IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE REED,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37735

FILED

JUL 12 2001

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 battery by a prisoner in lawful custody. The district court sentenced appellant to serve 18 to 45 months in prison, to be served consecutively to any sentence that appellant was then serving.

Appellant 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, wherein appellant spit on a correctional officer while incarcerated at the Ely State Prison. In support of this argument, appellant further points out that the State recommended a sentence of 12 to 30 months. We conclude that appellant's contention lacks merit.

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.[1] 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

[1]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

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the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[2]

This court has consistently afforded the district court wide discretion in its sentencing decision.[3] Accordingly, we 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."[4]

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. Further, we note that the sentence imposed was within the parameters provided by the relevant statute.[5] Moreover, NRS 176.035(2) mandates that the sentence in this case be served consecutively to any prior sentence. Finally, given the circumstances of the offense (appellant spit on two correctional officers a few months after indicating that he was HIV positive and could expose an officer to the disease), and the potential penalty that appellant faced as a habitual criminal had the State not agreed to forgo sentencing as a habitual criminal, we conclude that the sentence imposed is

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[2]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); accord United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001) ("Generally, as long as the sentence imposed on a defendant does not exceed statutory limits, this court will not overturn it on Eighth Amendment grounds.").

[3]See, e.g., Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[4]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[5]See NRS 200.481(2)(f) (providing for sentence of 1 to 6 years in prison).

not so grossly disproportionate to the offense as to shock the conscience. Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

Having considered appellant's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Dan L. Papez, District Judge
Attorney General
White Pine County District Attorney
Lockie & Macfarlan, Ltd.
White Pine County Clerk