IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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DAVID EDWARD ELLISTON

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83217

RESPONDENT'S ANSWERING BRIEF

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II. JURISDICTIONAL STATEMENT

The Nevada Court of Appeals has jurisdiction over this matter based upon NRAP Rule 4(b)(1)(A), which states that appeals in criminal cases must be filed within 30 days of entry of judgment. A judgment of conviction was entered after the Appellant entered a guilty plea on June 15, 2021, and a corrected Judgment of Conviction was entered on October 13, 2021, clarifying the Court's intent that all counts were to run consecutive. The Notice of Appeal was timely filed within 30 days thereafter.

III. STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion at sentencing for sentencing Appellant within the statutory limitations in place at the time of Appellant's offense.

IV. STATEMENT OF FACTS

Appellant was charged by way of Criminal Information with one count of Trafficking in a Schedule I Controlled Substance, 28 Grams or More, a Category A felony, one count of Trafficking in a Schedule I Controlled Substance, 14 to 28 Grams, a Category B felony, one count of Ex-Felon in Possession of a Firearm, a Category B felony, and one count of Possession of a Controlled Substance for the Purpose of Sale, a Category D felony. AA 212-220. Appellant invoked his right to a jury trial and, pursuant to NRS 207.016, the State filed an Amended Criminal Information two days before the start of trial adding, among other things, a charge

for Habitual Criminal based upon Appellant having obtained four prior felony convictions including Burglary and Assault with a Deadly Weapon. AA 212-220.

At trial, testimony and evidence provided the following statements of facts. On May 30, 2020, Deputy Lizzeth Granata of the Carson City Sheriff's Office, assigned to the Special Enforcement Team (SET)[1], observed a white Chevy Colorado traveling eastbound on Tenth Street in Carson City toward a four-way stop intersection at Curry Street that did not stop at a posted stop sign. AA 338-340. As a result, Deputy Granata initiated a traffic stop on the white Chevy for a stop sign violation. AA 340. Prior to the traffic stop, deputies had obtained information that a car matching the description of Appellant's vehicle was involved as a possible source of drugs at the Griffin House Apartments in Carson City. AA 246-248.

When Deputy Granata stopped the vehicle, she noted that Appellant was nervous. AA 343-344. At the scene of the traffic stop, while awaiting confirmation from Dispatch regarding the Appellant's identification and vehicle registration, Deputy Granata called for assistance from other SET deputies. AA 344-345. Among other deputies called on-scene was Deputy Pullen and his canine partner, Blue. AA 550. Deputy Pullen and Blue performed a dog sniff on Appellant's

[1] Also referred to as the Carson City Sheriff's Office Street Enforcement Team

vehicle, which resulted in two alerts to the odor of one or more of the three narcotic odors Blue is trained and certified to identify. AA 551-552.

Deputies then searched Appellant's car and located a case on the floorboard which contained approximately 187.8 grams of methamphetamine, "several baggies of varying sizes…pipes…a scale" and a "gray and black nine-millimeter handgun" with a magazine. AA 263-264.[2] Additionally, deputies located a "carboard tube" containing approximately 15 to 20 grams of heroin, hypodermic needles, a spoon, and other baggies. AA 264.[3] Deputies also located $790.00 in cash and two cell phones. AA 265; AA 268. The quantity of controlled substances and the handgun, multiple cell phones, cash, and packaging materials were items consistent with drug distribution, sales, and transactions. AA 264-274.

During the first day of trial, the District Court had raised a concern regarding the timing of the traffic stop and a chain of custody issue. AA 363-373. The issues were remedied immediately that afternoon, and the following morning the Court sustained its prior ruling denying a prior Motion to Suppress addressing similar concerns. AA 373-383.

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[2] Appellant entered his guilty plea prior to testimony from the Washoe County Crime Lab, which the State anticipated presenting regarding the weight of the methamphetamine consistent with that alleged in the Criminal Information, providaed in Appellant's Appendix at 512-515.

[3] Appellant entered his guilty plea prior to testimony regarding the weight of the heroin, which the State anticipated would be consistent with that alleged in the Criminal Information, provided in Appellant's Appendix at 512-515.

On the second day of jury trial, Appellant entered a plea of guilty by way of *Alford*, after evidence mounted against him. AA 578-579. On April 27, 2021, the State and Appellant entered into an agreement whereby Appellant would plead guilty by way of *Alford* to two counts of Trafficking in a Schedule I Controlled Substance, 14-28 grams, category B felonies (Counts I and II), and to one count of Ex-Felon in Possession of a Firearm, a category B felony (Count III), and jointly recommend a stipulated sentence of 24 to 180 months on Count I; 24 to 180 months on Count II; and 24 to 60 months on Count III; each Count to run consecutive for an aggregate total of 72 to 420 months in the Nevada Department of Corrections. Appellant's Appendix (AA) 637-649. On April 6, 2021, Appellant entered his plea pursuant to the negotiations, and his plea was deemed to have been made freely, knowingly, and voluntarily. AA 587-588. On June 15, 2021, the First Judicial District Court sentenced Appellant pursuant to and consistent with the plea negotiations. AA 587-588.

At sentencing, the Court stated, "Based upon what was going on in the trial and everything, I think you made a very wise decision to take the plea." AA 578. To which Appellant responded, "Yes." AA 578. The Court then stated, "That was offered to you because it was not going good." AA 579. And Appellant again conceded, "No, I do too. It wasn't." AA 579. Prior to imposing sentence, the Court indicated to Appellant, "[Y]our record is one of the worse I've seen in a long time.

I mean, it's not good. You want to blame everybody else. You know, at some point along the way you had some opportunities – and I know they are tough and in respect to that," and subsequently, the Court sentenced Appellant to a prison sentence consistent with the stipulated agreement between the parties. AA 580.

V. ARGUMENT

a. Standard of Review

When reviewing the district court's sentencing decision, the appellate court's appropriate standard of review is an abuse of discretion standard. *Glegola v. State*, 110 Nev. 344, 349 (1994). A district court has wide discretion in imposing a sentence, and absent a showing of abuse of discretion, the court on appeal will not disturb a sentence. *Id*. The sentencing court may consider facts and circumstances at sentencing which would not be admissible at trial. *Skills v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976); *United States v. Metz*, 470 F.2d 1140, cert. denied, 411 U.S. 919 (3d Cir. 1972). Additionally, a sentencing judge has "extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence." *Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) (quoting *People v. Mockel*, 226 Cal. App. 3d 581, 276 Cal. Rptr. 559, 563 (Ct. App. 1990)). The Nevada Supreme Court held that "so 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, this court will refrain from interfering with the sentence imposed." *Id*. A court's sentencing may be reversed "if the sentence is supported s*olely* by impalpable and highly suspect evidence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (*citing Renard v. State*, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978)); *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (emphasis in original). Where other evidence exists to support the sentence, and that evidence is relied upon by the district court in imposing the sentence, there is no abuse of discretion. *Id.*

A sentence that is within the statutory limits "is not cruel and unusual punishment unless the statute fixing the 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). *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (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).

A. The district court did not abuse its discretion in sentencing Appellant consistent with the plea negotiations and statutory limitations.

Appellant does not challenge the constitutionality of any of the governing statutes in this case, and the prison term imposed is well within the statutory

limits. Therefore, the sentence does not constitute cruel and unusual punishment, and Appellant's Appeal should be denied. The only exception to the rule is if the sentence imposed in so unreasonably disproportionate to the offense as to "shock the conscience." *Blume*, 112 Nev. at 475, 915 P.2d at 284. In *Blume*, the Appellant was sentenced to the maximum possible sentence and the maximum possible fine for one count of felony driving under the influence of alcohol. *See id.* The Appellant in *Blume* was charged with a felony based upon multiple prior convictions, all of which were from a different state with different elements to the underlying offense. *Id.* This Court held, however, that not only were the prior convictions properly admitted, but because the lower court sentenced Appellant within the statutory limits of the felony offense, albeit the maximum possible sentence, the sentence was not cruel and unusual, and the judgment of conviction was affirmed. *Id.*

