

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD BENJAMIN FERST, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58691

**FILED**

MAR 07 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of three counts of burglary, two counts of grand larceny, and possession of stolen property. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Richard Benjamin Ferst, Jr., contends that the district court erred by (1) adjudicating him as a habitual criminal without conducting a hearing pursuant to NRS 207.016(3) and making specific findings, and (2) imposing an excessive and disproportionate sentence which shocks the conscience and amounts to cruel and unusual punishment. We disagree.

The district court has broad discretion to dismiss a count of habitual criminality. See NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007). Ferst did not object at the sentencing hearing to the use of the prior convictions for habitual criminal adjudication purposes or deny their existence; therefore, he was not entitled to a separate hearing pursuant to NRS 207.016(3). Further, our review of the record reveals that the district court understood its sentencing authority and considered the appropriate factors prior to making its determination to adjudicate Ferst as a habitual criminal. See Hughes v. State, 116 Nev.

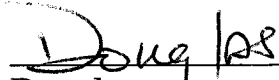
327, 333, 996 P.2d 890, 893 (2000); see also NRS 207.016(5); O'Neill, 123 Nev. at 15-16, 153 P.3d at 42-43 (once a district court declines to exercise its discretion to dismiss an allegation of habitual criminality, the only factual findings the judge may then make must relate solely to the existence and validity of the prior convictions). We conclude that the district court did not abuse its discretion by adjudicating Ferst as a habitual criminal.


Additionally, Ferst has not alleged that the district court relied solely on impalpable or highly suspect evidence or demonstrated that the sentencing statutes are unconstitutional. See Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 489-90 (2009). Ferst's concurrent prison terms of 96-240 months fall within the parameters provided by the relevant statute, see NRS 207.010(1)(a), and the sentence is not so unreasonably disproportionate to the gravity of the offense and his history of recidivism as to shock the conscience, Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); see also Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). We conclude that the district court did not abuse its discretion at sentencing. See Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).


Finally, Ferst contends that he "is entitled to a jury finding that his prior convictions are felonies" for habitual criminal adjudication purposes. See U.S. Const. amend. VI. Essentially, Ferst is asking this court to revisit O'Neill and we decline to do so. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime . . . must be submitted to a jury, and proved beyond a reasonable doubt."); O'Neill, 123 Nev. at 16, 153

P.3d at 43 (recognizing Appendi's holding in the context of prior convictions used to support habitual criminal adjudication). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk