IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH JOHN GIESE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42189

FILED

MAR 23 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one felony count of obtaining and/or using the personal identification information of another. The district court sentenced appellant Kenneth John Giese to serve a prison term of 96-240 months to run consecutively to the sentences in two other unrelated cases, and ordered him to pay $9,316.26 in restitution jointly and severally with his codefendants.

First, Giese contends that the district court erred in its determination of the restitution award. Giese argues that the district court's restitution determination was based upon impalpable and highly suspect evidence. Giese claims that as part of the plea negotiation process, and as reflected in the criminal information and written guilty plea memorandum, he only agreed to plead guilty to a violation of NRS 205.463 involving the delivery of computer equipment; therefore, an award of restitution should not have exceeded the value of the computer equipment. We conclude that Giese's contention is without merit.

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"[A] defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution."[1] A district court retains the discretion "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant."[2] A district court, however, must rely on reliable and accurate information in calculating a restitution award.[3] Absent an abuse of discretion, "this court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence."[4]

Giese cannot demonstrate that the district court relied on impalpable or highly suspect evidence in determining the amount of restitution ordered for the reimbursement of the victim's monetary loss. At the sentencing hearing, initially there was confusion because the State asked for an award of restitution based on uncharged offenses committed by Giese. The district court noted that the plea memorandum referred only to the unlawful delivery of a computer and not to uncharged offenses,

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[1]Erickson v. State, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991); see also NRS 176.033(1)(c) ("If a sentence of imprisonment is required or permitted by statute, the court shall: . . . [i]f restitution is appropriate, set an amount of restitution for each victim of the offense.").

[2]Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

[3]Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

[4]Id. at 12-13, 974 P.2d at 135.

specifically, unlawful wire transfers, cellular phone charges, and checks. The victim was present, testified, and confirmed his monetary losses. After much discussion on the record and after at least two recesses for continued negotiations out of court, Giese agreed to pay $9,316.26 in restitution jointly and severally with his codefendants. Thereafter, the following exchange took place:

> THE COURT: Mr. Giese, do you understand, sir, that you have a right to have an evidentiary hearing and call witnesses, and your attorney can subpoena any further documentation that you might want, and by agreeing to this restitution sum, you're going to be giving up that right to a hearing?
>
> THE DEFENDANT: Yes. Yes, ma'am.
>
> THE COURT: Do you wish to give up that right?
>
> THE DEFENDANT: Yes, I do.
>
> . . .
>
> THE COURT: And the Court is satisfied that these are sums that can be proven and brought forward for the defense.
>
> And you're satisfied you have had sufficient time to go over the rights of your client regarding any further restitution hearings?
>
> DEFENSE COUNSEL: I am, your Honor.
>
> THE COURT: Okay. The Court finds that Mr. Giese has knowingly, voluntarily and willfully given up his right to any further restitution hearings.

Therefore, based on all of the above, we conclude that Giese agreed to pay the restitution amount ordered by the district court, and that the district court did not abuse its discretion in its restitution determination.

Finally, Giese contends that the district court abused its discretion by imposing an excessive sentence. Giese states that the sentence "appears to be the product of some other factor than the crime charged," and that the district court improperly "pushed the Deputy District Attorney several times to find a way to include restitution for uncharged crimes" and had a "seemingly untoward concern with satisfying [the victim]." Giese admits to his prior criminal history, but notes that in the instant case, the victim's loss was "relatively small." Citing to the dissent in Tanksley v. State[5] for support, Giese argues that this court should review the sentence imposed by the district court to determine whether justice was done. We conclude that Giese's 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.[6] This court has consistently afforded the district court wide discretion in its sentencing decision.[7] The district court's discretion,

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[5]113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

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

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

however, is not limitless,[8] nevertheless, we 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."[9] 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.[10]

In the instant case, Giese cannot demonstrate that the district court relied on impalpable or highly suspect evidence, or that the relevant sentencing statute is unconstitutional. In fact, the sentence imposed was within the parameters provided by the relevant statute.[11] In sentencing Giese, the district court noted that Giese was "a danger to the community" and that he "continue[d] to commit crimes while on parole for other crimes." We also note that Giese received a substantial benefit by pleading guilty – in exchange for his guilty plea, the State agreed not to

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[8]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

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

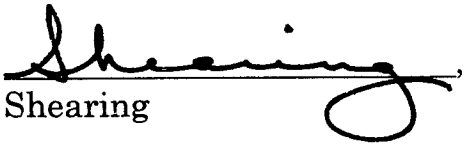
[10]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[11]NRS 205.463(1)(b) (category B felony providing for a 1-20 year term of imprisonment and a fine not to exceed $100,000.00).

file additional charges or pursue habitual criminal adjudication. Accordingly, we conclude that the district court did not abuse its discretion at sentencing, and that the sentence imposed is not excessive or disproportionate to the crime.

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

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
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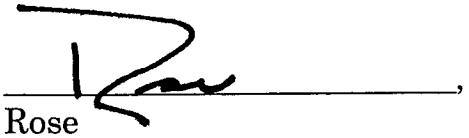
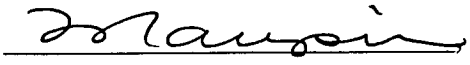


_____, J.
Rose



_____, J.
Maupin

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk