IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTIAN STEPHON MILES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79554-COA

ORDER OF AFFIRMANCE

Christian Stephon Miles appeals from a judgment of conviction, pursuant to a jury verdict, of sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Police arrested Miles for prostituting a 16-year-old girl, eventually charging him with sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. Before trial, Miles filed a motion to withdraw counsel so he could represent himself. The district court conducted a *Faretta* canvass to satisfy the requirement that Miles's waiver was knowing, intelligent, and voluntary. *Faretta v. California*, 422 U.S. 806 (1975). The district court also cautioned Miles numerous times that self-representation was ill-advised. However, Miles persisted and the court granted his motion to withdraw counsel and allowed him to represent himself.

After a seven-day trial, the jury convicted Miles on all charges. The district court sentenced Miles as follows: life in prison for Count 1 with a minimum parole eligibility of five years; life in prison for Count 2 with a minimum parole eligibility of five years, consecutive to Count 1; 48 months

in prison for Count 3 with a minimum parole eligibility of 19 months, consecutive to Counts 1 and 2; and 72 months in prison for Count 4 with a minimum parole eligibility of 28 months, consecutive to Counts 1, 2, and 3.

Miles appeals from the district court's judgment of conviction. First, Miles argues that the district court violated his Eighth Amendment right to be protected from cruel and unusual punishment when it imposed his sentences to run consecutively because the ultimate sentence was disproportionate to the offenses he committed. Second, Miles contends NRS 176.035(1) is unconstitutionally vague in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Article 1, Section 8, Clause 2 of the Nevada Constitution, because it allows district courts unfettered discretion to impose concurrent or consecutive sentences. Third, Miles argues the district court violated his Sixth Amendment right to counsel when it allowed him to represent himself because the court failed to properly conduct a *Faretta* canvass to determine whether his waiver of the right to counsel was knowing, intelligent, and voluntary. Fourth, Miles contends the court should have implemented standby counsel when it was apparent Miles acted improperly while representing himself. We disagree and address his arguments in turn.

First, the district court did not abuse its discretion when it imposed consecutive sentences. This court reviews a judgment of conviction imposing consecutive sentences for an abuse of discretion. *See Pitmon v. State*, 131 Nev. 123, 126-27, 352 P.3d 655, 657-658 (Ct. App. 2015). While this court affords broad discretion to district courts when sentencing a defendant, this discretion is not limitless. *See Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000) (explaining that although "the district court is afforded wide discretion" in imposing a sentence, that discretion is

not limitless). A district court does not abuse its discretion when the sentence it imposes falls within statutory limits. *See Gallon v. State*, Docket No. 75976 (Order of Affirmance, October 24, 2019) (concluding that the district court did not abuse its discretion in its sentencing because it relied on the facts of the case and the sentence fell "within statutory limits"); *Nemcek v. State*, Docket No. 68919 (Order of Affirmance, May 9, 2016) (holding the district court did not abuse its discretion in its sentencing because "Appellant's sentence is within the statutory limits" and because the district court has independence when determining its sentence).

Here, the district court did not abuse its discretion when it imposed consecutive sentences. The district court based its decision on the facts of the case, Miles's criminal history, and a psychosexual evaluation depicting Miles as "a high risk to re-offend both sexually and violently." Using these facts, the district court imposed a sentence that fell within the parameters provided by the relevant statutes, including NRS 176.035(1). Thus, the district court did not abuse its discretion because the sentence fell within the statutory parameters.

Second, NRS 176.035(1) is not unconstitutionally vague. NRS 176.035(1) states: "[W]henever a person is convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may provide that the sentences subsequently pronounced run either concurrently or consecutively with the sentence first imposed." The Legislature intended to grant the district court discretion to determine whether to impose sentences concurrently or consecutively. *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015). This court has previously concluded that NRS 176.035(1) is unambiguous

and constitutional, *id.* at 129, 352 P.3d at 659, and therefore Miles's argument is without merit. Accordingly, we decline to revisit *Pitmon*.

A statute's constitutionality is a question of law that this court reviews de novo. *Berry v. State*, 125 Nev. 265, 279, 212 P.3d 1085, 1095 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). We presume statutes are valid, and the burden therefore falls upon an appellant to "make a clear showing of invalidity." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). An appellant may challenge a statute as unconstitutional either because it is vague on its face, or because it is vague as applied to the appellant. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509-10, 217 P.3d 546, 551-52 (2009).

When analyzing whether a statute violates the Due Process Clause for unconstitutional vagueness, courts usually apply a two-factor test. *Pitmon*, 131 Nev. at 127-28, 352 P.3d at 658 (citing *Silvar*, 122 Nev. at 293, 129 P.3d at 685); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Under this two-factor test, a statute is unconstitutionally vague "if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silvar*, 122 Nev. at 293, 129 P.3d at 685. An ordinary person who commits and is convicted of two offenses should reasonably anticipate the possibility, and perhaps even the likelihood, that the court will impose consecutive sentences. *Pitmon*, 131 Nev. at 130, 352 P.3d at 660.

Here, under *Silvar*'s two-factor test, NRS 176.035(1) is not unconstitutionally vague. First, the language in NRS 176.035(1) granting

discretion to judges to impose concurrent or consecutive sentences is unambiguous. This court has previously come to that conclusion in *Pitmon*. The first sentence of NRS 176.035(1) states the district court "may" impose consecutive sentences. When read as a whole, NRS 176.035 is intended to grant the district court discretion to determine whether to impose sentences concurrently or consecutively and, thus, is unambiguous.

Further, Miles's argument that NRS 176.035(1) is unconstitutionally vague because it does not provide guidelines to the district court on how to determine whether to impose concurrent or consecutive sentences is unpersuasive. The fact that a statute grants the district court discretion to match the sentence imposed to the nature of every crime a defendant committed does not render NRS 176.035(1) unconstitutionally vague. The Due Process Clause only requires a statute to be understandable to persons of ordinary intelligence. An ordinary person that commits and is convicted of more than one offense should reasonably anticipate the possibility that he or she may serve consecutive sentences for each offense. Thus, NRS 176.035(1) is not unconstitutionally vague simply because it does not provide guidelines to the district court. Thus, NRS 176.035(1) is not unconstitutionally vague.

Additionally, Miles fails to satisfy plain error, which applies here because he did not raise the constitutionality of NRS 176.035(1) below. "[W]hen a criminal defendant fails to object to a district court's action, this court reviews the record for plain error only." *Berry v. State*, 125 Nev. 265, 282-83, 212 P.3d 1085, 1097 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). An error is plain when it is so clear "that it is apparent from a casual inspection of the record;" the

defendant must also show the error impacted her or his substantial rights. *Id.* at 283, 212 P.3d at 1097.

Here, applying plain error analysis dictates NRS 176.035(1) is not unconstitutionally vague because Miles failed to show plain error: Miles does not argue it is apparent from a casual inspection of the record that an error is clear. Even if he had made this argument, the record does not support the notion that the district court erred. On the contrary, the record shows the district court based its decision on the facts of the case and imposed a sentence that fell within statutory parameters. Additionally, Miles has not shown that this error impacted his substantial rights. Thus, because Miles fails to demonstrate plain error, this court will not revisit the constitutionality of NRS 176.035(1).

Third, the district court did not abuse its discretion when it allowed Miles to represent himself. Whether a defendant validly waived his or her right to counsel is a question of law that is reviewed de novo, contingent upon the facts as found by the district court. *See Brewer v. Williams*, 430 U.S. 387, 403-04 (1977). This court gives deference to the district court's decision to allow a defendant to waive his or her right to counsel and represent him- or herself. *Hooks v. State*, 124 Nev. 48, 55, 176 P.3d 1081, 1085 (2008).

A criminal defendant must knowingly, intelligently, and voluntarily waive his or her right to counsel to exercise his or her right to self-representation. *Id.* at 53-54, 176 P.3d at 1084. Repeated assertions of one's right to self-representation alone are insufficient to show a valid waiver of the right to counsel. *Id.* at 57, 176 P.3d at 1086. To properly waive the right to counsel, the district court should conduct a *Faretta* canvass to make the defendant "aware of the dangers and disadvantages of

self-representation" so the record establishes that he or she knows what he or she is doing and his or her "choice is made with eyes open." *Id.* at 53-54, 176 P.3d at 1084 (internal quotation marks omitted). Areas of suggested inquiry for a *Faretta* canvass are provided in SCR 253(3).[1] However, the district court is not constitutionally required to inquire into any particular matter for a valid waiver if "it is apparent from the record that the defendant was aware of the dangers and disadvantages of self-representation." *Graves v. State*, 112 Nev. 118, 125, 912 P.2d 234, 238-39 (1996).

Here, the district court did not abuse its discretion because it properly conducted a *Faretta* canvass and determined Miles's waiver was knowing, intelligent, and voluntary. The record shows Miles was aware of the dangers and disadvantages of self-representation. The district court warned Miles multiple times during its *Faretta* canvass that waiving his right to counsel was ill-advised. Also, despite only informing Miles what his potential sentence could be if convicted of one charge and not all of them, the district court stressed that his potential sentence could be life imprisonment.

Additionally, the district court inquired into a plethora of criteria to make a proper finding that Miles's waiver was knowing, intelligent, and voluntary. The district court inquired into Miles's age, his education level, his experience with the judicial system, the complexity of criminal cases, his legal training, his understanding of the case against him,

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[1]These areas *may* include a "[d]efendant's age, education, literacy, background, and prior experience or familiarity with legal proceedings; . . . [and] understanding of the elements of each crime and lesser included or related offenses." SCR 253(a), (f) (emphasis added).

the grounds for objections, the potential life sentence he was facing, the district court's belief that self-representation was a bad decision, how to disqualify a juror, his right against self-incrimination, and more. Thus, the district court did not abuse its discretion in allowing Miles to represent himself because his choice to waive his right to counsel was knowing, intelligent, and voluntary, supported by the record that shows he acknowledged numerous times the disadvantages of self-representation, and because the court inquired into a plethora of criteria for its determination.

Fourth, the district court did not err when it did not implement standby counsel because Miles cites no legal authority dictating that the district court must sua sponte *revoke* a defendant's right to self-representation for being disruptive. Despite self-representation usually being detrimental to a defendant's case, the district court must honor her or his choice. *Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001) (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993)). However, the district court has no duty to sua sponte revoke a criminal defendant's right to self-representation for being disruptive.[2] *See People v. Price*, No. B197624, 2008 WL 2440287, at *4 (Cal. Ct. App. June 18, 2008) (rejecting the notion that a district court must sua sponte "terminate" a defendant's right to self-

[2]There is no authority for the proposition that the district court had a duty to sua sponte revoke a defendant's right to self-representation for being disruptive. *Sharkey v. State*, Docket No. 75474-COA (Order of Affirmance, Ct. App., March 18, 2019) (comparing this proposition to *Vanisi*, 117 Nev. at 338, 22 P.3d at 1170 ("holding that a defendant's right to self-representation *may* be denied if the 'defendant is disruptive'") (emphasis added)).

representation simply because the defendant attempted to derail the court's sentencing timetable).

Here, the district court did not err because Nevada precedent does not establish a duty for the district court to implement standby counsel for defendants who are disruptive. Miles affirmatively desired to represent himself, and the court must honor his choice. Thus, the district court did not err in allowing Miles to conduct his own defense because it had no duty to sua sponte revoke his right to self-representation for being disruptive.

Therefore, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
Mario D. Valencia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk