 842-43 (2005), modified on other grounds by Mendoza v. State, 122 Nev. 267, 274, 130 P.3d 176, 180 (2006).

In response to questioning by the district court during his arraignment, Barnett stated that he had not "met very much" with counsel over the years to discuss his case and he believed counsel would not be effective if they went to trial. Counsel informed the court that Barnett never before expressed dissatisfaction with his performance and offered to withdraw. The district court inquired extensively into their relationship, asked Barnett several times if he needed more time to discuss his case with counsel and whether Barnett wished to plead guilty, as he previously indicated and which counsel advised, or proceed to trial. Eventually, Barnett agreed that he was satisfied with counsel and stated,

"I'll go ahead and plead guilty. That's why I come over here this morning." The district court thoroughly canvassed Barnett prior to accepting his plea. Finally, we note again that Barnett never actually moved for substitution of his court-appointed public defender. Therefore, we conclude that Barnett failed to demonstrate adequate cause and the district court did not err by failing to appoint substitute counsel sua sponte.

Abuse of Discretion at Sentencing

Barnett contends that the district court abused its discretion at sentencing by relying on impalpable and highly suspect evidence. Specifically, Barnett claims that because he received more than the minimum sentence, the district court "must have relied on the unsubstantiated statement [in the presentence investigation report (PSI)] that [he] continues to drink and drive."

Initially, we note that Barnett has not provided this court with a copy of the PSI with the challenged statement. "The burden to make a proper appellate record rests on appellant." Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); see also Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))); Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989) (recognizing that appellant's failure to include in record on appeal evidence from trial court record relevant to issue raised constitutes a failure to preserve issue for appeal). Nevertheless, although the appellate record provided by Barnett is deficient, we are able to conduct a

meaningful review based on the documents presently before the court and conclude that his contention is without merit.

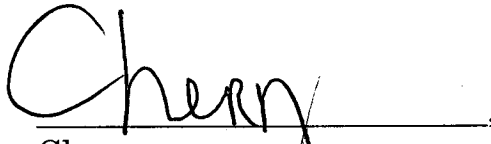
This court has consistently afforded the district court wide discretion in its sentencing decision. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The district court's discretion, however, is not limitless. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Nevertheless, we 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) (emphasis added). 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), limited on other grounds by Knipes v. State, 124 Nev. ___, 192 P.3d 1178 (2008).

We conclude that Barnett has failed to demonstrate that the district court relied solely on impalpable or highly suspect evidence. At the sentencing hearing, Barnett failed to mention the allegedly unsubstantiated statement when the district court asked if there were any corrections to be made in the PSI. The district court noted Barnett's extensive criminal history and the fact that he absconded and fled from the state for several years after his arrest before returning on his own "to clear this up, which is . . . commendable." The district court also acknowledged that Barnett had not been arrested again since his 2002 arrest in the instant case. Additionally, Barnett does not allege that the relevant sentencing statute is unconstitutional. In fact, the sentence

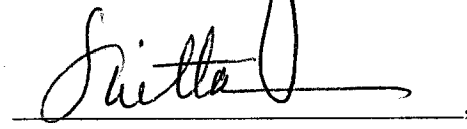
imposed by the district court was within the parameters provided by the relevant statute. NRS 484.3792(1)(c) (category B felony punishable by a prison term of 1-6 years). Therefore, we conclude that the district court did not abuse its discretion at sentencing.

Having considered Barnett's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
Lincoln County District Attorney
Lincoln County Clerk