IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN ROSS MONCADA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68083

FILED

DEC 18 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of an offense involving a stolen vehicle. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Appellant Jonathan Moncada claims the district court erred by allowing the State to argue for any legal sentence pursuant to the failure to appear (FTA) clause in the parties' written plea agreement. Moncada appears to argue the district court should have based its ruling on the results of a preliminary hearing, where he had an opportunity to be heard, and not on the basis of a magistrate's review of an arrest affidavit. This claim lacks merit.

The FTA clause provided,

> The defendant further agrees that the State will be free to argue for any legal sentence and terms of confinement possible under the circumstances of the charges set forth in the charging document, to include any increased punishment as an habitual criminal, if defendant fails to interview with the Department of Parole and Probation; fails to appear at any subsequent

15-901990

> hearings in this case; or an independent magistrate, by affidavit review, confirms probable cause against him for new criminal charges, including reckless driving or DUI, but excluding minor traffic violations.

The record demonstrates that Moncada consented to the FTA clause: the FTA clause was in the written plea agreement that Moncada read and signed, the clause was explained to him during the plea canvass, and he did not object to the clause prior to entering his guilty plea in the district court. We note the Nevada Supreme Court has previously ruled that FTA clauses are lawful and enforceable, *Sparks v. State*, 121 Nev. 107, 112-13, 110 P.3d 486, 489 (2005), and we conclude the district court did not err by enforcing the FTA clause after finding that Moncada had been arrested for a new crime and a magistrate found probable cause for the arrest based on a review of the arrest affidavit.

Moncada also claims his sentence of 20 to 50 years in prison constitutes cruel and unusual punishment because such a sentence is "reserved for murderers, rapists, and those heinous individuals that have disrupted a large segment of societ[y]" whereas he "is a life-long drug abuser [whose] criminal history does not demonstrate any violent felony convictions, merely convictions on drug and theft charges." The record demonstrates that Moncada was sentenced to a prison term of 10 to 25 years in this case and his sentence was imposed to run consecutive to a sentence he received in another case.

Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably

disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining that the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

The sentence imposed in this case is within the parameters provided by the relevant statute, *see* NRS 207.010(1)(b),[1] and Moncada does not allege that this statute is unconstitutional. We conclude the sentence imposed is not so grossly disproportionate to the crime and Moncada's history of recidivism as to constitute cruel and unusual punishment. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion).

Moncada further claims the district court did not conduct a proper canvass and he did not know the consequences of his guilty plea, and he asserts that his conviction must be vacated to correct a manifest injustice. Challenges to the validity of a guilty plea must be raised in the district court in the first instance, *Bryant v. State*, 102 Nev. 268, 272, 721

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[1]The judgment of conviction erroneously states Moncada was adjudicated a habitual criminal pursuant to NRS 207.010(1)(a) (the small habitual criminal statute) instead of NRS 207.010(1)(b) (the large habitual criminal statute). Upon issuance of the remittitur, the district court shall enter an amended judgment of conviction that corrects this clerical error. *See* NRS 176.565; *Buffington v. State*, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994).

P.2d 364, 368 (1986), unless the error clearly appears from the record, *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994). Because the record does not demonstrate Moncada challenged the validity of his guilty plea in the district court, and the alleged error does not clearly appear on the record, we decline to review this claim.

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

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Robert W. Lane, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk