IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARQUES BUTLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68218

FILED

FEB 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order revoking probation and a third amended judgment of conviction. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Statutory good time credit

Appellant Marques Butler claims the district court erred by concluding that NRS 209.4465(1)(c) does not apply to probation and refusing to award him credit for the two years he spent on house arrest while his case was pending appeal, the four months he spent in the Shannon West Homeless Youth Center, and the six months he spent in the Three Lakes Valley Boot Camp.

Butler's prison sentence was suspended and he was placed on probation; therefore, he was not subject to the authority of the Department of Corrections and he was not entitled to the good time credits discussed in NRS 209.4465(1)(c). To the extent Butler also argues he did not receive credit for all of his periods of incarceration, we conclude he was not entitled to presentence credit for the time he spent on house arrest, *see State v. Second Judicial Dist. Court (Jackson)*, 121 Nev. 413, 418-19, 116 P.3d 834, 837 (2005), he was not entitled to credit for time spent in the Shannon West Homeless Youth Center, *see Webster v. State*, 109 Nev.

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1084, 1085, 864 P.2d 294, 295 (1993), and the 631 days of credit that he did receive included credit for time spent at the Three Lakes Valley Boot Camp. Accordingly, Butler has not demonstrated the district court erred in this regard.

Abuse of discretion at sentencing

Butler appears to claim that the district court abused its discretion by basing its sentencing decision on the arrest that lead to his probation revocation and by carrying a bias against defense counsel as evidenced by the remarks it made over the course of several proceedings.

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). "[The] court is privileged to consider facts and circumstances which clearly would not be admissible at trial." *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). However, we "will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). "[The] remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

The record reveals the district court revoked Butler's probation and modified his original sentence by reducing the terms of imprisonment. *See* NRS 176A.630(5). The court sentenced Butler to concurrent prison terms amounting to 24 to 72 months, whereas it had originally sentenced Butler to consecutive and concurrent prison terms amounting to 72 to 192 months. And the court's sentence falls within the parameters of the relevant statutes. *See* NRS 193.140; NRS 199.480(1)(a); NRS 200.380(2); NRS 202.290(2).

The record does not suggest the court's sentencing decision was based on impalpable or highly suspect evidence.[1] Furthermore, Butler did not allege bias or object to the court's remarks during sentencing. And, even assuming the court has a bias against Butler's counsel, the record does not support a conclusion that the court was biased against Butler or closed its mind to the presentation of all evidence. Given this record, we conclude the court did not abuse its discretion at sentencing.

Cruel and unusual punishment

Butler claims his sentence constitutes cruel and unusual punishment and argues that it shocks the conscience because he was a child when he committed these crimes, he has been in the adult criminal system for nine years, his involvement in the crime that resulted in the probation revocation was passive, he lost the benefit of a bargain that would have allowed him to withdraw his guilty plea upon successful completion of probation, and he was adjudicated guilty of three felonies and sent to prison.

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

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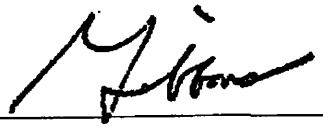
[1]We deny Butler's motion to supplement the record on appeal because the documents he wishes to supplement the record with are not properly part of the appellate record. *See* NRAP 10(a), (b)(1). We also deny the State's motion to strike Butler's motion.

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).

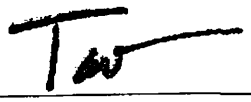
Here, the district court imposed a sentence that falls within the parameters of the relevant statutes, *see* NRS 193.140; NRS 199.480(1)(a); NRS 200.380(2); NRS 202.290(2), and Butler has not alleged that those statutes are unconstitutional. We conclude the court's sentence for Butler's conspiracy to commit robbery, two counts of robbery, and discharge of a weapon where a person might be endangered does not shock the conscience and is not so grossly disproportionate to his crimes as to constitute cruel and unusual punishment.

Having concluded Butler is not entitled to relief, we

ORDER the district court order revoking probation and the third amended judgment of conviction AFFIRMED.



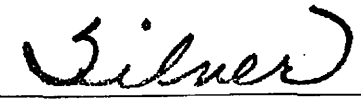
_____, C.J.
Gibbons



_____, J.
Tao

SILVER, J., dissenting:

I dissent.



_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Law Office of Kristina Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk