IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN ALLEN FREDERICK, A/K/A STEPHEN ALLEN FREDRICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83963-COA

ORDER OF AFFIRMANCE

Stephen Allen Frederick appeals from a judgment of conviction, entered pursuant to a no contest plea, of trafficking in a controlled substance. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

First, Frederick argues the State breached the plea agreement by arguing for an illegal sentence. At sentencing, the State argued Frederick should receive a sentence of 96 to 180 months in prison, which would be illegal under NRS 193.130(1) because the minimum term would exceed 40 percent of the maximum term. Frederick did not object to the State's alleged breach of the plea agreement. Because Frederick did not object below, he is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018); *see also Sullivan v. State*, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999). To demonstrate plain error, an appellant must show there was an error, the error was plain or clear, and the error affected appellant's substantial rights. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. "[A] plain error affects the defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

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The State was required by the plea agreement to argue for a lawful sentence. 96 to 180 months was not a possible legal sentence. Therefore, the State breached the plea agreement, and Frederick demonstrated error. However, Frederick failed to demonstrate actual prejudice or a miscarriage of justice because the district court noted that the State argued for an illegal sentence and did not impose that sentence. Thus, Frederick failed to demonstrate his substantial rights were affected. Therefore, Frederick failed to demonstrate plain error and, accordingly, that he is entitled to relief on this claim.

Second, Frederick argues the district court abused its discretion by imposing a prison term of 72 to 180 months, because the district court did not consider his individual mitigation evidence, the district court did not consider allowing him to participate in community programs, and the State improperly argued for an illegal sentence. He also argues his sentence constitutes cruel and unusual punishment.

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Generally, this court will not interfere with a sentence imposed by the district court that falls within the parameters of relevant sentencing statutes "[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); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). The granting of probation or placement into a treatment program is discretionary. *See* NRS 176A.100(1)(c); NRS 176A.240. 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).

The sentence imposed is within the parameters provided by the relevant statute, *see* 2015 Nev. Stat., ch. 506, § 6, at 3088 (former NRS 453.3385(1)(b)), and Frederick does not allege that this statute is unconstitutional. Frederick also does not demonstrate the district court relied on impalpable or highly suspect evidence. Frederick had ten prior felony convictions and failed to appear for his previous sentencing hearing. Further, the district court reviewed the presentence investigation report, heard argument from counsel, and listened to Frederick's allocution. We have considered the sentence and the crime, and we conclude the sentence imposed is not grossly disproportionate to the crime, it does not constitute cruel and unusual punishment, and the district court did not abuse its discretion when imposing sentence and declining to place Frederick on probation or into a treatment program. Therefore, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk