IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS GENE GUILLEN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40984

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 one count of battery with the use of a deadly weapon. The district court sentenced appellant Thomas Gene Guillen, Jr. to serve 24 to 72 months in the Nevada State Prison.

Guillen contends first that the district court abused its discretion by refusing to grant probation. We conclude that Guillen's contention lacks merit.

This court has consistently afforded the district court wide discretion in its sentencing decision.[1] 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."[2] Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional,

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

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

and the sentence is not so unreasonably disproportionate as to shock the conscience.[3]

In the instant case, Guillen does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Further, we note that the sentence imposed is within the parameters provided by the relevant statute.[4] Additionally, the granting of probation is discretionary.[5] We conclude, therefore, that the district court did not abuse its discretion in sentencing Guillen.

In a related argument, Guillen contends that the prosecutor made an improper argument at sentencing regarding the recent case of Dzul v. State.[6] Guillen argues that the prosecutor inappropriately quoted the Dzul case for the proposition that "rehabilitation is a key factor in extending leniency to defendants" and that "denial of responsibility [for a crime committed] is generally regarded as an impediment to successful rehabilitation."[7] The prosecutor improperly implied, according to Guillen, that because Guillen did not take personal responsibility for the wrongfulness of stabbing and slashing his girlfriend in front of their children, he should not be given probation.

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[3]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)).

[4]See NRS 200.481(2)(e).

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

[6]118 Nev. ___, ___, 56 P.3d 875, 883 (2002) (noting that defendant faced difficult choice of either admitting responsibility for his crimes and receiving favorable psychosexual evaluation or denying responsibility and possibly receiving negative evaluation).

[7]See id. at ___, 56 P.3d at 883-84.

Guillen contends that the State's sentencing argument based on Dzul misrepresented the facts in the instant case because Guillen affirmatively expressed sincere remorse over his actions to the judge at sentencing. Guillen also argues that the fact he pleaded guilty demonstrates he acknowledged responsibility for his actions, unlike the defendant in Dzul who entered an Alford[8] plea. On the other hand, Guillen acknowledges that the State acted in conformity with plea negotiations in this case by concurring in the Division of Parole and Probation's (P & P's) recommended sentence of 24 to 72 months, the sentence Guillen actually received. Guillen also acknowledges that the State was entitled to argue in support of that recommended sentence.[9]

We conclude that Guillen's contention lacks merit, and that the prosecutor engaged in permissible argument. Dzul does in fact stand for the general proposition that historically, a defendant who takes responsibility for an offense may be given probation because he is considered less likely to reoffend.[10] We also note that while Guillen did express remorse to the sentencing judge, the record also shows that Guillen's handwritten statement provided to P & P blamed the victim for provoking the attack and allegedly injuring herself with the knife Guillen was carrying. We conclude that Guillen has not shown that the district court relied on impalpable or highly suspect evidence in sentencing him.[11]

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[8]North Carolina v. Alford, 400 U.S. 25 (1970).

[9]See Sullivan v. State, 115 Nev. 383, 389-90, 990 P.2d 1258, 1261-62 (1999) (holding that where prosecutor reserves right to argue in support of a specific sentence, such argument is proper).

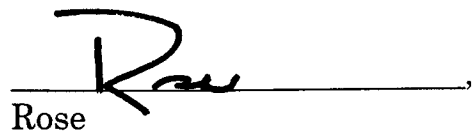
[10]Dzul, 118 Nev. at ___, 56 P.3d at 883.

[11]Silks, 92 Nev. at 94, 545 P.2d at 1161.

Guillen also asks this court to review his sentence according to the dissenting opinion in Tanksley v. State.[12] We decline to do so because we do not lightly encroach upon the legislature's power to define crimes and determine punishments.[13]

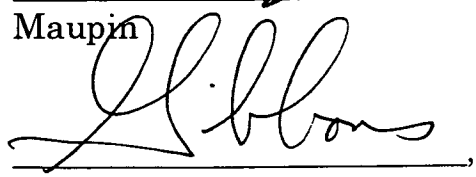
Having considered Guillen's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose

_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[12]113 Nev. 844, 850, 944 P.2d 240, 244 (1997) (Rose, J., dissenting).

[13]See Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994) (quoting Schmidt v. State, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978)).