

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR ELESIO HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72007

FILED

JUN 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Oscar Elesio Herrera appeals from a judgment of conviction, pursuant to a guilty plea, of attempted assault with a deadly weapon. First Judicial District Court, Carson City; James Todd Russell, Judge.

Herrera claims the district court abused its discretion during sentencing by relying on parole and probation's raw score and the presentence investigation report's recommendation, which he argues were based on impalpable and highly suspect evidence.¹ Specifically, Herrera asserts the score and recommendation took into account the facts underlying his original charge, but should have been based upon the negotiated and amended charges. He further argues the district court abused its discretion by considering those underlying facts.

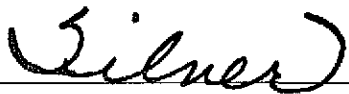
We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). We will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91,


¹We do not recount the facts except as necessary to our disposition.

94, 545 P.2d 1159, 1161 (1976). And the district court's decision to grant probation is discretionary. See NRS 176A.100(1)(c).

The record belies Herrera's arguments. Importantly, Herrera stipulated to a 12- to 36-month prison sentence in a plea agreement whereby the State agreed to reduce felony charges involving exposure to greater prison time. Not only did the district court follow the agreed upon sentence recommendation of both Herrera and the State, the record reflects that the district court's sentencing decision denying probation was predicated upon both the violent nature of the crime and the uncontroverted fact that Herrera stabbed the victim twice.² And, Herrera's 12- to 36-month prison term falls within the parameters of the relevant statutes. See NRS 193.130(2)(c); NRS 193.330(1)(a)(3); NRS 200.471(2)(b). We therefore conclude the district court did not abuse its sentencing discretion, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

²We note sentencing "is not a second trial and the court is privileged to consider facts and circumstances which clearly would not be admissible at trial," *Silks*, 92 Nev. at 93-94, 545 P.2d at 1161, and "a presentence report may include information pertaining to criminal offenses which have not been charged," *Ferris v. State*, 100 Nev. 162, 164, 677 P.2d 1066, 1067 (1984), so long as that information is not based on "impalpable or highly suspect evidence." *Id.* at 163, 677 P.2d at 1066 (internal quotation marks omitted).

cc: Hon. James Todd Russell, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk