

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN LEE FORESTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53558

FILED

OCT 07 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of battery with a deadly weapon. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Benjamin Lee Forester to serve a term of 24 to 60 months in the Nevada State Prison.

Forester argues that because a complete transcript of his sentencing hearing is not available, he is entitled to a new sentencing hearing because there is no way to determine if the district court relied on an improper basis when imposing sentence.¹

“A criminal defendant is normally entitled to a new trial if a trial transcript has been lost or destroyed and the transcript cannot be adequately reconstructed.” Bellows v. State, 110 Nev. 289, 291, 871 P.2d

¹The fast track statement is not in the form required by Nevada Rule of Appellate Procedure 3C(e) and NRAP Form 6. Nevertheless, we have elected to file the fast track statement. We caution appellant’s counsel that, in the future, submitting fast track statements for filing with this court that are not in the required form could result in this court returning the document to counsel to be correctly prepared.

340, 342 (1994). Nevada Rule of Appellate Procedure 9(d) provides that when no report was made of a proceeding or when a transcript of a proceeding is unavailable “the appellant may prepare a statement of the evidence or proceedings from the best available means, including appellant’s recollection.”

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). 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).

There is no dispute that, due to a power failure, the audio recording equipment stopped recording during Forester’s sentencing hearing. The record indicates that the power failure occurred less than one minute and fifteen seconds before the conclusion of the sentencing hearing, while the district court was commenting on Forester’s prior criminal history and the involvement of alcohol in the instant offense. Forester informed this court of the problem regarding the sentencing transcript, and we remanded this appeal to the district court for the limited purpose of reconstructing the record pursuant to NRAP 9(d). After reviewing the statements submitted by the parties, the transcripts and the

presentence investigation report, the district court entered a written Statement of Proceedings pursuant to NRAP 9(d) regarding what occurred at the sentencing hearing after the recording ended. We conclude that the reconstructed record is adequate for this court to review Forester's sentence on appeal.

Forester has not alleged that the relevant sentencing statute is unconstitutional, and it does not appear that the district court relied on palpable or highly suspect evidence when imposing the sentence. In fact, the sentence imposed was within the parameters provided by the relevant statute. NRS 200.481(2)(e)(1). Accordingly, we conclude that the district court did not abuse its discretion at sentencing and a new sentencing hearing is not warranted.

Having concluded that Forester's claim lacks merit, we
ORDER the judgment of conviction AFFIRMED.

Cherry J.
Cherry

Douglas J.
Douglas

Gibbons 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
White Pine County District Attorney
White Pine County Clerk