IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD STEVEN PRATT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40239

FILED

JAN 0 6 2003

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 possession of a controlled substance for the purpose of sale. The district court sentenced appellant Richard Steven Pratt to serve a prison term of 14 to 48 months.

Pratt contends that the district court abused its discretion at sentencing by refusing to grant probation. In particular, Pratt contends that, in violation of the First Amendment of the United States Constitution, Pratt was sentenced for vocalizing his belief that the possession of marijuana should not be a crime. We conclude that Pratt's contention is without merit.

At the sentencing hearing, the prosecutor stated as follows:

> [W]e are not going to support [Pratt] being placed on probation if his attitude will be I'm going to obey those laws which I agree with and those law which I don't agree with I'm not going to obey. If he is willing to say that independently of how he thinks about [the marijuana] laws he will obey the rules of probation, straight out. Then we suggest probation is appropriate as the Division has recommended.
>
> If he is going to say that, well I don't think marijuana laws are all that smart. I'm going to smoke marijuana on probation or anything like

> that. . . then we are not in favor of that. That is our recommendation.

After imposing sentence, the district court commented: "Mr. Pratt has a very fixed idea about the marijuana and the laws with respect to these types of things. And it would be a big waste of time to try to convince him that anything else would be a reasonable way to look at the situation." Pratt or his defense counsel did not object or otherwise claim that Pratt's First Amendment rights were violated at any time during the sentencing proceeding.

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."[1] 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."[2]

As we noted above, Pratt failed to object to the prosecutor's comment or the district court's purported violation of his First Amendment rights.[3] As a general rule, failure to object below bars

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[1]Dawson v. Delaware, 503 U.S. 159, 168 (1992).

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

[3]Cf. Dawson, 503 U.S. at 162 (where defendant "continued to assert [at trial] that the admission of the stipulated facts into evidence violated the Constitution").

appellate review; however, this court may address plain error or issues of constitutional dimension sua sponte.[4]

In the instant case, we conclude that there is no plain or constitutional error because Pratt was not prejudiced by a violation of his First Amendment rights. Even assuming that Pratt's views on the marijuana laws implicated his First Amendment right to free speech, we conclude that the district court did not err in considering the evidence. The evidence about Pratt's beliefs about the marijuana laws was relevant to Pratt's ability to abstain from using controlled substances and abide by the conditions of probation, as well as relevant to the crime charged of possession of marijuana for the purpose of sale.

Moreover, we note that 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] 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]

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[4]See Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

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

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

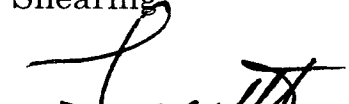
[7]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (citing Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

In the instant case, Pratt does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, we note that the sentence imposed is within the parameters provided by the relevant statutes.[8] Moreover, the granting of probation is discretionary.[9] Accordingly, the district court did not abuse its discretion at sentencing.

Having considered Pratt's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

cc: Hon. J. Michael Memeo, District Judge
Attorney General/Carson City
Elko County District Attorney
Elko County Public Defender
Elko County Clerk

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[8]See NRS 453.337; NRS 193.130(2)(d).

[9]See NRS 176A.100(1)(c).