

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VICTOR JOE POTTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69398

**FILED**

OCT 19 2016

ELIZABETH A. BROWN  
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 theft of scrap metal.<sup>1</sup> Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Victor Joe Potter claims his sentence of life with the possibility of parole after 10 years imposed pursuant to the habitual criminal statute constitutes cruel and unusual punishment. He asserts his sentence is grossly disproportionate to the crime he committed and his criminal history. He points out his prior crimes were for non-violent offenses and the sentence imposed exceeds that recommended by the Division of Parole and Probation.

We have consistently afforded the district court wide discretion in its sentencing decision. *See, e.g., Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The district court is not required to follow the recommendations of the Division of Parole and Probation when imposing sentence. *Lloyd v. State*, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978). Further, "NRS 207.010 makes no special allowance for non-violent

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<sup>1</sup>This appeal was filed pursuant to the provisions of NRAP 4(c).


crimes . . . ; instead, [this is a] consideration[] within the discretion of the district court.” *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). 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)(2), and Potter does not allege that this statute is unconstitutional. At the time of sentencing, Potter had an extensive criminal history spanning more than 20 years, which included 10 felony, 1 gross misdemeanor, and 13 misdemeanor convictions. We conclude the sentence imposed is not grossly disproportionate to the crime and Potter’s history of recidivism and does not constitute cruel and unusual punishment. See *Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion).


Potter also claims the district court erred by denying two claims of ineffective assistance of counsel that were raised in his postconviction petition for a writ of habeas corpus. However, because this is an appeal from the judgment of conviction and not an appeal from the order resolving the postconviction petition for a writ of habeas corpus, we lack jurisdiction to consider these claims and we take no action on them.

*See Abdullah v. State*, 129 Nev. 86, 91-92, 294 P.3d 419, 422 (2013) (an “order that is not designated in the notice [of appeal] cannot be considered on appeal” and the district court clerk does not have authority to file a notice of appeal from the denial of a postconviction petition for a writ of habeas corpus).

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

  
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Gibbons C.J.

  
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Tao J.

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

cc: Hon. Stefany Miley, District Judge  
Oronoz, Ericsson & Gaffney, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk