IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH JOHN RITANO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36440

FILED

OCT 24 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of burglary. The district court adjudicated appellant as a habitual criminal pursuant to NRS 207.010(1) and sentenced appellant to serve 76 to 190 months in prison.

Appellant contends that the habitual criminal adjudication must be reversed because he was improperly forced to stipulate to habitual criminal status. We conclude that the record belies appellant's claim. Counsel for appellant repeatedly stated at the entry of appellant's guilty plea that appellant was not stipulating to habitual criminal status. The State and the district court agreed that appellant had not stipulated to habitual criminal status as part of the plea negotiations. Because the record demonstrates that appellant did not stipulate to habitual criminal status, we conclude that appellant's contention lacks merit.

Appellant next contends that the sentence constitutes cruel and unusual punishment in violation of the United States and Nevada constitutions because the sentence is disproportionate to the crime. In particular, appellant contends that the habitual criminal sentence is cruel and

unusual because he only stole two cartons of cigarettes. We disagree.

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). 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 Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

This court has consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987). This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Moreover, the district court has discretion to impose sentence under the habitual criminal statute and may dismiss a habitual criminal allegation when the prior offenses are stale, trivial, or where an adjudication of habitual criminality would not serve the interests of the statute or justice. See Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990). The habitual criminal statute, however, "makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are

considerations within the discretion of the district court." Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

In the instant case, appellant does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Additionally, appellant has not demonstrated that the district court abused its discretion in adjudicating appellant as a habitual criminal. Further, we note that the sentence imposed was within the parameters provided by the relevant statute. See NRS 207.010(1). Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

Having considered appellant's contentions and concluded that they are without merit, we affirm the judgment of conviction.[1]

It is so ORDERED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[1]To the extent that appellant claims that his guilty plea was not knowingly and voluntarily entered, we note that such claims must be raised in the district court in the first instance by filing a motion to withdraw the guilty plea or commencing a post-conviction proceeding pursuant to NRS chapter 34. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). We therefore express no opinion as to the merits of any such claims in appellant's fast track statement.