IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD JOE TODACHEENE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39916

FILED

JUL 9 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of attempted sexual assault and battery with substantial bodily harm. For the attempted sexual assault, the district court sentenced appellant to prison for a maximum term of 144 months with a minimum parole eligibility of 32 months. For the battery, the court sentenced appellant to a consecutive term of imprisonment for a maximum of 36 months with a minimum parole eligibility of 12 months. The court further ordered appellant to pay certain fees for an administrative assessment, DNA analysis and a psychosexual evaluation. The court also ordered appellant to pay $5,883.17 in restitution, to submit to genetic marker testing and to register as a sex offender.

Appellant first contends that the district court erred by disregarding a favorable psychosexual evaluation report, which was obtained by the defense, and sentencing appellant to consecutive prison terms. We disagree.

This court has consistently afforded the district court wide discretion in its sentencing decisions.[1] We will refrain from interfering

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

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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."[2] Additionally, "a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional."[3]

Our review of the record of the sentencing proceeding here shows that the district court gave appellant a full opportunity to argue and present evidence in support of his request for leniency and to comment on the psychosexual evaluation reports. The court indicated that it understood that appellant was eligible for probation based on these reports. The court then stated, "[R]egardless of whether he's eligible for probation or not, the Court is not inclined to give him probation." We conclude that the court was within its discretion in determining not to grant probation regardless of appellant's probation eligibility.[4] Furthermore, it was within the court's discretion to impose consecutive

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

[3]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).

[4]See NRS 176A.110(1),(3)(a) (not mandating probation for eligible defendants, but, instead, stating the restriction: "[t]he court shall not grant probation to or suspend the sentence" of a person convicted of attempted sexual assault unless it is properly certified in a psychosexual evaluation prepared pursuant to NRS 176.139 that the person "does not represent a high risk to reoffend based upon a currently accepted standard of assessment"); Renard v. State, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978) (recognizing that district courts have wide discretion in determining whether to grant probation).

sentences.[5] The crimes here were of a serious and violent nature: appellant attempted to sexually assault his college roommate and then battered him with a golf club until the roommate fell unconscious and suffered severe head injuries. Additionally, appellant has not demonstrated that the district court relied on impalpable or highly suspect evidence. The sentence imposed is within the parameters of the relevant statutes,[6] and appellant does not challenge the constitutionality of these statutes. Accordingly, appellant's claim of error lacks merit.

Appellant next argues that the district court erred at sentencing by improperly relying on a report, which was based on a court-ordered psychosexual evaluation that was not preceded by Miranda[7] warnings and was, therefore, conducted in violation of appellant's rights under the Fifth and Sixth Amendments to the United States Constitution. However, appellant failed to object below to the use of the unwarned, court-ordered evaluation on the Fifth or Sixth Amendment grounds he now raises. Thus, he failed to preserve his arguments for appeal.[8] This court may nevertheless address appellant's assigned error if it is plain and

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[5]See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967).

[6]See NRS 193.330; NRS 200.481; NRS 200.366.

[7]Miranda v. Arizona, 384 U.S. 436 (1966).

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

affected his substantial rights.[9] We conclude that no such error is apparent in this case.

In Dzul v. State,[10] this court rejected claims of Fifth and Sixth Amendment violations identical to those raised by appellant here, and we held that a defendant is not entitled to Miranda warnings prior to a psychosexual evaluation that will be used to determine sentence. Thus, the use of the unwarned psychosexual evaluation and resulting report at appellant's sentencing did not result in plain error.

Appellant further contends that the district court erred at sentencing by improperly inquiring into appellant's sexuality and his motivation for the battery. It is unclear whether appellant's argument presents a claim that the court relied on irrelevant evidence or a claim that the court engaged in unconstitutional discriminatory treatment. Nonetheless, appellant failed to timely object to the district court's inquiry and has not preserved either issue for appeal. Furthermore, we have determined that we need not address the merits of either issue to satisfy our review for plain error.

Appellant's arguments are grounded on his contention that the district court "insisted on inquiring if the basis of the incident [resulting in appellant's guilty plea] was homosexual advances and whether [appellant] actually needed to defend himself with a weapon."

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[9]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.").

[10]118 Nev. ____, 56 P.3d 875 (2002).

But this contention mischaracterizes the nature of the district court's inquiry.

Appellant pleaded guilty and admitted to attempting to sexually assault his male roommate and then battering his roommate with a golf club after the roommate physically resisted the attempted assault. According to the roommate's report of the crimes, appellant initiated unwanted sexual contact with the roommate while the roommate was lying in bed in an intoxicated condition. When the roommate realized what appellant was doing, he struck appellant and chased him from the room. After the roommate locked the door to the room and returned to bed, appellant reentered the room and began striking the roommate in the head with a golf club. However, at sentencing, the prosecutor noted that appellant made statements, during the presentence investigation and the psychosexual evaluations, indicating that the roommate had invited the attempted sexual assault and that appellant was justified in using the golf club to defend himself against the roommate's response to the attempted sexual assault. The prosecutor argued that appellant's statements showed that he is a "master manipulator," who tells people "what he wants to, when he wants to." The district court then inquired, "Which is the proper explanation as to what occurred here? Was it a self-defense situation . . . [o]r was it a situation where you came in and beat this person while he was evidently asleep? . . . Was this disagreement between you two based on sexual advances you made?"

Appellant fails to point to any statement by the district court aimed at discovering appellant's sexual identity or preferences, and our review of the record reveals none. Moreover, it cannot seriously be disputed that a district court has discretion at sentencing to make such

inquiries as might be helpful to understanding a defendant's statements regarding his crimes. Thus, we are satisfied that no plain error arose in connection with the district court's inquiry at sentencing.

Having considered appellant's contentions and concluded that they do not merit relief, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk