IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENNIS WAYNE HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68361

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction filed pursuant to NRAP 4(c) and an appeal from a district court order resolving a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Direct appeal issues

Appellant Dennis Howard was convicted pursuant to a guilty plea of felon in possession of an electronic stun device and unlawful transport of a controlled substance. The district court sentenced Howard to two consecutive prison terms of 28 to 72 months. The district court subsequently found Howard was deprived of his right to a direct appeal and filed a notice of appeal pursuant to NRAP 4(c). This appeal followed.

Validity of NRS 202.357

Howard challenges the constitutionality of NRS 202.357—the statute that limits the use and possession of electronic stun devices. "The constitutionality of a statute is a question of law that we review de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Silvar v. Eighth*

Judicial Dist. Court, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (footnotes omitted).

Howard claims NRS 202.357 is unconstitutionally vague because the fact it is illegal for a felon to possess a stun gun is not common knowledge. Howard asserts postconviction counsel did not know a felon could not possess a stun gun, the Lyon County Sheriff's Deputies did not know about the law, the Nevada Department of Corrections' discharge information does not mention stun guns, the various Internet sites that cater to stun gun buyers do not disclose Nevada's restrictions on the sale of stun guns to felons, and he was never informed by his parole or probation officers that possession of a stun gun was illegal. Howard argues "[t]he widespread ignorance of NRS 202.357(2) renders its application unconstitutionally vague as applied to [him]."

A statute is void for vagueness "(1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *State v. Castaneda*, 126 Nev. 478, 481-82, 245 P.3d 550, 553 (2010) (internal quotation marks omitted). We conclude NRS 202.357 is sufficiently definite to allow a person of ordinary intelligence to understand what conduct is prohibited, the statute provides adequate standards to prevent discriminatory enforcement, and Howard's ignorance of the statute does not render it void for vagueness. *See Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) (same).

Howard also appears to claim NRS 202.357 is impermissibly overbroad because it does not specify the intent required to commit the crime of felon in possession of an electronic stun device and thereby imposes strict liability on a person who does not have the intent to commit the crime. "The overbreadth doctrine provides that a law is void on its face if it 'sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of' protective First Amendment rights, such as the right to free expression or association." *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 863 n.14, 59 P.3d 477, 480 n.14 (2002) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)), *abrogated on other grounds by Castaneda*, 126 Nev. at 482, 245 P.3d at 553.

We conclude the statute does not improperly interfere with First Amendment rights and, while it establishes a strict liability crime that is completed when a felon gains possession of an electronic stun device, Howard has not made a clear showing of its invalidity. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("[S]trict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements."); *cf. United States v. Sistrunk*, 622 F.3d 1328, 1332 (11th Cir. 2010) ("The offense of being a felon in possession of a firearm, under 18 U.S.C. § 922(g)(1), is a strict liability offense, in that the defendant need not have known that his possession of the firearm was illegal, and need not have intended to violate the law; the government need only prove that the defendant consciously possessed what he knew to be a gun. Thus, the defendant's state of mind is generally not relevant to this charge." (internal citation omitted)).

Abuse of discretion at sentencing

Howard claims the district court abused its discretion at sentencing by relying upon suspect evidence and failing to consider mitigating evidence. Howard does not identify the suspect evidence. Howard claims the district court should have considered his substance abuse issues, the abuse he received from his father and grandmother before leaving home at age 13 or 14 to live on the streets, his attempt at drug abuse rehabilitation after his release from prison, and the presentence evaluation indicating he would be a good candidate for the drug court program—if he were eligible.

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 imposed a sentence that falls within the parameters of the relevant statutes. *See* NRS 202.357(5)(a); NRS 453.321(2)(a). The record does not suggest the court's sentencing decision was based on impalpable or highly suspect evidence. And the record demonstrates the district court was well aware of Howard's history, past attempts at parole and probation, and other opportunities. Given this record, we conclude Howard has failed to demonstrate that the district court abused its discretion at sentencing.

Cruel and unusual punishment

Howard claims his sentence constitutes cruel and unusual punishment because it is in excess of that needed for society's interests.

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.'" *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 Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

Here, the sentence imposed is within the parameters provided by the relevant statutes, *see* NRS 202.357(5)(a); NRS 453.321(2)(a), and Howard does not allege those statutes are unconstitutional. We conclude the sentence imposed is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment.

Postconviction issues

Howard filed a timely postconviction petition for a writ of habeas corpus on April 23, 2014, and a supplemental petition on January 26, 2015. The district court conducted an evidentiary hearing and ordered the petition granted in part and denied in part. This appeal followed.

Howard argues the district court erred by rejecting his claims that his plea was not entered knowingly and voluntarily and that counsel provided ineffective-assistance at sentencing. Howard claims the plea canvass demonstrates his case was confusing, defense counsel did not

discuss NRS 202.357's constitutional deficiencies, and defense counsel advised him that his "sentences would most likely be served concurrently because [his offenses were committed] at the same time." To the extent Howard even raised these assertions in the court below, we conclude he has not demonstrated manifest injustice.

After conviction, a district court may permit a petitioner to withdraw a guilty plea where necessary "[t]o correct manifest injustice." NRS 176.165. "A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel." *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228 (2008). To prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[We] will not overturn the district court's determination on manifest injustice absent a clear showing of an abuse of discretion." *Rubio,* 124 Nev. at 1039, 194 P.3d at 1229 (internal quotation marks omitted).

The district court conducted an evidentiary hearing and made the following findings: Howard entered his plea knowingly and voluntarily and received effective assistance of counsel throughout the plea negotiations and sentencing. Defense counsel advised Howard of the deficiencies in the State's case, the high risk Howard faced if he rejected the plea offer, and the consequences he faced by accepting the plea offer. And Howard was given an opportunity to file a motion to withdraw his pleas, but decided against doing so because he did not want to face the risk of habitual criminal adjudication.

The record supports the district court's findings. Howard has not demonstrated prejudice from defense counsel's failure to present expert mitigating evidence at sentencing, defense counsel provided ineffective-assistance, or the existence of manifest injustice. Accordingly, we conclude the district court did not err by denying his claims.

For the foregoing reasons, we conclude Howard is not entitled to relief, and we

ORDER the judgment of conviction and the district court order resolving the postconviction petition for a writ of habeas corpus AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Leon Aberasturi, District Judge
Karla K. Butko
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk