

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH MCGEE, A/K/A KILL BILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74714-COA

FILED

JAN 17 2019

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

ORDER OF AFFIRMANCE

Kenneth McGee appeals from a judgment of conviction entered pursuant to a guilty plea of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

First, McGee argues the district court violated his right to due process by applying the federal sentencing guidelines when imposing sentence without affording him prior notice of its intent to do so. McGee did not preserve this claim of error for appellate review because he did not raise a contemporaneous objection when the district court discussed federal sentencing guidelines and, therefore, he has the burden to demonstrate plain error. *See Riddle v. State*, 96 Nev. 589, 591, 613 P.2d 1031, 1033 (1980) (providing that a party must make a “contemporaneous objection” in order to preserve an issue for appeal); *see also Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (applying plain-error review to alleged sentencing errors). “An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant

must show that an error was prejudicial in order to establish that it affected substantial rights.” *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks, brackets, and citations omitted).

We conclude McGee fails to demonstrate he is entitled to relief. Our review of the record reveals McGee filed a sentencing memorandum in which he noted that the federal sentencing guidelines provide for “considerations such as the seriousness of the offense, respect for the law, just punishment, deterrence, and protecting the public.” At the sentencing hearing, the district court noted it had reviewed the sentencing memorandum, compared the length of sentence McGee would have faced under the federal sentencing guidelines with the possible sentence McGee faced under state law, and found McGee would have faced a similar sentence as to what he faced under state law. The district court then imposed a sentence of 60 to 180 months for the primary offense with a consecutive term of 60 to 180 months for the deadly weapon enhancement, which was within the parameters of the relevant state statutes. See NRS 193.165(1); NRS 200.380(2). As the record reveals McGee raised the issue concerning the federal sentencing guidelines in his sentencing memorandum, we conclude McGee does not demonstrate plain error stemming from a discussion of federal sentencing guidelines.

Second, McGee argues the district court erred by applying the federal sentencing guidelines in part, without considering departures and variances that would have worked to reduce his sentence under the federal sentencing guidelines. McGee did not preserve this claim of error for appellate review because he did not raise a contemporaneous objection

when the district court discussed federal sentencing guidelines, and, therefore, he has the burden to demonstrate plain error. *See Riddle*, 96 Nev. at 591, 613 P.2d at 1033; *see also Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 507-08 (applying plain-error review to alleged sentencing errors). As explained previously, McGee raised an issue concerning the federal sentencing guidelines in his sentencing memorandum, the district court noted it had reviewed the federal sentencing guidelines to compare with the penalties McGee faced in state court, and the district court then imposed McGee's sentence based upon the relevant state statutes. *See* NRS 193.165(1); NRS 200.380(2). Because the record reveals the district court did not impose McGee's sentence based upon the federal sentencing guidelines and the sentence imposed was within the relevant state statutes, we conclude McGee failed to demonstrate plain error in this regard.

Third, McGee argues the district court improperly considered McGee's mental health illness in aggravation. McGee appears to assert the district court abused its discretion by finding that McGee's lack of employment history indicated he would have difficulty being rehabilitated. McGee contends his unemployment was caused by his mental health illness and, therefore, the district court improperly held his mental health problems against him. We review a district court's sentencing decision for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). "Few limitations are imposed on a judge's right to consider evidence in imposing a sentence" and "[p]ossession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment."

Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). 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).

A review of the record reveals the district court stated it had reviewed the sentencing memorandum, which discussed McGee’s mental health issues and difficult childhood. The district court noted McGee had no significant employment history and found McGee’s criminal history showed he had not taken advantage of his prior opportunities to be rehabilitated. The district court further explained McGee’s conduct put other people at risk. The district court then imposed a sentence within the parameters of relevant statutes. *See* NRS 193.165(1); NRS 200.380(2). Given the record before this court, we conclude McGee does not demonstrate the district court abused its discretion when imposing sentence or improperly considered McGee’s employment record and mental health.

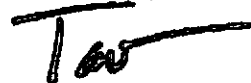
Fourth, McGee argues he is entitled to relief due to the cumulative effect of errors committed at the sentencing hearing. However, McGee failed to demonstrate there were any sentencing errors and, therefore, he is not entitled to relief due to cumulative error.

Fifth, McGee argues he was improperly convicted of robbery because he cannot commit such a crime against a deceased person and the district court erred by denying his pretrial petition for a writ of habeas corpus raising this issue. As McGee did not reserve in his plea agreement

the right to challenge the district court's ruling, see NRS 174.035(3), he waived any challenge to that ruling because it arose prior to the entry of his guilty plea, see *Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). We therefore decline to reach the merits of this claim. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Eric Johnson, District Judge
Law Office of Kristina Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk