

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES WILLIAM KECK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62305

FILED

MAR 12 2014

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 attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, assault with a deadly weapon, and burglary while in possession of a firearm. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant James William Keck raises three errors on appeal.

First, Keck contends that the district court abused its discretion and violated his constitutional rights under the Eighth Amendment and the Due Process Clause by not considering the recommended sentence of the Nevada Division of Parole and Probation, his history of mental health issues and drug abuse, lack of criminal history, or any other mitigating evidence presented at his sentencing hearing before sentencing him to 22 to 66 years in prison. "The Eighth Amendment requires that defendants be sentenced individually, taking into account the individual, as well as the charged crime." *Martinez v. State*, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998). We have consistently afforded the district court wide discretion in its sentencing decision, *see, e.g., Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), and will refrain from interfering with the sentence imposed by the district court

"[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). Keck has not presented any evidence that the district court based its sentencing decision solely on the charged crime and that it did not consider him as an individual. Furthermore, Keck does not allege that the district court considered evidence founded on impalpable or highly suspect evidence. Therefore, we conclude that the district court did not abuse its discretion at sentencing or violate the United States and Nevada constitutional requirement of individualized sentencing.

Second, Keck contends that the district court abused its discretion by failing to articulate a reason for its sentencing determination. In support of this contention, Keck cites a number of federal cases and argues that because a presentence investigation report is analogous to the Federal Sentencing Guidelines, the district court should be required to explain its reasons for departing from the recommendation of the Division of Parole and Probation. The Federal Sentencing Guidelines are not analogous to a Nevada presentence investigation report. *Compare* NRS 176.145 *with* 18 U.S.C. § 3553; U.S. Sentencing Guidelines Manual (2012); *see also* Fed. R. Crim. P. 32(d). Even assuming that a presentence investigation report is analogous to the Federal Sentencing Guidelines, decisions of the federal district court and panels of the federal circuit court of appeals are not binding on Nevada courts. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970). We are not persuaded that the district court abused its discretion by failing to articulate a reason for its sentencing determination.

Third, Keck contends that the district court committed reversible error by not making the factual findings required by NRS 193.165. We agree that the district court erred by failing to make factual findings on the record prior to the imposition of the deadly weapon enhancement, thus violating the mandate of *Mendoza-Lobos v. State*, 125 Nev. 634, 643-44, 218 P.3d 501, 507 (2009). Keck, however, did not object at sentencing and we conclude that he fails to demonstrate plain error affecting his substantial rights. *See* NRS 178.602; *Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 507-08; *see also Puckett v. United States*, 556 U.S. 129, 135 (2009). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Hon. Michelle Leavitt, District Judge
Langford McLetchie LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk