

IN THE SUPREME COURT OF THE STATE OF NEVADA

KUPAA KEA,

No. 61160

Electronically Filed
Oct 02 2012 03:44 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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SUPPLEMENTAL FAST TRACK RESPONSE

1. Name of party filing this Supplemental Fast Track Response: The State of Nevada.
2. Name, address and phone number of attorney submitting this Supplemental Fast Track Response: Jennifer P. Noble, Deputy District Attorney, Washoe County District Attorney's Office, P.O. Box 30083, Reno, Nevada 89520; (775) 328-3200.
3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.
4. Proceedings raising same issue: None.
5. Procedural history: On January 23, 2012, the State filed an information charging Appellant Kea with two counts of Battery With a Deadly Weapon

Causing Substantial Bodily Harm. Appellant's Appendix, hereinafter "AA," pp. 1-2. On February 7, 2012, Kea signed a guilty plea memorandum. AA, pp. 4-9. Pursuant to the guilty plea memorandum, Kea agreed to plead guilty to both counts. *Id.* In exchange for Kea's guilty plea, the State agreed to dismiss a drug charge in another case and forgo filing additional charges with respect to this case, but was otherwise free to argue. *Id.* On February 8, 2012, after a thorough plea canvass, Kea pleaded guilty. *Id.*, pp. 12-21. At sentencing, Kea agreed with the State that he deserved to go to prison, but asked the court not to give him "the max." *Id.*, p. 81. Noting that Kea's attorney did a "phenomenal job" in representing Appellant, the district court nonetheless found him to be a danger to the community, and sentenced him to 35-156 months on each count, to run consecutively. *Id.*, pp. 83-84.

6. Statement of facts: As this is an appeal from a judgment of conviction pursuant to a guilty plea, it does not appear that there are any material facts in dispute. As noted above, Kea pleaded guilty to an information. According to that charging document, on October 27, 2011, Kea shot two men at Paradise Park with a .22 caliber rifle, causing substantial bodily harm to both.

7. Issues on appeal:

Whether this Court should review the district court's sentence where Kea does not allege that the district court relied on impalpable or highly suspect evidence, that the relevant statutes are unconstitutional, or that his

sentence shocks the conscience.

8. Legal argument:

A. This Court Should Defer to the District Court's Sentence Where Kea Does Not Argue That the District Court Relied on Impalpable or Highly Suspect Evidence, That His Sentence Shocks the Conscience, or That the Relevant Statute Is Unconstitutional.

This is an appeal from a judgment of conviction, pursuant to a guilty plea, to two counts of Battery With a Deadly Weapon Causing Substantial Bodily Harm. Though he acknowledges he did not receive the maximum penalty, Kea argues the district court abused its discretion by sentencing him to 35-156 months on each count, to run consecutively, in the Nevada State Prison. Supplemental Fast Track Statement, p. 4. The claim lacks merit.

This Court has consistently afforded the district court wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). The Court will refrain from interfering with the sentence imposed "[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). Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience. *See 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)).

Here, Kea does not allege that the district court relied on impalpable or highly suspect evidence, or that the relevant statute is unconstitutional. Kea simply asserts that the sentence was too harsh given his youth, substance abuse, and childhood hardships. The district court imposed a sentence within the parameters provided by the relevant statutes. *See* NRS 200.380. Accordingly, this Court should defer to the District Court's sentence.

The sentence imposed was within the statutory limits, and not excessive given the gravity of Kea's offenses. Kea has not demonstrated any abuse of discretion by the district court. Accordingly, this Court should affirm the judgment of conviction.

9. Preservation of issues: The State agrees with appellant.

DATED: October 2, 2012.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

DATED: October 2, 2012.

JENNIFER P. NOBLE
Appellate Deputy
Nevada Bar No. 9446
P. O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 2, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Katherine I. Berning, Esq.
Counsel for Kupaa Kea

Shelly Muckel
Washoe County District Attorney's Office