IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL BROOKSHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39199

FILED

JUN 26 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea, of assault with the use of a deadly weapon.[1] The district court sentenced appellant Samuel Brooksher to serve a prison term of 28 to 72 months.

Brooksher first contends that the district court abused its discretion at sentencing because the sentence is too harsh. Citing the dissent in Tanksley v. State,[2] Brooksher asks this court to review the sentence to determine whether justice was done. We conclude that Brooksher's 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

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[1]Brooksher pleaded guilty pursuant to North Carolina v. Alford, 400 U. S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

[2]113 Nev. 844, 850, 944 P.2d 240, 244 (1997) (Rose, J., dissenting).

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

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 is constitutional."[5]

In the instant case, Brooksher does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statute.[6] Accordingly, the district court did not abuse its discretion at sentencing.

Brooksher also argues that the district court erred in denying his motion to dismiss based on the State's failure to collect a surveillance videotape of a local bar recorded on the night of the shooting. Brooksher alleged that the videotape would have shown "his dress, attire, hairstyle and facial features" on the night of the shooting, thereby refuting the eyewitness testimony identifying him as the shooter. We conclude that Brooksher's contention lacks merit.

Because the officers never viewed the videotape or booked it into evidence, Brooksher's allegation is properly analyzed as a claim that the State failed to gather evidence. In Daniels v. State,[7] we held that dismissal of criminal charges may be an available remedy for the State's failure to gather evidence where the evidence was material and the failure

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

[5]Griego v. State, 111 Nev. 444, 447, 893 P.2d 995, 997-98 (1995), abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

[6]See NRS 200.471(2)(b).

[7]114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).

to gather the evidence was the result of a bad faith attempt to prejudice the defendant's case.

In the instant case, the district court denied the motion to dismiss, finding that Brooksher failed to show that the videotape existed, and even assuming that it did exist, Brooksher failed to show that the videotape contained material, exculpatory information or that the officers acted in bad faith by not collecting it. We conclude that district court's findings are supported by substantial evidence.

At the evidentiary hearing on Brooksher's pretrial motion to dismiss, Reno Police Department Officer Greg Ballew testified that the videotape did not exist and that he had lied to Brooksher when he told him that he had the video. Ballew explained that he lied about the videotape as an interrogation technique, "just to make sure that [Brooksher] told [him] the truth." Further, Reno Police Detective Muhammed Rafaquat testified that, although he received three to five videotapes from the bar owner, he returned them without watching them or booking them into evidence because he concluded that they had no evidentiary value. Rafaquat's conclusion was based upon: (1) the bar owner's representation that he was not sure if he had put in a tape or if the tape recorder was working; (2) the fact that the dates and times were not noted on the tapes and that a couple of the tapes were marked pornographic; and (3) the fact that the camera was directed mainly at the cash register area, rather than the bar area where patrons such as Brooksher would sit. Notably, Brooksher presented no evidence that Rafaquat acted in bad faith in failing to view and collect the videotapes.

Additionally, at the evidentiary hearing, the State presented evidence with regard to the materiality of the videotape, assuming it existed. The State solicited testimony from the investigating officers that they had spoken to several witnesses who had observed Brooksher on the

night of the shooting and described his clothing and appearance as consistent with the eyewitness' description of the perpetrators of the shooting. Both Rafaquat and Ballew testified that the bartender, as well as an acquaintance of Brooksher, had seen Brooksher and his co-defendant together on the night of the shooting and were able to describe Brooksher's clothing and appearance. Because we conclude that the district court's findings that the videotape either did not exist, or alternatively, was not material or omitted from evidence in bad faith, are supported by substantial evidence, the district court did not err in denying appellant's motion to dismiss.[8]

Having considered Brooksher's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General/Carson City
Washoe County District Attorney
M. Jerome Wright
Washoe District Court Clerk

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[8]To the extent that appellant alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on the State's failure to view the videotapes, we conclude that there was no such violation.