IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MITCHELL JAMES DOHENY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71769

FILED

NOV 16 2017

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

ORDER OF AFFIRMANCE

Mitchell James Doheny appeals from a judgment of conviction entered pursuant to a guilty plea of statutory sexual seduction. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

First, Doheny argues the district court erred by failing to voluntarily recuse itself from this matter after it became biased against him. Doheny asserts the district court showed it was biased against him by reprimanding him and his counsel for seeking continuances, chastising Doheny for exercising his right to remain silent, and stating Doheny had never had to "face the music" before the sentencing hearing. Doheny argues the circumstances in this matter meet the standard provided in *Rippo v. Baker*, 580 U.S. ___, ___, 137 S. Ct. 905, 907, (2017), as the risk of bias by the district court was too high to be constitutionally tolerable.

"[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Moreover, "rulings and actions of a judge during the course of official judicial proceedings do not establish" bias sufficient to disqualify a

district court judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988).

The record reveals during the sentencing hearing the district court noted the procedural history, which included many continuances. The district court then explained it had reviewed the police reports, found Doheny had declined to speak with the police and asked for an attorney, and later acknowledged Doheny had the right to request an attorney. The district court further stated Doheny had finally acknowledged at the sentencing hearing that his actions were wrong and he had to "face the music."

Our review of the record reveals the district court did not exhibit improper bias against Doheny. All of the statements at issue occurred during the sentencing hearing and Doheny does not demonstrate the district court judge closed her mind to the presentation of all the evidence during the sentencing hearing. The record demonstrates the district court judge's comments during the sentencing hearing stemmed from her review of the facts of this case and, in light of the circumstances in this case, Doheny fails to demonstrate the risk of bias by the district court judge was too high to be constitutionally tolerable. Doheny also fails to demonstrate actual or implied bias sufficient to require disqualification of the district court judge pursuant to NRS 1.230. Therefore, we conclude Doheny fails to demonstrate he is entitled to relief.

Second, Doheny argues the district court abused its discretion at the sentencing hearing because it compared Doheny's offense of statutory sexual seduction with an offense of sexual assault of a minor and misidentified the age of the victim when the offense occurred. 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, 94, 545 P.2d 1159, 1161 (1976).

At the sentencing hearing, the district court noted Doheny's actions could have resulted in a sexual assault of a minor charge, which carries a life sentence. The district court further explained Doheny had contact with the victim when she was 13, began a sexual relationship with her when she was 14, and Doheny's decision to engage in sexual activity with a then 14-year-old child amounted to inappropriate sexual misconduct. The district court's recitation of the facts of this offense is supported by the record before this court.

The district court concluded based on the facts of this case that probation was not appropriate, which was within the district court's discretion. *See* NRS 176A.100(1)(c). The district court then concluded a sentence of 364 days in the Nye County Detention Center was appropriate, which was within the parameters of the relevant statutes. *See* NRS 193.140; NRS 200.368(2). We conclude Doheny failed to demonstrate his sentence was supported solely by impalpable or highly suspect evidence, *see Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), and therefore we conclude the district court did not abuse its discretion when imposing sentence.

Third, Doheny argues his sentence constitutes cruel and unusual punishment because the district court issued a sentence greater than that agreed upon by the parties or recommended in the PSI, ignored mitigating factors and recommendations for probation, and imposed the maximum possible sentence. 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).

As stated previously, Doheny's sentence of 364 days in the Nye County Detention Center fell within the parameters of the relevant statutes. *See* NRS 193.140; NRS 200.368(2). Doheny makes no argument the statutes are unconstitutional and he fails to demonstrate his sentence is so disproportionate to his offense as to shock the conscience. We also note the district court is not required to follow the sentencing recommendation of the Division of Parole and Probation, *see Collins v. State*, 88 Nev. 168, 171, 494 P.2d 956, 957 (1972) ("A trial court does not abuse its discretion by imposing a sentence in excess of that suggested by the [Division]"), and the district court is also not required to follow the parties' sentencing recommendation. Therefore, we conclude Doheny fails to demonstrate his sentences constitute cruel and unusual punishment. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Kimberly A. Wanker, District Judge
Las Vegas Defense Group, LLC
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk