IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD LEE WHATLEY, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89087

FILED

FEB 14 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

The criminal charge arose from a single-vehicle accident involving a work van. After proceeding through a four-way stop without slowing, the van swerved in and out of oncoming traffic before crashing into a barrier. Following trial, appellant Gerald Whatley, Jr., was convicted of felony driving under the influence of alcohol (DUI) and was sentenced to imprisonment for 4-15 years.[1] Whatley raises three arguments on appeal.

[1]This court dismissed Whatley's initial appeal from the judgment of conviction for lack of jurisdiction. *Whatley v. State*, No. 85077, 2022 WL 4394395 (Nev. Sept. 22, 2022) (Order Dismissing Appeal). On appeal from the district court's denial of a postconviction habeas petition, the Court of Appeals concluded that counsel had been ineffective for failing to file a timely notice of appeal. *Whatley v. Eighth Jud. Dist. Ct.*, No. 86185-COA,

First, Whatley argues that insufficient evidence supported the DUI conviction because the State failed to prove beyond a reasonable doubt that Whatley was driving or in actual physical control of the van when it crashed. When reviewing a challenge to the sufficiency of evidence, we consider the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

At trial, Oscar Castillo testified that he was waiting to make a right turn when he saw a white van drive through a four-way stop at approximately 55 miles per hour. Castillo followed the van and watched as it swerved in and out of oncoming traffic until it knocked over a traffic pole and crashed into a concrete road median. Castillo immediately approached the front of the van and saw a man sitting in the driver's seat, attempting to open the jammed driver's-side door. Castillo testified that he had an unobstructed view through the front windshield and had no difficulty identifying Whatley as the man he saw in the driver's seat. Neither Castillo nor a second eyewitness indicated having seen any other person exit the van, either before or after the accident. Additionally, police officers who responded to the scene testified that there were only two seats in the van, which were separated from the rear cargo area by a closed divider, and that the passenger door did not appear to have been opened. Both officers denied

---

2023 WL 9053150, at *1 (Nev. Ct. App. Dec. 28, 2023) (Order Affirming in Part, Reversing in Part and Remanding). Because Whatley's habeas petition established a valid deprivation of appeal claim, the district court directed the filing of the instant appeal on Whatley's behalf. *See* NRAP 4(c).

finding any evidence of a second person while searching the van. Only Whatley was transported to the hospital, where a blood test revealed that he had a .249 blood alcohol level. We conclude that a rational juror could reasonably infer from this evidence that Whatley was the sole occupant and driver of the van when it crashed. Accordingly, we conclude that sufficient evidence supported Whatley's DUI conviction.

Whatley next contends that the district court engaged in vindictive sentencing. *See Mitchell v. State*, 114 Nev. 1417, 1428, 971 P.2d 813, 820 (1998) ("It is well established that a sentencing court may not punish a defendant for exercising his constitutional rights."), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002), *and Rosky v. State*, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). Whatley asserts that the district court equated his choice to go to a jury trial with a failure to accept responsibility for the offense because the district court, after noting that Whatley had seven prior DUI convictions, stated, "then this DUI and it was the DUI that went to trial. So I don't know that you really accepted any responsibility for this is falling on somewhat deaf ears for this Court."

We conclude that Whatley has not met his burden of demonstrating error. *See id.* (recognizing that "[t]he defendant has the burden to provide evidence that the district court sentenced him vindictively"). Having reviewed the record in context, we conclude that the district court's comment was intended to convey the court's reservations regarding Whatley's alleged acceptance of responsibility for previous offenses and remorse for this offense, particularly considering Whatley's repeated prior DUI convictions. There is no indication that the comment expressed an improper opinion regarding Whatley's choice to go to trial.

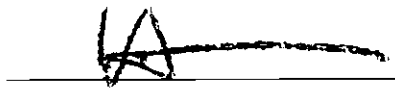
The record further shows that the district court's sentencing decision was informed by the goal of deterring future DUI offenses, the likelihood of rehabilitation (as indicated by Whatley's criminal history), the severity of the offense, and the potential that others could have been seriously injured. Thus, Whatley failed to prove that the district court vindictively sentenced him because he exercised his constitutional right to a jury trial.

Whatley also argues that the district court abused its discretion by rejecting his request to be sentenced to an alcohol disorder treatment program. Whatley contends that the district court's imposition of a prison sentence was arbitrary and capricious because Whatley was on probation in an unrelated case when sentenced and had remained compliant with all supervision requirements. Whatley does not contend, however, that the sentence is unconstitutional or that the district court relied on impalpable or highly suspect evidence. *See Houk v. State*, 103 Nev. 659, 662-64, 747 P.2d 1376, 1378-79 (1987). This court will not disturb a district court's sentencing determination absent an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009).

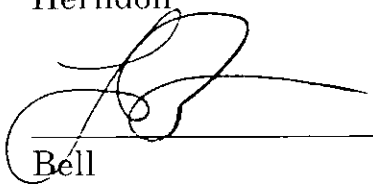
The sentence of 4-15 years falls within the relevant statutory limits. *See* NRS 484C.110; NRS 484C.410(1). The record shows that the district court acknowledged Whatley's addiction to alcohol but weighed it against the danger of allowing Whatley to remain in the community given his criminal history of seven prior DUIs, at least one of which was a felony, one hit and run, and 14 total felony convictions. Furthermore, the record indicates that Whatley would not have been eligible for a suspended sentence to pursue treatment under the circumstances. *See* NRS 484C.420(1) (prohibiting release on probation of a person convicted of DUI,

absent limited exceptions). We therefore discern no abuse of discretion in the district court's sentencing decision. Accordingly, we

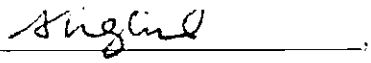
ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Herndon



_____, J.
Bell



_____, J.
Stiglich

cc: Hon. Eric Johnson, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk