IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TODD JULIUS HEISKANEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84961-COA

FILED

MAR 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Todd Julius Heiskanen appeals from a judgment of conviction entered pursuant to a guilty plea of driving under the influence (DUI) with a prior felony DUI. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

First, Heiskanen argues that the district court abused its discretion at sentencing because it relied upon suspect evidence when it imposed sentence. Heiskanen contends that the district court wrongly blamed him for his case languishing in the system during the COVID-19 pandemic and wrongly believed that he had been regularly driving while intoxicated since his release from prison in 2015 after a prior DUI conviction. Heiskanen also notes that a different criminal defendant with a similar conviction received a shorter prison sentence than he did and contends that his lengthier sentence shows the district court refused to consider his mitigation information.

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

23-07859

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).

At the sentencing hearing, the district court noted that it had been more than two years since Heiskanen had been charged in this matter and he had not been in custody during that time. The district court also notified the parties that it had reviewed all of the documents contained within its file in preparation for the sentencing hearing and read the letters submitted on Heiskanen's behalf. The district court listened to the arguments of the parties and Heiskanen's statement. The district court subsequently stated that it had reviewed information concerning Heiskanen's prior DUI offenses and noted that this was Heiskanen's third felony DUI offense. The district court also noted that Heiskanen's blood alcohol level in this matter was higher than the levels for his two prior felony DUI convictions, and the district court stated that this information was very troubling. The district court also stated that Heiskanen's history and the circumstances in this matter made it hard to believe Heiskanen's statement that this was his first time drinking alcohol since 2015. The district court ultimately imposed a sentence of 48 to 120 months in prison.

The sentence imposed is within the parameters provided by the relevant statutes. *See* NRS 484C.110(1); NRS 484C.410(1). Heiskanen does not demonstrate that the district court improperly considered the length of time this matter had been pending prior to the sentencing hearing. Moreover, Heiskanen did not demonstrate that consideration of Heiskanen's criminal record and the circumstances surrounding this

offense amounted to consideration of impalpable or highly suspect evidence. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("Few limitations are imposed on a judge's right to consider evidence in imposing a sentence . . . . Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment." (citations omitted)). Accordingly, Heiskanen does not demonstrate that the district court relied on impalpable or highly suspect evidence when it imposed sentence. Finally, "sentencing is an individualized process," *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990), and Heiskanen does not demonstrate that a more lenient sentence handed to a different criminal defendant had any bearing upon his sentence. Having considered the sentence and the crime, we conclude the district court did not abuse its discretion in sentencing Heiskanen.

Second, Heiskanen argues that his sentence constitutes cruel and unusual punishment. He contends that NRS 484C.110 and NRS 484C.410 are unconstitutional as they permit sentences that are grossly disproportionate to the crime solely because a defendant has previously been convicted of felony DUI. Heiskanen also contends that his sentence is excessive when compared to his crime.

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).

We review the constitutionality of statutes de novo. *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015) (internal quotation marks omitted). "In order to meet that burden, the challenger must make a clear showing of invalidity." *Id.* at 796, 358 P.3d at 238 (internal quotation marks omitted).

A sentence is not rendered grossly disproportionate merely because a recidivist statute enhances the length of a defendant's sentence and thereby imposes upon a criminal defendant a harsher sentence than what he might have otherwise received. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) (explaining "the State's interest is not merely punishing the offense of conviction, or the triggering offense" as there is an additional interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law" (internal quotation marks omitted)). Moreover, enhanced penalties based upon a defendant's criminal history may be "justified by the State's public-safety interest in incapacitating and deterring recidivist felons." *Id.*

Nevada has a legitimate interest in dealing with both the punishment for the commission of a DUI and in deterring recidivism for such offenses. *See Lader v. Warden*, 121 Nev. 682, 691, 120 P.3d 1164, 1169 (2005) (recognizing that "the interest of protecting the public from recidivist

DUI offenders support[s] an increased punishment"). The Legislature plainly expressed its intent within NRS 484C.410 for persons who have previously committed a felony DUI to face felony treatment for any subsequent DUIs that those persons may commit. *See Bd. of Parole Comm'rs v. Second Judicial Dist. Court (Thompson)*, 135 Nev. 398, 404, 451 P.3d 73, 79 (2019) ("When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, this court must give effect to that plain meaning as an expression of legislative intent without searching for meaning beyond the statute itself." (internal quotation marks omitted)). In light of Nevada's legitimate interest in dealing with both the punishment for the offense and in deterring recidivism, we conclude that the punishment provided by NRS 484C.110 and NRS 484C.410 does not cause sentences that are grossly disproportionate to the crimes committed by recidivist DUI offenders. Heiskanen thus fails to meet his burden to demonstrate that NRS 484C.110 and NRS 484C.410 are clearly unconstitutional.

Moreover, as stated previously, Heiskanen's sentence is within the parameters provided by the relevant statutes. *See* NRS 484C.110(1); NRS 484C.410(1). And we conclude the sentence imposed is not grossly disproportionate to the crime and Heiskanen's history of recidivism. Therefore, we conclude Heiskanen's sentence does not constitute cruel and unusual punishment. Accordingly, Heiskanen is not entitled to relief based on this claim.

Third, Heiskanen argues that his judgment of conviction must be overturned because the district court did not cause Heiskanen to be evaluated to determine if he suffered from an alcohol or substance abuse disorder as required by NRS 484C.300. Heiskanen also argues that he is

entitled to a new sentencing hearing because NRS 176.145(f) requires the results of an evaluation conducted pursuant to NRS 484C.300 to be included in the Presentence Investigation Report (PSI).

Heiskanen did not raise this issue below but instead informed the sentencing court that the PSI was complete and needed no alteration. Thus, Heiskanen is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). To demonstrate plain error, Heiskanen must show "(1) there was error; (2) the error is plain, meaning that it is clear under the current law from a casual inspection of the record; and (3) the error affected [his] substantial rights." *Id.* at 50, 412 P.3d at 48 (internal quotation marks omitted). "[A] plain error affects a 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.

The district court did not have Heiskanen undergo the alcohol or substance abuse evaluation as required by NRS 484C.300, and the results of an evaluation of that type were not included in Heiskanen's PSI. The failure to have Heiskanen undergo the required evaluation amounted to error that is plain from the record. However, Heiskanen does not identify any prejudice to his substantial rights stemming from that error. Heiskanen does not allege that any evaluation would have provided favorable information, and he therefore fails to show that the results of the sentencing hearing or any omission of an evaluation from the PSI affected the outcome of the sentencing hearing or caused him to suffer a grossly unfair outcome. *See Thomas v. State*, 88 Nev. 382, 385, 498 P.2d 1314, 1316 (1972) (permitting a sentencing court to impose sentence despite a PSI that did not include all of the required information). Thus, Heiskanen failed to

demonstrate that the lack of the alcohol or substance abuse evaluation amounted to error affecting his substantial rights. Accordingly, we conclude Heiskanen is not entitled to relief based on this claim, and we

ORDER the judgment of conviction AFFIRMED.

_________________________, C.J.
Gibbons

_________________________, J.
Bulla

_________________________, J.
Westbrook

cc: Hon. Kathleen M. Drakulich, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk