IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN LEE WHITTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41191

FILED

AUG 19 2003

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 one count of burglary. The district court sentenced appellant Benjamin Lee Whitton to serve a prison term of 24-60 months; he was given credit for 426 days time served.

Whitton's sole contention on appeal is that the district court abused its discretion at sentencing. Citing to the dissent in Tanksley v. State[1] for support, Whitton argues that this court should review the sentence imposed by the district court to determine whether justice was done. Whitton concedes that the sentence imposed was "legally justified," however, he claims that it is excessive and harsh and that the district court did not consider several mitigating factors, including that: (1) "he did not batter the victim," (2) the victim was a felon, and (3) the victim failed to appear at the sentencing hearing.[2] Whitton asked the district

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

[2]Although defense counsel noted at the sentencing hearing that Whitton disputed some of the factual allegations in the case, there was, in fact, no discussion at the hearing regarding the mitigating factors as alleged in this appeal.

court to instead impose a term of probation. We conclude that Whitton's contention is without merit.

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."[3] 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.[4]

In the instant case, Whitton does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. As noted above, Whitton concedes that the sentence imposed was within the parameters provided by the relevant statute.[5] Additionally, the plea negotiations were entirely favorable to Whitton – he was initially charged in the instant case with one count each of burglary, battery with the use of a deadly weapon, robbery with the use of a firearm, and being an ex-felon in possession of a firearm. In exchange for Whitton's guilty plea to burglary, the other three counts plus several other charges stemming from other offenses were

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

[4]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)).

[5]See NRS 205.060(4).

dismissed. Moreover, the granting of probation is discretionary.[6] Accordingly, we conclude that the sentence imposed is not too harsh, is not disproportionate to the crime, does not constitute cruel and unusual punishment, and that the district court did not abuse its discretion at sentencing.

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Jerome Polaha, District Judge
Robert C. Bell
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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[6]See NRS 176A.100(1)(c).