

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEVIN JAMES MCCARTHY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74567

FILED

OCT 10 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Devin James McCarthy appeals from a judgment of conviction entered pursuant to a guilty plea of attempted coercion and statutory sexual seduction by a person under the age of 21. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

First, McCarthy asserts the district court improperly failed to address his claim that the sentencing recommendation contained within the presentence investigation report (PSI) arbitrarily deviated from the objective scoring results by recommending he serve a prison term. McCarthy also argues the district court erred by declining to amend the PSI to state that McCarthy's pending Oklahoma charges were misdemeanors rather than felonies.

"[A] defendant [has] the right to object to factual or methodological errors in sentencing forms, so long as he or she objects before sentencing, and allows the district court to strike information that is based on 'impalpable or highly suspect evidence.'" *Blankenship v. State*, 132 Nev. ___, ___, 375 P.3d 407, 412 (2016) (internal quotation marks and brackets omitted). This court reviews a district court's decision to decline to strike information from a PSI for an abuse of discretion. *See Sasser v. State*, 130 Nev. 387, 393, 324 P.3d 1221, 1225 (2014).

At the sentencing hearing, McCarthy asserted the PSI improperly stated he had multiple pending felony charges in Oklahoma, but that it appeared many of the charges were actually misdemeanors. McCarthy also noted the PSI sentencing recommendation upwardly deviated from the objective scoring results due to his pending charges. For those reasons, McCarthy urged the district court to amend the PSI to reflect that the majority of McCarthy's pending charges were for misdemeanors. The State responded that the information it possessed showed that the majority of McCarthy's pending charges were felonies. The district court then denied McCarthy's request to amend the PSI and advised that the PSI sentencing recommendation was not binding upon the district court. Based on the record before this court, we conclude McCarthy fails to demonstrate the district court abused its discretion in this regard.

Second, McCarthy argues the district court abused its discretion at sentencing because it appears the district court did not realize McCarthy was eligible for probation for attempted coercion. When it pronounced McCarthy's sentence, the district court stated "And probation is not available to you," and McCarthy asserts this statement shows the district court mistakenly believed McCarthy was not eligible for probation.

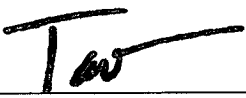
We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). We will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information 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).


The transcript of the sentencing hearing reveals the parties discussed at length whether probation was an appropriate sentence in this matter and the victim's father also urged the district court to decline to

place McCarthy on probation during his victim-impact testimony. The district court explained it concluded McCarthy's decision to engage in a sexual relationship with a 15-year-old girl and to take her to Oklahoma to continue the relationship warranted the maximum available punishment. The district court then announced that a prison term of 24 to 60 months for attempted coercion plus a concurrent term of 364 days for statutory sexual seduction by a person under the age of 21 was the appropriate punishment, which was within the parameters of the relevant statutes. See NRS 193.130(2)(c); NRS 193.140; NRS 193.330(1)(a)(3); NRS 200.368(2); NRS 207.190(2)(a). Moreover, the decision to deny McCarthy's request for probation for attempted coercion was within the district court's discretion, see NRS 176A.100(1)(c), and given the record before this court, McCarthy fails to demonstrate the district did not realize McCarthy was eligible for probation for that offense. Therefore, we conclude the district court did not abuse its discretion when imposing sentence.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Jerome M. Polaha, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk