

IN THE SUPREME COURT OF THE STATE OF NEVADA

NOE CASTANEDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37913

FILED

AUG 22 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of trafficking in a controlled substance. The district court sentenced appellant to a prison term of 24 to 84 months and ordered him to pay a \$10,000.00 fine.

Appellant first contends that his Sixth Amendment right to counsel was violated. Particularly, appellant contends that his counsel had an actual conflict of interest because he represented co-defendants with competing interests. We conclude that appellant waived his right to be represented by conflict-free counsel.¹

At a hearing on appellant's motion to continue, the court noticed that Mark Mausert, counsel for appellant, was also representing appellant's co-defendant, who was charged with one count of possession of a controlled substance. The court inquired whether counsel had discussed the conflict of

¹See Hayes v. State, 106 Nev. 543, 556, 797 P.2d 962, 970 (1990) ("criminal co-defendants may waive their right to conflict-fee representation by insisting on joint representation by a single attorney, despite the obvious potential conflicts").

interest with his client. Appellant's counsel explained that he had discussed the potential for conflict with both clients and represented to the court that the conflict was minimal because appellant's co-defendant was merely charged with possession, a crime punishable by mandatory probation. The court then warned appellant and his co-defendant of the "unusual" and "dangerous" ramifications of joint representation including that: "potentially one defendant can be pointing the finger at the other defendant for whatever reason, human nature, legal, ethical, everything else, and that puts the attorney in a position of being in the middle." Both appellant and his co-defendant represented that they understood the dangers and expressly waived their right to be represented by conflict-free counsel. Because appellant waived his right to conflict-free representation, his Sixth Amendment rights were not violated.

Appellant next contends that the district court abused its discretion at sentencing. Particularly, appellant contends that the district court erred in failing to grant a reduction in sentence in light of appellant's substantial assistance.² We conclude that this contention lacks merit.

The record of appellant's sentencing hearing reveals that appellant did not provide substantial assistance. In fact, at sentencing, the State represented that appellant had not performed substantial assistance in exchange for a reduction in his sentence because he did not assist law enforcement until after he was arrested on another trafficking

²See Matos v. State, 110 Nev. 834, 878 P.2d 288 (1994).

charge subsequent to the instant case. Likewise, at appellant's sentencing hearing, a narcotics detective represented that appellant had begun the process of rendering substantial assistance to be credited to the subsequent trafficking offense by "making a buy," but that appellant had not yet completed the assignment because he had not identified the individual involved in the transaction. Because there was no evidence that appellant performed substantial assistance on the instant case, we conclude that the district court did not abuse its discretion in refusing to credit appellant for rendering substantial assistance.

Appellant also contends that the district court abused its discretion at sentencing because the sentence was too harsh in light of the fact that appellant had no criminal history prior to this offense. We conclude that this contention lacks merit.

This court has consistently afforded the district court wide discretion in its sentencing decision.³ 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."⁴ Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself

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

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

is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.⁵

In the instant case, appellant does not contend that the relevant statute is unconstitutional. Further, there is no evidence that the district court relied on impalpable or highly suspect. Finally, we note that the sentence imposed was within the parameters provided by the relevant statute.⁶ Accordingly, we conclude that the district court did not abuse its discretion at sentencing.

Appellant next contends that the district court erred in refusing to continue the sentencing hearing. Specifically, appellant argues that his constitutional rights were violated because without a continuance he was not given time to: (1) provide substantial assistance; (2) consolidate his two trafficking cases so that they could be considered under the "totality of the circumstances;" and (3) to get conflict-free legal counsel. We conclude that the district court did not abuse its discretion in denying appellant's motion for a continuance.⁷

First, we conclude that appellant had ample time to provide substantial assistance on the instant case. Appellant was charged by way of information on September 21, 2000. Appellant was then granted a continuance on October 25, 2000 and, again, on December 20, 2000. After appellant pleaded

⁵Blume 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)).

⁶See NRS 453.3385(2).

⁷See Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978).

guilty in January 2001, the district court granted another request by appellant for a continuance, resetting sentencing for April 25, 2001. Additionally, we conclude that appellant had no constitutional right to have his two, unrelated trafficking cases consolidated for purposes of sentencing.⁸ Finally, we conclude that appellant had no right to conflict-free counsel that needed to be protected at sentencing because he had previously waived this right and because his counsel withdrew from representing the co-defendant prior to the time appellant was sentenced. Accordingly, the district court did not abuse its discretion in denying appellant a continuance.

Last, appellant contends that reversal is warranted because the prosecutor engaged in misconduct at sentencing by making statements without any evidentiary foundation. Particularly, appellant alleges that he was prejudiced when the prosecutor stated: "Look at him looking at me. He has absolutely no respect for this Court, absolutely no respect for the law, and absolutely no respect for anything." The prosecutor also stated that: "And if there's dangerous people out there, he's one of them." Appellant contends that there was no evidentiary foundation for these statements because he was not dangerous, and in fact, had no prior criminal history, and there was no evidence he was not a respectful person.

We conclude that the prosecutor's remarks did not rise to the level of improper argument that would justify

⁸See Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990) (noting that consolidation of cases for trial is within the discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of discretion).

overturning his conviction.⁹ We further conclude that appellant has failed to show that the remarks made by the prosecutor improperly influenced the sentencing decision of the district court.¹⁰

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Dennis A. Cameron
Karla K. Butko
Mark L. Mausert
Washoe County Clerk

⁹See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

¹⁰See Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991) ("trial judges are presumed to know the law and to apply it in making their decisions").