IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN E. HICKEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66382

FILED

JAN 19 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant John E. Hickey appeals from an amended judgment of conviction entered pursuant to a guilty plea of two counts of burglary; his appeal is brought under NRAP 4(c). Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

First, Hickey claims the district court erred by denying his motion to dismiss the indictment because the State failed to provide reasonable notice of the Grand Jury proceedings. As a general rule, the entry of a guilty plea waives any right to appeal from events which preceded that plea. *See Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). NRS 174.035(3) presents an exception to the rule; it allows a defendant pleading guilty to reserve in writing the right to appeal an adverse determination on a specified pretrial motion, provided he or she has the consent of the district court and district attorney. Here, the record demonstrates Hickey entered his guilty plea after filing his motion to dismiss the indictment and before the district court ruled on the motion, and he did not reserve the right to challenge an adverse ruling in the written plea agreement. Based on this record, we conclude Hickey waived his reasonable-notice claim.

Second, Hickey claims the district court erred by denying his motion to withdraw his guilty plea because he was incompetent to enter the plea. The record reveals Hickey informed the district court he wanted to withdraw his guilty plea because he had mental health problems, he was off his medications, and he had made a mistake by entering the guilty plea. Defense counsel did not feel comfortable filing the motion on Hickey's behalf, so the district court appointed alternate counsel. Alternate counsel did not file a motion to withdraw the guilty plea, and, consequently, the district court did not render a decision as to whether Hickey should be permitted to withdraw his plea. Without a district court decision to review, we decline to address Hickey's claim. *See generally Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (a challenge to the validity of a guilty plea is not appropriately raised on direct appeal), *limited by Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994).

Third, Hickey claims the district court erred by sentencing him to two consecutive prison terms of 5 to 20 years. Hickey argues his lengthy sentence is cruel and unusual because he accepted responsibility for two burglaries, did not present a threat of violence, voluntarily enrolled himself into treatment, and suffers from mental health issues. Hickey also asserts that NRS 207.010 is unconstitutional because it allows for the imposition of grossly disproportionate sentences.

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 falls within the parameters of the relevant statute, *see* NRS 207.010(1)(a), and Hickey has not demonstrated the statute is unconstitutional, *see Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 684 P.3d 682, 684 (2006). We note the record indicates Hickey has ten prior felony convictions. And we conclude the sentence imposed in this case is not grossly disproportionate to the crime and Hickey's history of recidivism and does not constitute cruel and unusual punishment. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion).

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

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

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