

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANKLIN DAVID MARQUEZ, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71931

FILED

DEC 14 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Franklin David Marquez, Jr. appeals from a judgment of conviction entered pursuant to a guilty plea of pattern of mortgage lending fraud. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Marquez claims the district court abused its discretion at sentencing because it relied on the fact he failed to pay restitution prior to being sentenced to sentence him to prison rather than placing him on probation. Further, Marquez claims his prison sentence constitutes cruel and unusual punishment.

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed by the district court "[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." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Regardless of its severity, a sentence that is "within the

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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). Further, the granting of probation is discretionary. See NRS 176A.100(1)(c).

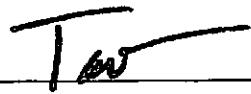
The sentence imposed is within the parameters provided by the relevant statute, see NRS 205.372(2), and Marquez does not allege the statute is unconstitutional. Marquez also does not demonstrate the district court relied on impalpable or highly suspect evidence. Even assuming the district court should not have discussed whether Marquez had paid restitution or saved money to pay restitution while awaiting sentencing, the district court did not rely on the restitution issue to sentence Marquez to prison rather than probation. Instead, the district court stated it was concerned with the nature and sophistication of the crime, the number of victims, the fact Marquez has other convictions for this same type of conduct, and deterrence.


Further, we have considered the sentence and the crime and we conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment and the district court

did not abuse its discretion when imposing a prison term rather than placing Marquez on probation. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


Silver, C.J.


Tao, J.


Gibbons, J.

cc: Hon. Carolyn Ellsworth, District Judge
Aisen Gill & Associates LLP
Attorney General/Carson City
Attorney General/Las Vegas
Clark County District Attorney
Eighth District Court Clerk