IN THE SUPREME COURT OF THE STATE OF NEVADA

APOLINAR RIVAS-HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39649

FILED

JUN 04 2003

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 guilty plea, of one count of lewdness with a child under the age of fourteen years. Appellant Apolinar Rivas-Herrera asks this court to reverse his sentence and remand for resentencing, asserting that the district court based its sentencing decision on the fact that he is an illegal alien.

In October 2001, the State charged Rivas-Herrera with two counts of lewdness with a child under the age of fourteen years and one count of burglary. In January 2002, he pleaded guilty to one count of lewdness with a child under the age of fourteen, and the two other felony counts were dismissed. Rivas-Herrera was informed by the plea memorandum and in court when he changed his plea that he faced ten years to life in prison and was not eligible for probation unless a psychosexual evaluation certified that he did not represent a high risk to reoffend. He was also informed that the State was free to argue for an appropriate sentence.

The Division of Parole and Probation indicated in its presentence investigation report that appellant was an illegal alien. The report stated that

> the defendant does not pose a high risk of re-offense. However, he denies the Instant Offense and appears to be in denial regarding his alcohol abuse problem. There is no doubt that substance abuse counseling and sex offender counseling would be beneficial to the defendant. However, Mr. Rivas-Herrera has been determined to be an alien unlawfully in the United States, and therefore the defendant is unable to maintain lawful residency and/or unemployment. As a result, the defendant is not amenable to a grant of community supervision.

The report recommended that probation be denied and that appellant be sentenced to life in prison with the possibility of parole after ten years.

At the sentencing hearing, defense counsel told the court:

> The [Division], however, adequately and accurately assesses the situation as it concerns the defendant that he is an illegal. . . . [T]he [Division] in their analysis indicates that while he would benefit from this type of programming and supervision, that since he is illegal and cannot possibly work or cannot necessarily maintain any stable residential, the Division [recommends ten years to life in prison].
>
> And, Your Honor, I would disagree with that, and I would hope that the court would disagree with the reasoning based behind that finding.

Defense counsel did not object to the Division's reference to or reliance on Rivas-Herrera's status as an alien, but argued that if placed on probation, Rivas-Herrera was likely to be deported and, should he reenter the country, would face five years in federal prison as well as his underlying sentence in this case. A representative of the Division told the court that Rivas-Herrera "is an illegal alien, and INS is going forward with deportation proceedings" and that the Division stood by its

recommendation. Without any reference to Rivas-Herrera's alien status, the district court imposed a sentence of life in prison with the possibility of parole after ten years.

This court has stated that in imposing a sentence a district court has wide discretion and may consider a nearly unlimited variety of information, but basing a sentencing decision on the defendant's nationality or ethnicity violates due process.[1] However, Rivas-Herrera failed to preserve this issue for appeal. Failure to raise an objection with the district court generally precludes appellate consideration of an issue.[2] This court may nevertheless address an assigned error if it was plain and affected the appellant's substantial rights.[3] We conclude that no plain error occurred here. Rivas-Herrera now objects to the Division's consideration of his alien status in recommending against probation, but he does not demonstrate that the district court considered that fact: the court made no reference to his nationality, ethnicity, or alien status in pronouncing the sentence.[4]

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[1]Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998).

[2]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[3]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.")

[4]Citing three opinions by California Courts of Appeal, the State argues that illegal alien status is an appropriate factor to consider in deciding whether to grant probation. See, e.g., People v. Cisneros, 100 Cal. Rptr. 2d 784, 788 (Ct. App. 2000) ("Illegal alien status is a legitimate factor for consideration but does not categorically preclude a grant of probation."). Because it is not plain that the district court considered this factor here, we need not reach this issue.

Rivas-Herrera also contends that the district court abused its discretion at sentencing in not granting probation. He cites the dissent in Tanksley v. State.[5] We conclude that the contention lacks merit.

Rivas-Herrera argues that probation was appropriate based on his claims that he has no violent criminal history; that the factual record of his guilt is slight; that evaluations showed he did not represent a high risk of reoffending, even without treatment, and his problem was alcohol related; that he was not in this country for illegal purposes but to work and earn money to support his family in Mexico; and that he has taken responsibility for "the alleged crime." His claim that he takes responsibility is belied by his reference to the "alleged" crime and his insistence that the evidence in this case is slight. Rivas-Herrera pleaded guilty, and his guilt is not in dispute.

This court affords the district court wide discretion in its sentencing decision.[6] Accordingly, we will not interfere 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."[7] Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional and the sentence is not so unreasonably disproportionate to the offense as to shock the conscience.[8]

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[5]113 Nev. 844, 944 P.2d 240 (1997).

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

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

[8]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

Rivas-Herrera does not allege that the relevant statute is unconstitutional and fails to show that the district court relied on impalpable or highly suspect evidence. The sentence imposed was within the parameters provided by the relevant statute, and we conclude that it is not unreasonably disproportionate to the offense. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Steven R. Kosach, District Judge
Law Office of David R. Houston
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk