

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WHITE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39435

FILED

JUL 22 2002

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a dangerous weapon by an incarcerated person. The district court sentenced appellant Matthew White to serve a prison term of 18 to 60 months. White filed the instant appeal.

White first contends that the prosecutor violated his right to free association under the First Amendment to the United States Constitution by proffering testimony from correctional officer Rod Moore that White was a member of a prison gang. We disagree.

The First Amendment prohibits the State "from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried."<sup>1</sup> This court has recognized that admission of evidence of constitutionally protected First Amendment activity is erroneous where it is not "tied in any way to the [crime], it did not serve to show that the appellant was a future danger to society, nor was it used to rebut any mitigating evidence."<sup>2</sup>

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<sup>1</sup>Dawson v. Delaware, 503 U.S. 159, 168 (1992).

<sup>2</sup>Flanagan v. State, 112 Nev. 1409, 1417, 930 P.2d 691, 696 (1996) (citing Dawson, 503 U.S. at 166-67).

Here, even assuming without deciding that White's association with a prison gang implicated his First Amendment right to association, we conclude that the district court did not err in considering the evidence. The State proffered testimony regarding White's purported involvement in a prison gang to rebut White's evidence presented in mitigation that he was not a member of a prison gang. Additionally, the evidence about his involvement with the prison gang was both relevant to White's future dangerousness and the crime charged. We therefore conclude that the district court did not err in considering White's gang involvement, and that White's First Amendment rights were not violated.

White next contends that his due process rights were violated at the sentencing hearing when the district court considered Moore's testimony, alleging White had committed prior bad acts. In particular, Moore testified that White was involved with a prison gang, had been found with other weapons in his cell, and had bragged about an incident where he assaulted another inmate.

This court has held that where a witness statement at sentencing refers to a defendant's prior bad acts, due process requires that (1) the statement be made under oath; (2) there be an opportunity for cross-examination; and (3) reasonable notice given regarding the prior bad acts.<sup>3</sup> "If the defense is not given reasonable prior notice of [a] statement which refers to specific prior acts, then the defense will be entitled to a continuance to rebut the . . . statement, unless the court can disclaim any reliance on the prior acts in imposing sentence."<sup>4</sup>

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<sup>3</sup>Buschauer v. State, 106 Nev. 890, 894, 804 P.2d 1046, 1048 (1990).

<sup>4</sup>Id. at 894, 804 P.2d at 1049.

In the present case, the record of the sentencing hearing reveals that Moore was under oath and subject to cross-examination when he testified about White's prior bad acts. Further, the prior bad acts were referred to in the presentence investigation report, which provided White with notice of the State's allegations. Even assuming White received inadequate notice of the substance of Moore's testimony, White did not request a continuance to allow him an opportunity to rebut or impeach Moore's testimony concerning his prior bad acts. Accordingly, we conclude that White's due process rights were not violated at the sentencing hearing.

Finally, White contends that reversal of his conviction is warranted because the district court considered impalpable and highly suspect evidence at sentencing. Particularly, White alleges that the evidence concerning his gang association and assault on another inmate was unreliable. We disagree.

This court has recognized that few limitations are imposed on a court's discretion to consider evidence in imposing a sentence.<sup>5</sup> The district court may consider facts and circumstances at a sentencing proceeding that would not be admissible at trial.<sup>6</sup> "So 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, this court will refrain from interfering with the sentence imposed."<sup>7</sup> Here, we conclude that the evidence presented about

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<sup>5</sup>Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).


<sup>6</sup>Silks v. State, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976).

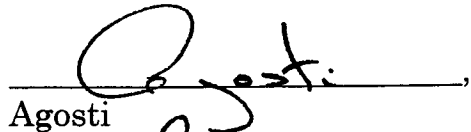
<sup>7</sup>Id. at 94, 545 P.2d at 1161.


White at his sentencing hearing was not palpable. The State's claims that White was involved in a prison gang and had assaulted another inmate were supported by objective evidence, namely, Moore's testimony, prison reports, White's tattoos, and letters purportedly written by White. Because the State's allegations were supported by objective testimony and exhibits admitted into evidence at the sentencing hearing, we conclude that the district court did not rely on palpable or highly suspect evidence in imposing sentence.

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

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. William A. Maddox, District Judge  
State Public Defender/Carson City  
Attorney General/Carson City  
Carson City District Attorney  
Carson City Clerk