

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD L. BUSKEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41635

FILED

OCT 27 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order revoking appellant Donald L. Buskey's probation and amending the judgment of conviction.

On December 5, 2002, Buskey was convicted, pursuant to a guilty plea, of one count of first-degree arson. The district court sentenced Buskey to serve a prison term of 24 to 84 months and then suspended execution of the sentence, placing Buskey on probation for a time period not to exceed 3 years. Buskey did not file a direct appeal.

On March 20, 2003, the Division of Parole and Probation filed a probation violation report against Buskey. Thereafter, on June 4, 2003, the district conducted a probation revocation hearing. Beth Stankus, Buskey's probation officer, testified at the hearing. Stankus testified that, on February 20, 2003, Buskey failed to attend an appointment with mental health services, which was a required condition of his probation. Additionally, Stankus testified that Buskey failed to maintain a stable residence. Although Buskey told Stankus that he was residing at St. Vincent's shelter, an employee of the shelter told Stankus that Buskey did

not reside there on a consistent basis. Stankus also testified that Buskey was not employed and was consistently late for his appointments with her.¹ Finally, Stankus testified that, after she made a home visit to Buskey's motel room, Buskey became angry, and started leaving "increasingly bizarre" threatening messages on her voicemail. Consequently, when Buskey reported to the Division, Stankus handcuffed him, causing Buskey to become very agitated. Buskey yelled profanities at Stankus, and threatened to "take [her] outside and beat [her] ass" and "pistol whip" her.

After hearing testimony from Buskey and arguments from counsel, the district court entered an order revoking Buskey's probation and amending the judgment of conviction. Buskey filed this timely appeal.

Buskey first contends that the district abused its discretion in revoking his probation. At the proceedings below, Buskey argued that his probation should not be revoked because: (1) he did not commit any new crimes; and (2) he had come to the realization that he needed a stable residence and also needed to be polite to his probation officer. We conclude that Buskey's contention lacks merit.

The decision to revoke probation is within the broad discretion of the district court, and will not be disturbed absent a clear showing of abuse.² Evidence supporting a decision to revoke probation must merely

¹Buskey apparently lived on a monthly disability check of \$530.00.

²Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974).

be sufficient to reasonably satisfy the district court that the conduct of the probationer was not as good as required by the conditions of probation.³ In this case, the district court acted within its discretion in revoking Buskey's probation because the testimony at the probation revocation hearing supported a finding that Buskey violated the conditions of his probation.

Buskey next contends that the district court erred in revoking his probation because the sentence imposed in the amended judgment of conviction constitutes cruel and unusual punishment in violation of the United States and Nevada Constitutions.⁴

Preliminarily, we note that Buskey has waived his right to challenge the severity of his sentence by failing to pursue the matter in a direct appeal from the original judgment of conviction. Although the district court's order is entitled, "Order for Revocation of Probation and Amended Judgment of Conviction," the order does not, in fact, amend the judgment of conviction, but instead merely revokes Buskey's probation. Nonetheless, we have reviewed the record on appeal and conclude that the sentence imposed by the district court does not constitute cruel and unusual punishment.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but

³Id.

⁴Appellant primarily relies on Solem v. Helm, 463 U.S. 277 (1983).

forbids only an extreme sentence that is grossly disproportionate to the crime.⁵ Regardless of its severity, a sentence that is within the statutory limits is not "cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience."⁶

In the instant case, Buskey does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional.⁷ Further, we note that the sentence imposed was within the parameters provided by the relevant statute.⁸ Finally, we disagree with Buskey that the sentence imposed is grossly disproportionate to the charged crime as to shock the conscience.⁹

⁵Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

⁶Blume 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).

⁷Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (recognizing that 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").


⁸See NRS 205.010(2) (providing for a prison term of 2 to 15 years).


⁹Buskey pleaded guilty to first-degree arson for setting fire to a motel room.


Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk