IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD V. BROWN, SR. A/K/A HOWARD V. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39795

FILED

JUL 9 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of second-degree murder. The district court sentenced appellant Howard V. Brown to serve a prison term of life with the possibility of parole after 10 years and ordered him to pay $14,944.98 in restitution.

First, Brown contends that the district court erred in denying his presentence motion to withdraw his guilty plea. Brown argues that his guilty plea was not entered knowingly, voluntarily, and intelligently because: (1) counsel did not explain the consequences of his plea; (2) counsel informed him that he would not serve longer than 20 years; and (3) counsel "called Brown an offensive racial term." We conclude that Brown's contentions are without merit.

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason'

if it is 'fair and just.'"[1] In deciding whether a defendant has advanced a substantial, fair, and just reason to withdraw a guilty plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.[2] The district court "has a duty to review the entire record to determine whether the plea was valid. . . . [and] may not simply review the plea canvass in a vacuum."[3]

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings.[4] "On appeal from the district court's determination, we will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion."[5] Additionally, this court has stated that "the failure to utter talismanic phrases will not invalidate a plea where a totality of the circumstances

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[1]Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); see also NRS 176.165.

[2]See Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

[3]Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

[4]NRS 177.045; Hart v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000) (citing Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225 n.3 (1984)).

[5]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

demonstrates that the plea was freely, knowingly and voluntarily made."[6] If the motion to withdraw is based on a claim that the guilty plea was not entered knowingly and intelligently, the burden to substantiate the claim remains with the appellant.[7]

We conclude that the district court did not abuse its discretion in denying Brown's presentence motion to withdraw his guilty plea. Brown failed to demonstrate that his guilty plea was not entered knowingly and intelligently. At the hearing on the motion in the district court, Brown did not testify on his own behalf or call any witnesses in support of his motion, such as former counsel, and submitted the case on the record without even the argument of counsel. The State, as well, did not present any witnesses or argument. Based on the totality of the circumstances, the district court concluded that Brown's guilty plea was entered knowingly and voluntarily, and that Brown understood the consequences of his guilty plea, including the potential sentence. We further conclude that Brown's arguments pertaining to counsel's allegedly deficient performance were therefore unsubstantiated and not supported by the record.

Brown also raises two arguments for the first time on appeal pertaining to the allegedly deficient oral canvass by the district court prior to the entry of his guilty plea: (1) that the district court failed to ask him

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[6]State v. Freese, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000) (citing Bryant, 102 Nev. at 271, 721 P.2d at 367).

[7]See Bryant, 102 Nev. at 272, 721 P.2d at 368.

if he was suffering from any mental illness or was under the influence of drugs or alcohol; and (2) the district court failed to advise him about the elements of the offense to which he was pleading. This court has stated that "[w]here a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."[8] Therefore, we conclude that these issues were not preserved for review on appeal.

Second, Brown contends that the district court abused its discretion because the sentence imposed is disproportionate to the crime and constitutes cruel and unusual punishment in violation of both the United States and Nevada constitutions.[9] Brown argues that he is 47 years old, schizophrenic and alcoholic, and he claims that his criminal history includes only two non-violent felony convictions more than ten years old and one misdemeanor from 1999. Brown also points out that the Department of Parole and Probation recommended a prison term of 10-25 years. We conclude that Brown's contention is without merit.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[10] Further, this court has consistently afforded the district court

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[8]McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

[9]See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6. Brown relies on Solem v. Helm, 463 U.S. 277 (1983), for support.

[10]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

wide discretion in its sentencing decision,[11] and 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."[12] 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 as to shock the conscience.[13]

In the instant case, Brown does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Brown also concedes that the sentence imposed was within the parameters provided by the relevant statutes.[14] Additionally, we note that the district court expressly stated prior to sentencing Brown that it took into consideration his extensive and documented history of violent behavior directed towards the victim, and Brown's use of alcohol as an excuse for his actions. Accordingly, we conclude that the sentence imposed is not disproportionate to the crime

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

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

[13]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 Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[14]See NRS 200.010; NRS 200.030(5)(a).

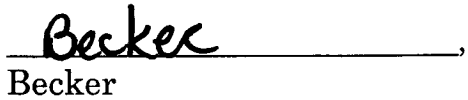
and does not constitute cruel and unusual punishment under either the federal or state constitution.[15]

Therefore, having considered Brown's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Robert L. Langford & Associates
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[15]See Schmidt v. State, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978).