

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIT FANULE AUGBORNE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 68706

**FILED**

**MAR 16 2016**

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 robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Brit Augborne claims the district court abused its discretion by denying his motion to withdraw his plea. The State asserts Augborne did not preserve this claim for appeal.

After entry of his guilty plea, Augborne filed a motion to dismiss counsel. At the hearings on this motion, Augborne verbally indicated one of the reasons he wished to dismiss his counsel was because he felt there was a problem with the guilty plea. The district court agreed that it appeared the plea agreement contained a mistake, determined the mistake created a conflict with counsel, granted the motion to dismiss counsel, and appointed conflict counsel to assist Augborne. At a subsequent hearing, conflict counsel informed the court he had reviewed the record and spoken at length with Augborne and he could not find a sufficient legal basis for filing a motion to withdraw the plea. Subsequently, original counsel was reappointed for sentencing. Although Augborne again expressed dissatisfaction with his plea at sentencing, he

did not move to withdraw the plea at that time and the district court made no ruling regarding the plea.

Because no motion to withdraw the guilty plea was ever filed in the district court and the district court judge never made any decision regarding whether Augborne should be permitted to withdraw his plea, there is no decision for this court to review on appeal. Therefore, we decline to address this claim.<sup>1</sup>

Augborne also claims that, in light of his objections to the plea agreement, his sentence constitutes cruel and unusual punishment.

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 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 district court sentenced Augborne to serve two consecutive terms of 4 to 12 years, as stipulated by the parties in the plea

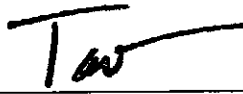
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<sup>1</sup>To the extent Augborne claims this appeal should be remanded to the district court to allow him to challenge the plea agreement, we conclude such relief is not warranted. Augborne may challenge the validity of his plea in the district court by filing a post-conviction petition for writ of habeas corpus in the district court in compliance with NRS Chapter 34. See NRS 34.810(1). We express no opinion regarding the merits of such a challenge.

agreement. The sentence imposed is within the parameters provided by the relevant statutes, *see* NRS 193.165(1); NRS 200.380(2), and Augborne does not allege those statutes are unconstitutional. We conclude the sentence imposed is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Michelle Leavitt, District Judge  
Matthew D. Carling  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk