

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LYNN YEATS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39362

FILED

JUL 25 2002

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Gary Lynn Yeats' post-conviction petition for a writ of habeas corpus.

On January 29, 2001, Yeats was convicted, pursuant to a jury verdict, of one count of burglary. The district court adjudged Yeats a habitual criminal and sentenced him to serve a prison term of 10 to 25 years. Yeats filed a direct appeal, and this court affirmed his conviction.¹

On July 13, 2001, Yeats filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel, who supplemented Yeats' petition. Without conducting an evidentiary hearing, the district court denied the petition. Yeats filed the instant appeal, alleging the district court erred in rejecting his claims that his counsel was ineffective.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been

¹Yeats v. State, Docket No. 37395 (Order of Affirmance, June 12, 2001).

different.² The court need not consider both prongs of the test set forth in Strickland v. Washington if the defendant makes an insufficient showing on either prong.³

Yeats first contends that his trial counsel was ineffective for failing to file a pretrial motion to dismiss based on prosecutorial vindictiveness. Specifically, Yeats contends that a motion to dismiss would have been successful because the prosecutor's decision to charge him with felony burglary, instead of misdemeanor shoplifting, was motivated by a desire to punish Yeats for refusing to plead guilty and asserting his constitutional right to a trial. We conclude that Yeats' contention lacks merit.

This court has held that "absent a decision to file the allegation based on an arbitrary factor such as race, an inference of vindictiveness is not compelling in light of the give-and-take of the plea bargaining process and the prosecutor's power to have filed the allegation at the outset of the plea negotiations."⁴ Here, Yeats has failed to allege that he was prosecuted based on an arbitrary factor, such as race. Further, we conclude that it was within the prosecutor's powers to allege that Yeats committed burglary and was a habitual criminal as those allegations were supported by the evidence. Accordingly, the district court did not err in rejecting Yeats' claim that his counsel was ineffective for

²Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

³Strickland, 466 U.S. at 697.

⁴Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978)); see also Schmidt v. State, 94 Nev. 665, 584 P.2d 695 (1978) (prosecutor not vindictive where charge of habitual criminal added after plea negotiations broke off).

failing to file a motion for dismissal based upon prosecutorial vindictiveness because that motion would have been denied.

Yeats also contends that his appellate counsel was ineffective for failing to raise the issue of whether his sentence constituted cruel and unusual punishment because he only stole a few bottles of whiskey. We disagree.

This court has consistently afforded the district court wide discretion in its sentencing decision.⁵ 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 accusations founded on facts supported only by impalpable or highly suspect evidence."⁶ Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statutes themselves are constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.⁷ Finally, the district court has discretion to impose sentence under the habitual criminal statute and may dismiss a habitual criminal allegation where an adjudication of habitual criminality would not serve the interests of the statute or justice.⁸

In the instant case, we conclude that appellate counsel was not ineffective for failing to raise the issue of whether Yeats' sentence constituted cruel and unusual punishment because that issue had no

⁵See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

⁶Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).


⁷Blume 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)).

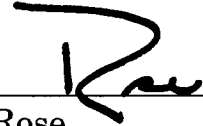
⁸Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990).

likelihood of success on appeal. The relevant statutes are constitutional and the sentence imposed was within the parameters provided by the habitual criminal statute.⁹ Further, the record reveals that the sentencing court did not rely on impalpable or highly suspect evidence or abuse its discretion in adjudicating Yeats a habitual criminal. At Yeats' sentencing hearing, the State admitted certified copies of Yeats' seven prior felony convictions, and the district court found that Yeats was a repeat offender and a "predatory criminal."¹⁰ Because the sentence imposed does not constitute cruel and unusual punishment, the district court did not err in rejecting Yeats' claim that his appellate counsel was ineffective for failing to challenge the constitutionality of his sentence.

Having considered Yeats' contentions and concluded that they lack merit, we¹¹

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

⁹NRS 207.010(1)(b)(3); NRS 205.060(1).

¹⁰See Sessions, 106 Nev. at 191, 789 P.2d at 1245.

¹¹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Janet J. Berry, District Judge
Scott W. Edwards
Gary Lynn Yeats
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk