

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAY ANDREW DIOKNO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69993

FILED

AUG 17 2016

TRACIE K. INDEMAN
CLERK OF SUPREME COURT
BY *J. Hodges*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in death and one count of driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Appellant Ray Andrew Diokno claims the district court abused its discretion at sentencing by relying on suspect evidence when imposing sentence. Diokno alleges that a witness' estimation that Diokno was traveling at 100 miles per hour (m.p.h.) prior to the accident was suspect because the witness is not an expert and other witnesses said that while Diokno's speed was high, it was much lower than 100 m.p.h.

"A district court is vested with wide discretion regarding sentencing," and "[f]ew limitations are imposed on a judge's right to consider evidence in imposing a sentence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). However, "this court will reverse a

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sentence if it is supported *solely* by impalpable and highly suspect evidence." *Id.*

The record clearly demonstrates that the district court judge did not rely on the estimated speed of 100 m.p.h. when imposing sentence. Rather, the judge stated that her sentencing decision was based on the totality of the circumstances, which were uncontested. Specifically, that Diokno did not only drink alcohol and drive while intoxicated, he also decided to drag race. We conclude the district court did not rely on suspect evidence or abuse its discretion at sentencing.


Diokno also claims that his sentence constitutes cruel and unusual punishment in light of his remorse, his good character, and his lack of criminal history, and because a less severe punishment would have served the same penal interests.


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 Diokno to consecutive prison terms of 96-240 months for counts 1 and 2 and a concurrent term of 96-240 months for count 3. The sentence imposed is within the parameters provided by the relevant statute, *see* NRS 484C.430(1), and Diokno does

not allege that the statute is 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. Kerry Louise Earley, District Judge
Las Vegas Defense Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk