

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL MARTINEZ A/K/A DANNY  
MARTINEZ,  
Appellants,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 62184

FILED

DEC 16 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of forgery and possession of a credit card or debit card without the cardholder's consent. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant Daniel Martinez contends that his sentence of life imprisonment with the possibility of parole constitutes cruel and unusual punishment because all of his offenses have been non-violent and trivial. However, because Martinez has not alleged that the sentencing statute is unconstitutional, his sentence falls within the parameters of that statute, and we are not convinced that the sentence is so grossly disproportionate to the gravity of the offense and Martinez's history of recidivism as to shock the conscience, we conclude that the sentence does not violate the constitutional proscriptions against cruel and unusual punishment. See NRS 207.010(1)(b)(2); *Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion); *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); see also *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805

(1992) (“NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions.”).

Martinez also contends that the district court abused its discretion by adjudicating him a habitual criminal because it failed to consider the factors set forth in *O’Neill v. State*, 123 Nev. 9, 153 P.3d 38 (2007). However, the only factor the district court considers when adjudicating a defendant a habitual criminal is the existence of prior felony convictions. *See id.* at 15, 153 P.3d at 42 (“NRS 207.010 only grants a district court the discretion to dismiss a count of habitual criminality, not the discretion to adjudicate that status based on factors other than prior convictions.”). Here, the record reveals that the district court considered Martinez’s five prior felony convictions, knew that habitual criminal adjudication was discretionary, and declined to exercise its discretion to dismiss the habitual criminal count. Accordingly, we conclude that the district court properly adjudicated Martinez a habitual criminal.

Martinez further contends that the State breached the terms of the guilty plea agreement by filing a notice of intent to seek habitual criminal treatment. “When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain.” *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted). Here, pursuant to negotiations and as reflected in the plea agreement memorandum, the State agreed not to seek habitual criminal treatment. However, prior to sentencing, the State filed notice of its intent to seek habitual criminal punishment. Martinez did not object to the notice, but the district court asked about it. The State informed the

district court that the notice had been filed in anticipation of Martinez's failure to appear for his presentence investigation interview and sentencing. The record reveals that Martinez picked up additional criminal charges before the State filed its notice and that he later failed to appear for the presentence investigation interview and sentencing. As provided in the plea agreement, these circumstances constituted a breach by Martinez that freed the State from its promise not to seek a habitual criminal adjudication. We conclude from these circumstances that there was no plain error. *See Sullivan v. State*, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999) (reviewing an unpreserved allegation that the State breached a guilty plea agreement for plain error).

Having concluded that Martinez is not entitled to relief, we  
ORDER the judgment of conviction AFFIRMED.

Pickering, C.J.  
Pickering

Hardesty, J.  
Hardesty

Cherry, J.  
Cherry

cc: Hon. Douglas Smith, District Judge  
Keith C. Brower  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk