IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER VALENZUELA-OLIVAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82673-COA

ORDER OF AFFIRMANCE

Christopher Valenzuela-Olivas appeals from a judgment of conviction, entered pursuant to a guilty plea, of two counts of assault with the use of a deadly weapon and one count each of battery with the use of a deadly weapon and discharging a firearm from or within a structure. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Valenzuela-Olivas claims his aggregated sentence of 4 to 20 years in prison constitutes cruel and unusual punishment and the district court abused its discretion by not granting him probation. He claims the sentence was excessive and disproportionate to the crime because he is young, there were no permanent injuries to the victims, he has virtually no criminal record, and he was outnumbered by the group and was responding to an attack by a much larger man.

The district court has wide discretion in its sentencing decision, *see Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), including in the granting of probation, *see* NRS 176A.100(1)(c). Regardless of its severity, "[a] sentence 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). Generally, this court 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." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Valenzuela-Olivas's sentence is within the parameters provided by the relevant statutes, *see* NRS 176.035(1); NRS 200.471(2)(b); NRS 200.481(2)(e)(1); NRS 202.287(1)(b), and he does not allege that those statutes are unconstitutional. Valenzuela-Olivas also does not demonstrate the district court relied on impalpable or highly suspect evidence. We have considered the sentence and the crimes, and we conclude the sentence imposed is not grossly disproportionate to the crimes, it does not constitute cruel and unusual punishment, and the district court did not abuse its discretion when imposing sentence. Further, considering the facts of the crimes, we conclude the district court did not abuse its discretion by declining to suspend the sentence and place Valenzuela-Olivas on probation.

Next, to the extent Valenzuela-Olivas argues his sentence should be modified because the district court relied on mistaken assumptions regarding his criminal history, we conclude this claim lacks merit. Valenzuela-Olivas claims the sentencing court misapprehended his

criminal record as to why he was carrying a firearm when he committed the instant crimes. Valenzuela-Olivas's motivation for actions related to the instant crimes is not a part of his criminal record, and therefore, he is not entitled to modification of his sentence. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (holding that a sentence may be modified if the sentencing judge relied on mistaken assumptions regarding a defendant's criminal history that worked to his extreme detriment).

Finally, Valenzuela-Olivas argues the district court abused its discretion by denying his motion to reconsider his sentence. Valenzuela-Olivas did not designate the denial of this order in the notice of appeal. Further, the motion for reconsideration was filed five days after the judgment of conviction was filed and would not be considered an intermediate order that may be appealed with the judgment of conviction. *See* NRS 177.045. Therefore, we decline to consider this claim for lack of jurisdiction. *See Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (holding that where no statute or court rule permits an appeal from an order denying a motion, we lack jurisdiction). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk