

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HUNTER HERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76879-COA

FILED

OCT 16 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Hunter Herman appeals from a judgment of conviction entered pursuant to a guilty plea of sexually motivated coercion. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

First, Herman argues the district court abused its discretion when imposing sentence because it improperly relied upon the victim's statement that she may have been drugged during the incident. 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).

The record demonstrates the victim told the authorities that Herman had supplied her with an alcoholic beverage and she fell asleep on a couch. She later awoke to discover Herman sexually abusing her. She stated that she was unable to move while Herman sexually abused her, which caused her to believe the drink may have been laced with drugs. At the sentencing hearing, the district court noted the victim's statements

19-42738

concerning the crime. The district court sentenced Herman to serve a suspended prison sentence of 28 to 72 months and placed him on probation for a term of five years, which was within the parameters of the relevant statutes. *See* NRS 176A.110(1); NRS 207.190(2)(a). Based upon our review of the record, the district court properly considered the victim's statements regarding the crime when imposing sentence. *See* NRS 176.015(6); *see also* *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (stating the sentencing court "is privileged to consider facts and circumstances that would not be admissible at trial"). Therefore, Herman is not entitled to relief based upon this claim.

Second, Herman argues the parties reasonably expected he would be permitted to reduce his conviction to a gross misdemeanor if he successfully completed probation and the district court violated the plea agreement by declining to impose a sentence in accordance with that expectation. Herman asserts he is therefore entitled to specific performance of the plea agreement. Based upon our review of the record, we conclude Herman is not entitled to relief.

Absent entry of a conditional plea based upon the court's acceptance of the parties' sentencing recommendation or the judge's expression of an inclination to follow the parties' sentencing recommendation, the court is not bound by the parties' sentencing recommendations and the court's refusal to impose a sentencing recommendation does not mandate withdrawal of the guilty plea. *See* NRS 174.035(4); *cf. Cripps v. State*, 122 Nev. 764, 771, 137 P.3d 1187, 1191-92 (2006) (stating when a district court has indicated it will follow the parties' sentencing recommendation and later declines to do so, "the defendant must be given an opportunity to withdraw the plea").

During the sentencing hearing, the district court reviewed the terms of the guilty plea agreement with the parties, stated “[o]f course, this Court is not bound by those [terms],” and clarified that Herman had not entered a conditional plea. Both parties informed the district court that it correctly understood the nature of the plea agreement and the district court was not bound to follow the parties’ sentencing recommendations.

In addition, in the written plea agreement Herman acknowledged he had not been promised a particular sentence and the district court was not obligated to accept the parties’ sentencing recommendations. Moreover, Herman did not demonstrate that prior to entry of his plea the district court expressed an inclination to accept the parties’ recommended sentence. Therefore, Herman is not entitled to relief based on this claim. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Carolyn Ellsworth, District Judge
Las Vegas Defense Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk