IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILIP STOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57135

FILED

SEP 14 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of burglary. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. Appellant Philip Stott raises five contentions concerning his sentencing as a habitual criminal.

First, Stott contends that his sentence of life with the possibility of parole after ten years is not permitted under NRS 207.010(1)(b) because he was convicted of a category B felony. We disagree. NRS 207.010 provides that a habitual felon may be sentenced for either a category A or category B felony depending on the number of prior convictions proven, not the felony category of the underlying offense. See NRS 207.010(1)(a), (b) (providing that habitual criminal treatment may be imposed for "[a]ny felony").

Second, Stott contends that the district court improperly considered more prior felonies than those required to adjudicate him a habitual criminal. We disagree. While habitual criminal adjudication pursuant to NRS 207.010(1)(b) only requires proof of three prior felonies, the district court is not prohibited from considering prior convictions beyond those necessary for habitual adjudication, see Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987) (recognizing a sentencing

court's wide discretion). Further, Stott has not shown that the district court relied solely on highly suspect or impalpable evidence. See Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

Third, Stott contends that the district court abused its discretion in not dismissing the habitual criminal count and in electing to run his sentences consecutively. We disagree. Our review of the sentencing transcript reveals that the district court understood its sentencing authority and the discretionary nature of habitual criminal adjudication. See Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000) ("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."). The district court noted that the prior crimes were recent and the prior sentences did not have a sufficient deterring effect. It further took into account the impact the crimes had on the victims. The court stated that the sentence was necessary both to deter Stott and anyone else in the community from committing similar crimes. Based on the record before us, we conclude that the district court did not abuse its discretion in declining to dismiss the habitual criminal count or electing to impose consecutive sentences. See NRS 176.035(1); Hughes, 116 Nev. at 333, 996 P.2d at 893.

Fourth, Stott contends that all but one of his prior felony convictions should not have been used to enhance his instant penalty because he was not warned during those prior convictions that those convictions could be used as a basis for a subsequent enhancement. We conclude that this contention lacks merit. The State introduced certified judgments of conviction that on their face did not appear constitutionally infirm. See Dresser v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991) (providing that certified judgment of conviction generally sufficient to establish the constitutional validity of prior conviction for

enhancement purposes "so long as the record of the conviction does not, on its face, raise a presumption of constitutional infirmity"). Further, Stott's prior pleas are not constitutionally infirm for failure to have been warned of their possible use to enhance future sentences as there is no recognized duty to advise a defendant about potential consequences of the defendant's future conduct. See Nollette v. State, 118 Nev. 341, 344, 46 P.3d 87, 89 (2002).

Fifth, Stott contends that his sentence violates the prohibition against cruel and unusual punishment because his sentence is grossly disproportionate to the crime. We disagree. The Eighth Amendment 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). Because the sentences fall within statutory limits, see NRS 207.010(1)(b), and are not grossly disproportionate to the offense and Stott's history of recidivism, the punishment is not cruel and unusual. See Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion); Allred v. State, 120 Nev. 410, 421, 92 P.3d 1246, 1254 (2004).

Having considered Stott's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Hardesty, J.

Parraguirre, J.

cc: Hon. Patrick Flanagan, District Judge
Janet S. Bessemer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk