IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRACY OLNEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87181-COA

ORDER OF AFFIRMANCE

Tracy Olney appeals from a judgment of conviction, entered pursuant to a guilty plea, of battery with the use of a deadly weapon. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Olney argues the district court's comments at sentencing were based upon "suspect evidence." First, she claims that the district court's statement that she should have stopped drinking after the incident was improperly based on information the district court gleaned from reviewing the temporary protection order (TPO) and divorce case proceedings at the time Olney changed her plea. At the change of plea hearing, the district court determined that alcohol monitoring should be ordered as part of Olney's pretrial release based on the district court's reviewing of the related TPO case and the divorce proceedings. Based on this monitoring, Olney tested positive for having had alcohol in the days leading up to the change of plea hearing. Olney did not object to the district court's use of this information, either at the change of plea hearing or at sentencing. Thus, her claim is subject to plain error review. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

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To demonstrate plain error, an appellant must show that: "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id.* "[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. "A district court is vested with wide discretion regarding sentencing," and "[f]ew limitations are imposed on a judge's right to consider evidence in imposing a sentence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). However, "this court will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence." *Id.*

Olney fails to demonstrate the district court relied on impalpable or highly suspect evidence. Ordering the alcohol monitoring as part of Olney's pretrial release was within the district court's discretion. And Olney did not contend that the alcohol monitoring test, which was part of the district court's record, was itself impalpable or highly suspect. Further, when the district court looked at the other pending cases, it was taking judicial notice of the allegation of the use of alcohol during the incident, which was not clear error under current law from a casual inspection of the record.[1] *See* NRS 47.150(1) (providing that a court may take judicial notice sua sponte); NRS 47.130(2) (providing that a judicially noticed fact must be "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Mack*

[1]Olney claims the district court looked at the divorce proceedings again at sentencing when it discussed financial issues relating to restitution. However, the district court specifically stated it got the information from the presentence investigation report.

v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (setting forth an exception to the general rule against taking judicial notice of records in another case where the closeness of the cases and the particular circumstances warrant judicial notice). And, Olney does not dispute the use of alcohol during the incident. Therefore, we conclude that Olney is not entitled to relief on this claim.

Second, Olney claims the district court relied on suspect evidence at sentencing when it mentioned her ability to pay for private counsel. This comment was not made at sentencing, and Olney fails to demonstrate that the district court relied on it when sentencing her. Therefore, we conclude that Olney is not entitled to relief on this claim.

Third, Olney claims the district court relied on suspect evidence because the divorce proceedings included additional claims beyond just the complaint for divorce. Specifically, she claims the divorce proceedings also included claims of negligence, assault, battery, and claims for monetary damages. The district court did not mention these other claims at sentencing, and Olney fails to demonstrate the district court relied on them. Thus, we conclude Olney is not entitled to relief on this claim.

Fourth, Olney claims the district court relied on suspect evidence because it stated it would not consider the first letter written by Olney, but it would consider the second letter. As to the first letter, the district court found that Olney blamed the victim and failed to take responsibility for her actions. As to the second letter, the district court found that Olney took responsibility for her actions. Olney did not object to the district court's statement it would not consider the first letter. Thus, this claim is subject to plain error review. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Olney argues on appeal that the first letter detailed the abuse

she suffered at the hands of the victim and that the district court's disregard of the letter prejudiced her. The district court heard of the abuse and the particulars of the relationship from the letters submitted from Olney and Olney's son and from the presentation put on by Olney and her attorney. The district court found that based on the evidence presented, the relationship may have been based on "mutual affray" between the parties but that it got worse when Olney drank. Olney admitted as much in both of the letters she wrote. Based on the record, Olney fails to demonstrate error plain from the record or that her substantial rights were affected. Therefore, we conclude that Olney is not entitled to relief on this claim.

Fifth, Olney claims the district court relied on suspect evidence when it considered the fact that she had three prior arrests for domestic violence against the same victim in this case. The charges were ultimately dropped. Olney did not object to the use of her prior arrests. Thus, this claim is subject to plain error review. *Id.* A district court has wide discretion to consider prior uncharged crimes during sentencing "for the purpose of gaining a fuller assessment of the defendant's life, health, habits, conduct, and mental and moral propensities." *Denson*, 112 Nev. at 494, 915 P.2d at 287. A "district court must refrain from punishing a defendant for prior uncharged crimes." *Id.* Here, the district court used the prior crimes to assess Olney's life, habits, conduct, and mental and moral propensities and did not use them to punish Olney for her prior crimes. Thus, Olney failed to demonstrate any error, plain or otherwise, when the district court considered the prior arrests. Therefore, we conclude that Olney is not entitled to relief on this claim.

Next, Olney claims the district court erred by not granting her probation. The granting of probation is discretionary. *See* NRS

176A.100(1)(c); *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987) ("The sentencing judge has wide discretion in imposing a sentence . . . ."). 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).

Olney's sentence of 24 to 96 months is within the parameters provided by the relevant statute, *see* NRS 200.481(2)(e)(1), and Olney does not demonstrate that the district court relied on impalpable or highly suspect evidence. The district court considered the facts of the crime, Olney's prior history, the abuse between the parties, and other mitigating evidence presented by Olney before declining to place her on probation. Given this record, we conclude the district court did not abuse its discretion by declining to suspend the sentence and place Olney on probation. Therefore, we conclude that Olney is not entitled to relief on this claim.

Finally, Olney claims that her sentence is cruel and unusual. 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, and Olney does not allege that statute is unconstitutional. We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment. Therefore, we conclude that Olney is not entitled to relief on this claim. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. David A. Hardy, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk