IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVERETT WAYNE KENDELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85719-COA

ORDER OF AFFIRMANCE AND REMANDING TO CORRECT JUDGMENT OF CONVICTION

Everett Wayne Kendell appeals from a judgment of conviction, entered pursuant to a guilty plea, of eluding a police officer. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

First, Kendell argues the district court abused its discretion by adjudicating him a habitual criminal and sentencing him according to the large habitual criminal statute. Kendell argues that the most recent alleged prior conviction was from 2004 and, thus, the prior convictions used to adjudicate him were stale.

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). This district court has the discretion to dismiss a count of habitual criminality. *See* NRS 207.010(3); *O'Neill v. State*, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007). We will not interfere with a 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

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by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

At sentencing, the district court stated, "Pursuant to NRS 207.010, I find you have the requisite number of felony convictions. That they are significant in the scope, meaning the nature of those convictions. They involve violence to the peace and dignity of the community, drugs, flight, theft." The district court noted Kendell's 40-year criminal history and multiple failures at supervision. The district court also found that "[i]t is apparent that the appropriate sentence as a consequence based on your risk to the community and your—the risk to yourself and your unrequited, unremittent criminal history [is] for life in the Nevada Department of Corrections with the possibility of parole after a minimum of ten years has been served." Thus, the record reveals the district court understood its sentencing authority and properly exercised its discretion to adjudicate Kendell a habitual criminal. *See Hughes v. State*, 116 Nev 327, 333, 996 P.2d 890, 893-94 (2000); *see also Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("NRS 207.010 makes no special allowance for non-violent crimes or the remoteness of convictions."). Further, Kendell's sentence of 10 years to life in prison under the habitual criminal enhancement falls within the parameters of the relevant statute, *see* NRS 207.010(1)(b)(2), and he does not demonstrate his sentence is based upon impalpable or highly suspect evidence. Accordingly, we conclude the district court did not abuse its discretion and Kendell is not entitled to relief.

Next, Kendell 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).

Kendell claims his sentence is cruel and unusual because it is disproportionate to the crime, the prior convictions used to enhance his sentence were old and stale, and he presented mitigating evidence at sentencing. The sentence imposed is within the parameters provided by the relevant statutes and Kendell does not allege that those statutes are unconstitutional. We conclude the sentence imposed is not grossly disproportionate to the crime and, given Kendell's history of recidivism and failures at supervision, the sentence imposed does not constitute cruel and unusual punishment. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion). Accordingly, we conclude the district did not abuse its discretion and Kendell is not entitled to relief.

Finally, both parties agree that the judgment of conviction contains an error because the judgment does not reference the habitual criminal statute under which Kendell was sentenced. In light of this, we direct the district court, after remand, to enter a corrected judgment of conviction that reflects the statute under which Kendell was sentenced. *See*

NRS 176.565 (noting the district court has the authority to correct a clerical error at any time). Accordingly, we

ORDER the judgment of conviction AFFIRMED AND REMAND to the district court for the limited purpose of correcting the judgment of conviction.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Egan K. Walker, District Judge
Law Office of Kristine L. Brown, LLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk