IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 68082

FILED

JUN 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

First, appellant Jonathon Moncada contends his plea was not knowingly, intelligently, and voluntarily entered because the district court did not canvass him regarding the habitual criminal enhancement.

As a general rule, challenges to the validity of a guilty plea must be raised in the district court in the first instance in a presentence motion to withdraw a guilty plea or a postconviction petition for a writ of habeas corpus. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *see also Harris v. State*, 130 Nev. ___, ___, 329 P.3d 619, 628 (2014) ("a post-conviction petition for a writ of habeas corpus provides the exclusive remedy for a challenge to the validity of the guilty plea made after sentencing for persons in custody on the conviction being challenged"). Because we are not convinced Moncada's claim fits an exception to this general rule, *cf. Smith v. State*, 110 Nev. 1009, 1010-11

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n.1, 879 P.2d 60, 61 n.1 (1994) (indicating the general rule stated in *Bryant* would not apply "where the error clearly appears from the record"), we decline to consider the challenge to the validity of the guilty plea.

Second, Moncada claims the district court erred by allowing the State to pursue habitual criminal adjudication. Moncada argues the State sought habitual criminal adjudication based only on the word of one person. We conclude this claim lacks merit.

Moncada agreed in the guilty plea agreement the State could seek habitual criminal adjudication if "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 district court found 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. We conclude the district court did not err by enforcing the clause and allowing the State to seek habitual criminal adjudication.

Third, Moncada claims the district court did not fully understand the habitual criminal statute and, therefore, could not exercise its discretion to sentence Moncada as a habitual criminal. While the district court asked for clarification of the possible sentences under the habitual criminal statute, the district court stated on the record it understood it was within its discretion to sentence Moncada either pursuant to the underlying charges or under the habitual criminal statute. Because the record demonstrates the district court understood its sentencing discretion, we conclude this claim lacks merit.

Fourth, Moncada claims the prosecutor committed misconduct by informing the district court the State intended to bring perjury charges against Moncada for statements made during his sentencing hearing. Moncada failed to object to these statements, therefore, no relief is warranted absent a demonstration of plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *see also Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (Under the plain error standard, we determine "whether there was error, whether error was plain or clear, and whether the error affected the defendant's substantial rights"(internal quotation marks omitted)).

Moncada fails to demonstrate plain error affecting his substantial rights because the district court specifically stated it was not going to consider the perjury allegation and was going to sentence Moncada based on the presentence investigation report. Therefore, we conclude Moncada is not entitled to relief for this claim.

Fifth, Moncada claims his sentence of 20 to 50 years in prison constitutes cruel and unusual punishment because he has no history of violence. Instead, Moncada asserts he "was a lifelong drug user with a handful of theft and drug charges throughout his life." Moncada was sentenced to a prison term of 10 to 25 years in this case. He was also sentenced to a prison term of 10 to 25 years in another case and that sentence was imposed to run consecutive to the sentence in this 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 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 is within the parameters provided by the relevant statute, *see* NRS 207.010(1)(b),[1] and Moncada fails to provide cogent argument as to why the statute is unconstitutional, *see Maresca v State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). 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).

Finally, Moncada argues cumulative error entitles him to relief. Because Moncada has only shown one potential error—the prosecutorial misconduct claim—there is nothing to cumulate. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not

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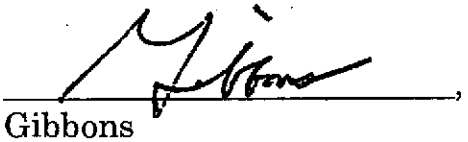
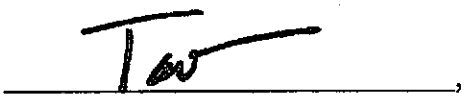
[1]The judgment of conviction erroneously states Moncada was adjudicated a habitual criminal pursuant to NRS 207.010(1)(a) (the small habitual criminal statute) instead of NRS 207.010(1)(b) (the large habitual criminal statute). Upon issuance of the remittitur, the district court shall enter an amended 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).

cumulative error."); *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[2]



_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Robert W. Lane, District Judge
JK Nelson Law LLC
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk
Jonathan Ross Moncada

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[2]Because Moncada is represented by counsel in this appeal, no action will be taken on the pro se documents submitted by Moncada. *See* NRAP 46A(a).