IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER HERNANDEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36335

FILED

OCT 30 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING AND REMANDING

FOR ENTRY OF CORRECTED JUDGMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict of: one count of possession of stolen property, a misdemeanor (Count I); one count of possession of burglary tools, a gross misdemeanor (Count II); and one count of possession of a controlled substance, a felony (Count III). The district court sentenced appellant: for Count I, to the Washoe County Jail for six months; for Count II, to the Washoe County Jail for twelve months; and for Count III, to the Nevada State Prison for a term of 12-48 months. The district court ordered the sentences to run concurrently. The district court further adjudicated appellant a habitual criminal and sentenced appellant to the Nevada State Prison for a term of 10-25 years, to be served concurrently with the sentences for Counts I through III.

Appellant first contends that the district court abused its discretion at sentencing by adjudicating appellant a habitual criminal. Specifically, appellant argues that he

should not have been adjudicated a habitual criminal because all of his prior convictions were either for non-violent drug possession crimes or non-violent property crimes. Appellant further argues that the sentence for being a habitual criminal is disproportionate to the underlying felony, possession of a controlled substance.[1] We disagree.

As to appellant's first argument, the district court may dismiss counts brought under the habitual criminal statute when the prior offenses are stale, trivial, or where an adjudication of habitual criminality would not serve the interests of the statute or justice. See Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990). The habitual criminal statute, however, makes no special allowance for non-violent crimes or for the remoteness of the prior convictions; these are merely considerations within the discretion of the district court. See Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). We conclude that, in light of appellant's fourteen prior felony convictions and career of criminal activity, the district court did not abuse its discretion in adjudicating appellant as a habitual criminal. See Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996); Arajakis, 108 Nev. at 984, 843 P.2d at 805.

As to appellant's second argument, the Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that

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[1]Appellant primarily relies on Solem v. Helm, 463 U.S. 277 (1983).

is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). 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 Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

This court has consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987). This court will refrain from interfering with the sentence imposed "[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).

In the instant case, appellant does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statutes. See NRS 207.010(1)(b)(3). Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

Appellant also contends that the district court erred by separately sentencing appellant for being a habitual

criminal. We agree. See Cohen v. State, 97 Nev. 166, 169, 625 P.2d 1170, 1172 (1981); Hollander v. State, 82 Nev. 345, 353-54, 418 P.2d 802, 806-07 (1966). "The trial court must sentence on the substantive crime charged . . . and then invoke the recidivist statute to determine the penalty." Hollander, 82 Nev. at 353, 418 P.2d at 807. There can be only one sentence for the possession of a controlled substance conviction. See Cohen, 97 Nev. at 169, 625 P.2d at 1172.

Accordingly, we affirm appellant's convictions. Nonetheless, we remand this matter to the district court for the sole purpose of correcting the judgment of conviction consistent with this order.

It is so ORDERED.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. James W. Hardesty, District Judge
Attorney General
Washoe County District Attorney
Washoe County Public Defender
Washoe County Clerk