

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GUSTAVO BANEGAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68982

FILED

APR 20 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 entered pursuant to a guilty plea of attempted sexual assault and sexually motivated coercion. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Gustavo Banegas claims his concurrent prison terms of 60 to 180 months and 24 to 72 months constitute cruel and unusual punishment. He argues the district court imposed a sentence that is both excessive and shocks the conscious because it is greater than the sentence recommended by the Division of Parole and Probation and does not serve a penal interest.


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

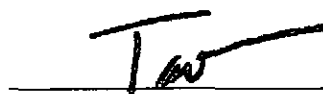
and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

Here, the district court imposed a sentence that falls within the parameters of the relevant statutes, *see* NRS 193.330(1)(a)(1); NRS 200.366(2); NRS 207.190(2)(a), and Banegas does not allege that those statutes are unconstitutional. We conclude the court's sentence for attempted sexual assault and sexually motivated coercion does not shock the conscience and is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment.

To the extent Banegas further argues the district court abused its discretion by failing to adequately balance the nature and circumstances of his offense with his character, history, and other mitigating factors before imposing sentence, we conclude he failed to demonstrate any abuse. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987); *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); *see also Collins v. State*, 88 Nev. 168, 171, 494 P.2d 956, 957 (1972) (the district court is not required to follow the sentencing recommendations of the Division of Parole and Probation).

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jennifer P. Togliatti, District Judge
Las Vegas Defense Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk