IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRAVIS PAUL ATCHISON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 90027-COA

ORDER OF AFFIRMANCE

Travis Paul Atchison appeals from a judgment of conviction, entered pursuant to a guilty plea, of attempting to elude a police officer while under the influence of an intoxicating liquor and driving a vehicle while being under the influence of an intoxicating liquor with a prior felony conviction. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

First, Atchison argues the State breached the plea agreement when the prosecutors made improper arguments during sentencing and the entry of plea hearing.[1] Specifically, Atchison contends the prosecutor improperly argued at sentencing that the plea offer was "generous" and that Atchison: (1) did not initially accept responsibility for his actions; (2) was "dangerous"; (3) had a criminal history that included crimes of violence; (4) previously failed a diversion program for a prior felony conviction; and (5) had white supremacist tattoos. Atchison also contends the prosecutor made improper arguments when asking the district court for a no bail hold following the entry of Atchison's plea.

[1]Different prosecutors represented the State at these hearings.

25-37912

Atchison did not object to the prosecutors' statements, so we review for plain error. *See 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 under current law from a casual inspection of the record, and the error affected appellant's substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). When the State enters into a plea agreement, it "is held to the most meticulous standards of both promise and performance," and a "violation of [either] the terms or the spirit of the plea bargain requires reversal." *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (internal quotation marks omitted). "[I]n arguing in favor of a sentencing recommendation that the state has agreed to make, the prosecutor must refrain from either explicitly or implicitly repudiating the agreement." *Sullivan*, 115 Nev. at 389, 990 P.2d at 1262; *see also Kluttz v. Warden*, 99 Nev. 681, 684, 669 P.2d 244, 245-46 (1983) (concluding the prosecutor's comment that the State entered into the plea agreement without knowledge of all salient facts regarding the defendant's criminal history violated the spirit of the agreement).

Here, the plea agreement provided that the parties agreed to jointly recommend a 12-to-30-month prison sentence for the eluding count and a consecutive 2-to-5-year prison sentence for the count of driving under the influence (DUI) with a prior felony. The agreement also provided that Atchison understood he was eligible for probation for the eluding count and that the district court had discretion to impose probation and to run the prison sentences concurrently. Further, the agreement provided that the State reserved "the right at sentencing to provide the court with relevant information that may not be in the court's possession . . . to comment on the

circumstances of the crime and [Atchison's] criminal history; and to correct any factual misstatements made by [Atchison]."

Atchison filed a memorandum in anticipation of sentencing to "assist the Court in understanding the mitigating factors in Mr. Atchison's history and character, which warrant consideration in imposing a sentence that balances justice with compassion." The memorandum asked for concurrent sentencing. When the prosecutor argued during the sentencing hearing that he considered Atchison's request to be a breach of the plea agreement, Atchison's counsel stated he was withdrawing his request for concurrent sentencing, stating, "That was my mistake. The agreement says consecutive, and we're sticking to that agreement." Thereafter, Atchison made arguments in mitigation but ultimately asked for the jointly recommended sentence.

The prosecutor began his sentencing argument by asking for the jointly recommended sentence but stated he was "concerned" with Atchison's representations to the court "as not being necessarily honest" and "with a few other things." The prosecutor described the facts of the crimes as concerning because Atchison was under the influence and drove erratically and dangerously. The prosecutor explained that, "despite [Atchison's] claims of admission of responsibility," he ran and hid from the scene and claimed he was a passenger in the vehicle to law enforcement and in phone calls to family members after the incident. The prosecutor recounted Atchison's "substantial" criminal history, "not just of alcohol and driving under the influence but of violence," and noted Atchison previously had "the opportunity provided by the DUI treatment court." The prosecutor took issue with how Atchison described his tattoos in the presentence investigation report as "spiritual and religious based," arguing that

Atchison had a swastika tattoo and a "1488" tattoo, which the prosecutor asserted was related to a white supremacist slogan. At the end of his sentencing argument, the prosecutor stated he thought the sentencing recommendation was "generous," but ultimately asked the court to follow the recommendation and submitted the issue.

We conclude the State's sentencing arguments did not clearly repudiate the plea agreement and were not otherwise outside the bounds of the plea agreement in light of Atchison's sentencing argument, actions, and representations. Further, we conclude the prosecutor's arguments regarding Atchison's custody status following the entry of his plea addressed only the need to keep Atchison in custody for public safety following his admission of guilt to two felony counts and did not serve as a repudiation of the plea agreement. We note that Atchison's failure to object to any of these arguments may be an indication that he understood the prosecutors' arguments to be within the bounds allowed by the plea agreement. *See Sullivan*, 115 Nev. at 387 n.3, 990 P.2d at 1260 n.3. Considering these circumstances, we conclude Atchison fails to demonstrate the State plainly breached the plea agreement. Therefore, Atchison is not entitled to relief based on this claim.

Second, Atchison argues the sentencing structure found in NRS 484C.110 and NRS 484C.410 is facially unconstitutional as cruel and unusual punishment because once a defendant has been convicted of a felony DUI, NRS 484C.410 requires any subsequent DUI to be enhanced to a felony with a mandatory prison sentence regardless of the circumstances of the subsequent DUI. *See* NRS 484C.410(1).[2] Regardless of its severity,

---

[2]NRS 484C.110 sets out the prohibited conduct but is not a sentencing statute.

"[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 Jud. Dist. Ct.*, 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 Jud. Dist. Ct.*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015) (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 (quotation marks omitted).

A sentence is not rendered grossly disproportionate to the offense 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"). In providing that a person previously convicted of a felony DUI shall be punished with a mandatory prison term for any subsequent DUI, the legislature plainly expressed its intent for persons who have previously committed a felony DUI to face felony treatment for any subsequent DUIs those persons may commit.[3] *See Bd. of Parole Comm'rs v. Second Jud. Dist. Ct. (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." (cleaned up)).

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.410 does not result in sentences that are grossly disproportionate to the crimes committed by recidivist DUI offenders. Atchison thus fails to meet his burden to demonstrate that NRS

---

[3]NRS 484C.410(1)(a) provides that a person who has previously been convicted of "[a] violation of NRS 484C.110 or 484C.120 that is punishable as a felony . . . and who violates the provisions of NRS 484C.110 or 484C.120 is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years."

484C.410 is clearly unconstitutional. Therefore, Atchison is not entitled to relief based on this claim.

Third, Atchison argues that the district court abused its discretion at sentencing and that his sentence amounts to 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). And it is within the district court's discretion to impose consecutive sentences. *See* NRS 176.035(1); *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015). 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 district court imposed a 12-to-30-month prison sentence for the eluding count and a consecutive 72-to-180-month prison sentence for the DUI count. Atchison's sentence is within the parameters provided by the relevant statutes. *See* NRS 193.130(2)(d); NRS 484B.550(5); NRS 484C.410(1). Atchison does not allege the statutes related to the eluding count are unconstitutional and, as is discussed above, he fails to demonstrate that NRS 484C.410(1) is unconstitutional. While Atchison argues the district court plainly erred by relying on the State's argument related to his tattoos, the district court explicitly stated before imposing Atchison's sentence that it did not use "that information at all" in its sentencing decision. Thus, Atchison fails to demonstrate the district court relied on impalpable or highly suspect evidence. 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. Therefore, Atchison is not entitled to relief based on this claim.

Finally, Atchison argues the district court violated his right to reasonable bail secured by the United States and Nevada Constitutions by holding him without bail after he entered his guilty plea. Atchison concedes his claim is moot but contends this court should address the issue on the merits because it is a matter of public importance capable of repetition, yet evading review. *See Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 136 Nev. 155, 158, 460 P.3d 976, 982 (2020) (noting that the appellate court will generally decline to hear a moot case but discussing the three factors of the mootness exception). We conclude Atchison has not demonstrated this issue falls within the exception to the mootness doctrine because he has not shown that this issue is likely to arise in the future. *Cf. id.* at 160, 460 P.3d at 983 (concluding that the petitioners satisfied the second factor of the mootness exception by providing documents from other criminal cases in which defendants had raised similar arguments). Therefore, we decline to consider this issue, and we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Thomas W. Gregory, District Judge
Law Office of Maximilian A. Stovall / Minden
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk