IN THE SUPREME COURT OF THE STATE OF NEVADA

DEWANE DON GAFFORD A/K/A DON DEWANE GAFFORD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37805

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 driving under the influence in violation of NRS 484.379 and 484.3792(1)(c). The district court sentenced appellant to serve 24 to 60 months in prison.

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, which is appellant's first felony DUI offense. We disagree.

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

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

[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).

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This court has consistently afforded the district court wide discretion in its sentencing decision.[3] Accordingly, we 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."[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, although the sentence imposed exceeded the 12-to-30-month-sentence recommended by the State, the district court was not bound by that recommendation and the sentence imposed was within the parameters provided by the relevant statutes.[5] Moreover, considering the circumstances of the instant offense[6] and appellant's driving record,[7] we conclude that the sentence imposed is not so grossly disproportionate to the offense as to shock the conscience. Accordingly, we conclude

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[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 484.3792(1)(c) (providing for sentence of 1 to 6 years in prison for felony driving under the influence).

[6]Two breath tests indicated a blood alcohol level of .256 and .245. A blood test showed a blood alcohol level of .310. Officers found an open bottle of vodka in appellant's vehicle. On the floorboard in appellant's vehicle, they located a device used to prevent the vehicle from being driven by anyone who had been drinking alcohol, which apparently had been installed pursuant to a court order; appellant admitted that he had disconnected the device.

[7]The instant offense was appellant's third arrest and conviction for DUI since October 1999. At the time of the instant offense, he was on non-supervised probation for one of the prior convictions and there was a misdemeanor warrant for failure to comply with the conditions of the sentence in that case. Appellant had a third misdemeanor DUI that was not used for enhancement purposes because it occurred more than 7 years prior to the instant offense.

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.

Leavitt, J.

Becker, J.

cc: Hon. Richard Wagner, District Judge
Attorney General
Humboldt County District Attorney
State Public Defender
Humboldt County Clerk