IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN ESPINOSA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40392

FILED

JAN 23 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of three counts of sexual assault with the use of a deadly weapon and one count of robbery. The district court sentenced appellant Benjamin Espinosa to serve three consecutive prison terms of life with the possibility of parole after 10 years for the three sexual assault counts plus equal and consecutive prison terms for the use of a deadly weapon, and a consecutive prison term of 60-160 months for the robbery; he was ordered to pay $625.00 in restitution.

Espinosa's sole contention is that the sentence imposed by the district court is disproportionate to the crime, shocks the conscience, and constitutes cruel and unusual punishment in violation of both the United States and Nevada constitutions.[1] Citing to the dissent in Tanksley v. State[2] for support, Espinosa argues that this court should review the sentence imposed by the district court to determine whether justice was done. Espinosa notes that he is only 23-years old, yet will not even be eligible for parole until he is 88-years old. He contends that "to simply warehouse him for the rest of his natural life – to 'max' him out – is a

[1]See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

[2]113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

waste and should be seen as grossly disproportionate," and he desires a new sentence providing him with "a meaningful opportunity for a meaningful life on supervised parole." We disagree.

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.[3] Further, this court has consistently afforded the district court wide discretion in its sentencing decision 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."[4] Regardless of its severity, 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.[5]

In the instant case, Espinosa does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. Moreover, Espinosa concedes that "it cannot be seriously argued that [the sentencing judge] absolutely abused his discretion." We also note that the sentence imposed was within

---

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

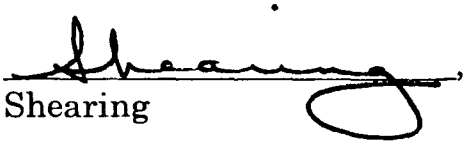
[4]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[5]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)).

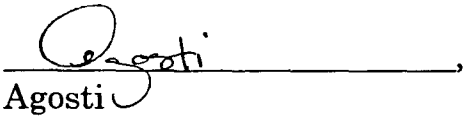
the parameters provided by the relevant statutes.[6] Further, at the sentencing hearing, the State informed the district court about the premeditated nature of the crime, Espinosa's actions after the assault indicating a consciousness of guilt, and his criminal history. The victim was present and offered an impact statement detailing the heinous offense. Therefore, based on all of the above, we conclude that the sentence imposed is not disproportionate to the crime, does not shock the conscience, and does not constitute cruel and unusual punishment in violation of either the federal or state constitution.

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

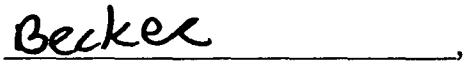
ORDER the judgment of conviction AFFIRMED.[7]



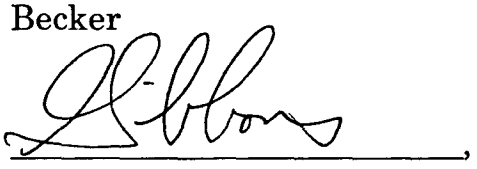
_____, C.J.
Shearing



_____, J.
Agosti



_____, J.
Becker



_____, J.
Gibbons

---

[6]See NRS 193.165(1); NRS 200.366(2)(b)(1); NRS 200.380(2).

[7]The Honorable Myron E. Leavitt, Justice, having died in office on January 9, 2004, this matter was decided by a six-justice court.

cc: Hon. Brent T. Adams, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

ROSE, J., with whom MAUPIN, J., agrees, concurring:

I concur because the majority properly states the law as it exists in Nevada – that a sentence within statutory limits is valid regardless of its severity, provided it does not amount to cruel and unusual punishment.[1] However, I have urged this court to review sentences to determine if they are excessive,[2] and I take this opportunity to do so in this case.

Espinosa committed a serious crime and pleaded guilty to three counts of sexual assault with use of a deadly weapon and armed robbery. The victim has suffered serious emotional distress, but not any substantial physical injury. Although Espinosa's crime was not the most serious crime of murder, he was assessed a sentence as if he had committed murder.

The district court gave Espinosa the maximum sentence on each count and ran the sentences consecutive to one another even though all were committed at about the same time. Since the three sexual assault crimes each require a sentence of life imprisonment with parole eligibility beginning when a minimum of 10 years have been served, and are doubled by the deadly weapon enhancements, the earliest Espinosa will be eligible for parole on the sexual assault crimes is 60 years. In addition, he was sentenced to a consecutive 160 months for the armed robbery with parole eligibility in 60 months. This means that Espinoza will not be eligible for parole until he has served 65 actual years in prison. Since Espinosa was 23 years old when sentenced, he will not be eligible for parole until after

---

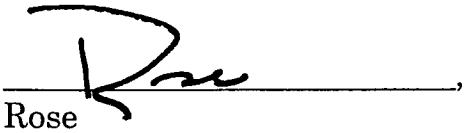
[1]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

[2]Tanksley v. State, 113 Nev. 844, 850-53, 944 P.2d 240, 244-45 (1997) (Rose, J., dissenting).

he is 88 years of age. Essentially his sentence is a sentence of life without the possibility of parole. And, we will pay for his incarceration until he dies.

I am not advocating a light sentence for Espinosa; he had committed two prior felonies and pleaded guilty to serious crimes. However, running two of the four convictions concurrent with the other two would have resulted in parole eligibility in 40 years. This, I think, would have been appropriate. He would be over 60 years old when he becomes parole eligible, but he would now have some hope of being released from prison during his life.

Given the state of the criminal law in Nevada, where this court will affirm just about any sentence that is legally possible to assess, I can only reiterate that we should review sentences that are claimed to be excessive since sentencing is a vital part of the criminal justice process and one that has the greatest ultimate effect on a defendant. While we review every discretionary act performed by a district court, this court refuses to scrutinize the sentence imposed on a defendant unless it appears so disproportionate that it will amount to cruel and unusual punishment. This court should assume the responsibility in criminal cases to ensure that the punishment fits the crime, as well as determining whether the defendant was properly convicted of the crime.



_____, J.
Rose

I concur:

_____, J.
Maupin