


IN THE SUPREME COURT OF THE STATE OF NEVADA

MARQUE GARDELEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62960

FILED

FEB 13 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of second-degree murder and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Competency

Appellant Marque Gardeley argues that the district court erred by failing to require an evaluation of his competency to be sentenced. He concedes that he was found competent to stand trial, but asserts that he was incompetent to be adjudged to punishment because he did not understand the mitigation aspect of the sentencing proceedings and was incapable of providing counsel with information to mitigate his punishment. And he suggests that some standard other than the standard announced in *Dusky v. United States*, 362 U.S. 402 (1960), applies to competency determinations for sentencing.

“The conviction of an incompetent person is a violation of due process and a defendant must be competent at all stages of prosecution,

including sentencing.” *United States v. Rickert*, 685 F.3d 760, 765 (8th Cir. 2012) (internal citations omitted), *cert. denied*, ___ U.S. ___, 133 S. Ct. 1609 (2013). “Competence [is] measured by the defendant’s ability to understand the nature of the criminal charges and the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.” *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 122, 206 P.3d 975, 977 (2009); *see* NRS 178.400 (setting forth Nevada’s competency standard); *Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1100 (2006) (holding that Nevada’s competency standard conforms to the standard announced in *Dusky*, 362 U.S. at 402); *Godinez v. Moran*, 509 U.S. 389, 404 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (“The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings.”). “A district court’s determination of competency after a competency evaluation is a question of fact that is entitled to deference on review. Such a determination will not be overturned if it is supported by substantial evidence.” *Calvin*, 122 Nev. at 1182, 147 P.3d at 1099 (footnote omitted).

Here, the record reveals that the issue of Gardeley’s competency was raised prior to trial and assigned to Department 5 for evaluation.¹ Defense counsel believed that Gardeley’s hearing ability was

¹The Honorable Jackie Glass, District Judge, presided over Gardeley’s competency proceedings.

relevant to his competency and that he lacked the ability to assist with mitigation issues for the penalty hearing. The prosecutors believed that Gardeley was not deaf and was faking his hearing loss. Gardeley was initially evaluated by two local doctors: Dr. Paglini found Gardeley marginally competent, and Dr. Glovinsky found him to be competent. When defense counsel contested these findings, the district court sent Gardeley to Lake's Crossing for further evaluation. At Lake's Crossing, Doctors Heller and Henson found Gardeley competent. When defense counsel challenged these findings, the district court conducted an evidentiary hearing. Both Dr. Heller and Dr. Henson testified by video from Lake's Crossing. Based on the pre-commitment reports, the Lake's Crossing reports, and the testimony presented at the hearing, the district court determined that Gardeley's hearing was unimpaired and that he had the capacity to aid and assist his counsel at all stages of the proceedings, understood the nature of the charges and the court process, and was competent to proceed under the *Dusky* standard. We conclude that the district court's competency determination is supported by substantial evidence and decline to overturn it on appeal.

Habitual criminal adjudication

Gardeley argues that the State's notices of evidence in aggravation and brief in support of habitual criminal treatment exposed the district court to allegations of prior bad acts before sentencing and thereby precluded a fair consideration of whether habitual criminal adjudication was appropriate. We review a district court's habitual-

criminal adjudication for abuse of discretion. See NRS 207.010(2); *O'Neill v. State*, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007).

The State initially sought the death penalty and filed four notices of evidence in aggravation. When Gardeley later agreed to plead guilty to second-degree murder and robbery with the use of a deadly weapon, the State filed an amended information that included a count of habitual criminality. The State also filed a brief that addressed the authority for habitual criminal treatment, listed Gardeley's prior felony convictions, and proffered information that might support a sentence of life without the possibility of parole. Gardeley moved to strike the habitual criminal count, the State's supporting brief, or the evidence of other bad acts. The district court conducted a hearing on the motion, observed that evidence of other bad acts could not be used in a habitual criminal adjudication but could be considered when imposing a sentence, and ordered the motion denied. Thereafter, the district court adjudicated Gardeley a habitual criminal.

The only factor the district court considers when adjudicating a defendant a habitual criminal is the existence of prior felony convictions. See *O'Neill*, 123 Nev. at 15, 153 P.3d at 42 ("NRS 207.010 only grants a district court the discretion to dismiss a count of habitual criminality, not the discretion to adjudicate that status based on factors other than prior convictions."). Here, the State presented certified copies of ten prior felony convictions, Gardeley was unable to overcome the presumption of regularity that is afforded to criminal convictions, and the district court

relied upon eight of the felony convictions in making its adjudication. See NRS 207.016(5); *Dressler v. State*, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991); see also *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (“NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions.”). The record demonstrates that the district court knew that habitual criminal adjudication was discretionary and nothing in the record indicates that the district court considered anything beyond Gardeley’s prior felony convictions when exercising its adjudication discretion. Accordingly, we conclude that Gardeley has not demonstrated that the district court abused its discretion in this regard.

Sentencing


Gardeley argues that the district court abused its discretion by sentencing him to life in prison without the possibility of parole for second-degree murder. Gardeley asserts that the district court relied upon uncharged, unfounded, or tenuous crimes; “a survey of reported Nevada habitual treatment cases shows a relatively negligible imposition of life without the possibility of parole;” and, since exiting his teenage years, almost all of his offenses have been non-violent drug-related possession or theft offenses.


We review a district court’s sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). A sentencing “court is privileged to consider facts and circumstances


which clearly would not be admissible at trial.” *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). However, we “will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence.” *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

Here, the district court adjudicated Gardeley a habitual criminal pursuant to NRS 207.010(1)(b), Gardeley’s sentence falls within the limits imposed by that statute, and the record belies Gardeley’s claim that the district court relied solely on highly suspect evidence in reaching its sentencing decision. Based on this record, we conclude that Gardeley has failed to demonstrate that the district court abused its discretion at sentencing.

Having concluded that Gardeley is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

cc: Hon. Elissa F. Cadish, District Judge
Law Office of Kristina Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk