

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS GILBERT BEHMER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84625-COA

FILED

MAR 14 2023

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

ORDER OF AFFIRMANCE

Thomas Gilbert Behmer, Jr., appeals from a judgment of conviction, entered pursuant to a guilty plea, of low-level trafficking in a controlled substance. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Challenges to the constitutionality of NRS 453.3405

Behmer argues NRS 453.3405 is unconstitutional because the statute and/or its application violates his rights to due process and equal protection and violates the separation of powers doctrine. NRS 453.3405 allows a district court to reduce or suspend the sentence of any person convicted of trafficking in a controlled substance if it finds the person “rendered substantial assistance in the investigation or prosecution of any offense.” “This court reviews the constitutionality of a statute de novo.” *State v. Colosimo*, 122 Nev. 950, 954, 142 P.3d 352, 355 (2006). “Statutes are presumptively valid and the burden is on those attacking them to show their unconstitutionality.” *Id.* (quotation marks omitted).

First, Behmer argues NRS 453.3405 and/or its application violates the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. To start, Behmer claims the law

enforcement community's application of NRS 453.3405 violated his due process rights because law enforcement officers prevented him from complying with NRS 453.3405 by rejecting his offer of assistance. "[A]n accused has no protected due process right to a *discretionary* sentence reduction for offering 'substantial assistance' to government officials in apprehending drug criminals." *Matos v. State*, 110 Nev. 834, 838, 878 P.2d 288, 290 (1994); *see also United States v. Harrison*, 918 F.2d 30, 33 (5th Cir. 1990) (listing several courts that have held "defendants have no constitutional right . . . to a 'substantial assistance' departure provision in the Guidelines"). Therefore, Behmer fails to demonstrate his due process rights were implicated when law enforcement officers rejected his offer of assistance.

Behmer also claims his due process rights were violated because the term "substantial assistance" is not defined. "[T]he Due Process Clause does not require that every sentencing statute include specifically enumerated and rigorously defined checklists that must be mechanically applied by rote in every case." *Pitmon v. State*, 131 Nev. 123, 130, 352 P.3d 655, 660 (Ct. App. 2015). Nonetheless, NRS 453.3405(3) lists several factors a court may consider in determining whether a defendant has rendered substantial assistance. Therefore, Behmer fails to demonstrate the term "substantial assistance" was insufficiently defined so as to violate his due process rights.

Behmer also claims his due process rights were violated because the term "substantial assistance" is applied in an arbitrary and capricious manner. Behmer did not support this argument with relevant authority or cogent argument. Therefore, we conclude Behmer is not

entitled to relief on this claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Behmer lastly claims his due process rights were violated because the district court stated NRS 453.3405 did not apply in this matter. Behmer failed to explain how the district court's statement implicated his due process rights. Moreover, as discussed below, we infer that the district court meant Behmer was not eligible for a sentence reduction or suspension under NRS 453.3405 because he had not rendered substantial assistance. Therefore, we conclude Behmer is not entitled to relief on this claim. Accordingly, Behmer fails to demonstrate that NRS 453.3405 and/or its application violates the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

Second, Behmer argues NRS 453.3405 and/or its application violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. "The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). Behmer did not provide any specific facts or argument showing he was similarly situated to others who had received a sentence reduction or suspension under NRS 453.3405. Therefore, we conclude Behmer is not entitled to relief on this claim. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

Third, Behmer argues NRS 453.3405 violates the separation of powers doctrine under the Nevada Constitution because it does not allow a district court to exercise its discretion to reduce or suspend a defendant's sentence unless a law enforcement agency grants the court permission. Behmer further argues a law enforcement agency violates the separation of

powers doctrine when it declines a defendant's offer of assistance. The Nevada Constitution prohibits "any one branch of government from impinging on the functions of another." *State v. Second Judicial Dist. Court (Hearn)*, 134 Nev. 783, 786, 432 P.3d 154, 158 (2018) (quotation marks omitted); *see also* Nev. Const. art. 3, § 1(1). Where the legislature grants courts discretion in sentencing, such discretion cannot be conditioned on the executive branch's approval. *See Hearn*, 134 Nev. at 786-87, 432 P.3d at 158-59.

Under NRS 453.3405, a law enforcement agency need not grant a district court permission before the court may exercise its discretion to reduce or suspend a defendant's sentence. Rather, NRS 453.3405 grants a district court discretion to reduce or suspend a defendant's sentence if it finds the defendant rendered substantial assistance in the investigation or prosecution of any offense. After the district court makes such a finding, it may reduce or suspend a defendant's sentence as it sees fit. *See* NRS 453.3405(2) (requiring only that "[t]he arresting agency . . . be given an opportunity to be heard before the motion is granted"). As the district court's exercise of discretion is not conditioned on a law enforcement agency's approval, Behmer did not demonstrate a law enforcement agency impinges on a judicial function when it declines a defendant's offer of assistance. *See Parrish v. State*, 116 Nev. 982, 991, 12 P.3d 953, 958 (2000) (stating law enforcement is not required "to work with every defendant who wishes to render substantial assistance"). Accordingly, Behmer fails to

demonstrate NRS 453.3405 violates the separation of powers doctrine under the Nevada Constitution.¹

For the foregoing reasons, we conclude Behmer fails to demonstrate that NRS 453.3405 and/or its application violates his rights to due process and equal protection and violates the separation of powers doctrine.

Challenges to Behmer's sentence

Behmer next argues the district court abused its discretion when it determined NRS 453.3405 did not apply and by failing to grant him probation or a reduced prison term pursuant to NRS 453.3405. "On appeal, this court may imply findings of fact and conclusions of law if the record clearly supports the lower court's ruling." *Matos*, 110 Nev. at 837, 878 P.2d at 290. Under NRS 453.3405, the district court had no discretion to reduce or suspend Behmer's sentence unless it first determined Behmer substantially assisted law enforcement in the investigation or prosecution of any offense. Although the district court stated that NRS 453.3405 "is not applicable in this matter," we infer from the district court's statement that the court determined Behmer was not eligible for a sentence reduction or suspension under NRS 453.3405 because he had not rendered substantial assistance.

The record clearly supports this inference. Behmer alleged that he had provided a detective "intelligence" relating to his sources of methamphetamine, but substantial assistance is not rendered as a matter

¹To the extent Behmer contends that NRS 453.3405 violates the separation of powers doctrine under the United States Constitution, Behmer did not support this claim with relevant authority or cogent argument. Therefore, we conclude Behmer is not entitled to relief on this claim. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

of law whenever a defendant provides law enforcement officers with information, *Parrish*, 116 Nev. at 991, 12 P.3d at 958. Moreover, Behmer did not allege, and the record does not reveal, what this “intelligence” entailed; whether the information provided was true, complete, and reliable; or whether the detective sought or used this information in investigating or prosecuting other offenses. Therefore, we conclude the district court did not abuse its discretion in determining that Behmer did not render substantial assistance. *See id.* at 988-89, 12 P.3d at 957 (reviewing a substantial-assistance determination for an abuse of discretion). As a result, the district court had no discretion to reduce or suspend Behmer’s sentence, and we thus conclude Behmer fails to demonstrate the district court abused its discretion by failing to grant him probation or a reduced prison term.

Behmer also argues his sentence constitutes cruel and unusual punishment. Regardless of its severity, “[a] sentence 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).

Behmer’s sentence of 60 to 240 months in prison is within the parameters provided by the relevant statute, *see* NRS 453.3385(1)(a), and Behmer does not allege that this statute is unconstitutional. We conclude

the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

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