IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY HAWES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40431

FILED

JAN 28 2004

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of sexual assault and misdemeanor battery. The district court adjudicated appellant Gary Hawes as a habitual criminal and sentenced him to serve a prison term of life without the possibility of parole for the sexual assault and a concurrent jail term of 6 months for the battery.

Hawes contends that the district court abused its discretion in adjudicating him as a habitual criminal and sentencing him to a prison term of life without the possibility of parole. Citing to the dissent in Tanksley v. State[1] for support, Hawes argues that this court should review the sentence imposed by the district court to determine whether justice was done. Hawes concedes that he has incurred the requisite felony convictions, however, he argues that they "were more than twelve years old and were, in many instances, impulsive acts." Furthermore, Hawes contends that the sentence is disproportionate to the crime because he maintains that he is innocent, and that the sexual encounter with the victim was consensual. Hawes requests that his sentence be

[1]113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

"restructured" so that he may one day be eligible for parole. We conclude that Hawes' 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.[2] Further, this court has consistently afforded the district court wide discretion in its sentencing decision,[3] 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] Despite 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 to the crime as to shock the conscience.[5]

The district court has broad discretion to dismiss a habitual criminal allegation.[6] Accordingly, the decision to adjudicate an individual as a habitual criminal is not an automatic one.[7] The district court "may

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

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

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

[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)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[6]See NRS 207.010(2).

[7]Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

dismiss a habitual criminal allegation when the prior convictions are stale or trivial or in other circumstances where a habitual criminal adjudication would not serve the purpose of the statute or the interests of justice."[8] The habitual criminal statute, however, "makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are considerations within the discretion of the district court."[9]

This court explained that "Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal."[10] Although it is easier for this court to determine whether the sentencing court exercised its discretion when the sentencing court makes particularized findings and specifically addresses the nature and gravity of the prior convictions, this court has never required such explicit findings.[11] Instead, we will look to the record as a whole to determine whether the district court exercised its discretion or was operating under a misconception that habitual criminal adjudication is automatic upon proof of the prior convictions.[12]

In the instant case, Hawes does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional, and he cannot demonstrate that the

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[8]Hughes v. State, 116 Nev. 327, 331, 996 P.2d 890, 892 (2000) (emphasis added).

[9]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

[10]Hughes, 116 Nev. at 333, 996 P.2d at 893.

[11]Id.

[12]Id. at 333, 996 P.2d at 893-94.

sentence was so unreasonably disproportionate to the crime as to shock the conscience. We note that the sentence imposed was within the parameters provided by the relevant statutes.[13] Further, Hawes cannot demonstrate that the district court failed to understand its sentencing authority and exercise discretion in deciding to adjudicate him as a habitual criminal.

The district court conducted a hearing and considered: (1) the arguments of defense counsel and the State; (2) witnesses testifying in support of Hawes; (3) Hawes' remorseless statement in allocution; (4) the presentence investigation report (PSI) prepared by the Division of Parole and Probation detailing Hawes' extensive violent and criminal history; (5) and the facts of the instant offense. The district court expressly stated on the record that "the defendant, Gary Eugene Hawes, is an habitual criminal, and such [a] declaration would best serve the purpose of discouraging this defendant from further committing and repeating offending acts of criminal conduct." The district court also filed an order with particularized findings of fact and conclusions of law, thereby adjudicating Hawes as a habitual criminal.

Finally, we note that in addition to Hawes' 6 previous felony convictions, the PSI listed 5 misdemeanor convictions, 2 arrests without a recorded disposition, and several revoked terms of parole and probation spanning approximately 20 years across 3 different states. Accordingly, we conclude that the district court did not abuse its discretion at sentencing, and the sentence imposed is not disproportionate to the crime

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[13]See NRS 207.010(1)(b)(1); NRS 200.481(2)(a); NRS 193.150(1).

and does not constitute cruel and unusual punishment under either the federal or state constitution.[14]

Having considered Hawes' contention and concluded that it is without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Hawes was convicted of battery with the intent to commit a sexual assault. The judgment of conviction should have stated that Hawes was convicted of misdemeanor battery; Hawes was found not guilty of battery with the intent to commit a sexual assault. We therefore conclude that this matter should be remanded to the district court for the correction of the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED, and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

_____, C.J.
Shearing

_____, J.
Rose

_____, J.
Maupin

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

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