Similarly, here, there is no indication the sentence is disproportionate to the offense, it is well within the statutory limits, and it should be affirmed. Further, unlike the Appellant in *Blume*, here Appellant was not sentenced to the maximum possible sentence. Appellant was sentenced to 72-420 months in the Nevada Department of Corrections on charges that, in the aggregate, could have resulted in a maximum sentence of 172-432 months of incarceration. The District Court could have sentenced the Appellant within the statutory limitations to a minimum

sentence of 14 years, but instead followed the agreement between the parties to sentence Appellant to a minimum sentence of only 6 years—less than half the possible punishment. Additionally, Appellant entered a guilty plea to significantly reduced charges. Pursuant to the Amended Criminal Information, Appellant was facing a possible sentence of ten years to life on Count I; two to 15 years on Count II; one to six years on Count III; and one to four years on Count IV. NRS 453.3385(1)(c); NRS 453.3385(1)(b); NRS 202.360; NRS 453.337. Each of Appellant's four felonies would then have been subject to the Habitual Criminal penalty of life without the possibility of parole pursuant to NRS 207.012. As a result, it is clear the punishment is not disproportionate to the offense, and the judgment of conviction should be affirmed.

Appellant seems to argue the sentence is cruel and unusual because it is a higher penalty than the current statutory schemes would permit, as the laws governing trafficking levels of drugs has since changed. NRS 453.336; NRS 453.3385. However, Appellant also concedes that the law is abundantly clear that crimes are punishable in accordance with the law at the time the crime was committed unless the legislature clearly expressed its intent to the contrary. *State v. Second Judicial Dist. Court of Nev.*, 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008). Here, there is no intent that the changes to the Trafficking statutes pursuant to NRS 453 are to be applied retroactively, and so Appellant was

properly sentenced according to the governing penalties at the time he committed the offenses.

Appellant also argues the district court abused its discretion in sentencing Appellant consistent with a stipulated and agreed-upon sentencing recommendation. An abuse of discretion is only found if the sentence is supported *solely* by impalpable and highly suspect evidence. *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (*citing Renard v. State*, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978)); *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (emphasis in original). But if the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, the sentence imposed must be affirmed. *Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993).

Here, Appellant does not identify any prejudice nor any suspect or impalpable evidence; Appellant only argues that the Court should consider the changes in statutory penalties that occurred after Appellant's offense occurred, the rehabilitative interests of some sentencing schemes, and society's interests. There is no indication the district court did not take such matters into consideration when imposing the sentence against Appellant. Sentencing courts have discretion to consider facts and circumstances from a large, unlimited variety of information that would not be admissible at trial. *Silks*, 92. Nev. at 93-

94, 545 P.2d at 1161. The record demonstrates that, in this case, the district court was well aware of Appellant's criminal history, stating Appellant's criminal history was "one of the worst I've seen in a long time. I mean, it's not good. You want to blame everybody else." Additionally, the district court noted that Appellant had multiple prior opportunities at rehabilitation, but was now again in front of a sentencing judge for trafficking methamphetamine, trafficking heroin, possessing a firearm, and engaging in drug sales. Given the record, there is no indication the court abused its discretion at sentencing.

Finally, Appellant argues that the Habitual Criminal enhancements were coercive and that "there is an open issue of law whether the enhancement provisions are applied from the date of the offense or from the date of the notice that the enhancement is sought." *Appellant's Opening Brief,* page 12. However, the State imposed the enhancement at least 2 days prior to trial, consistent with Nevada law under NRS 207.016. Additionally, the issue of when the enhancement applies is not an open issue of law, but rather is well settled—this court held that "the general rule concerning the retroactive application of changes in criminal law applies equally to both primary offenses and sentence enhancements." *State v. Second Judicial Dist. Court of Nev.*, 124 Nev. 564, 565, 188 P.3d 1079, 7080 (2008).

Appellant challenges only his perceived fairness of the sentence imposed; Appellant does not challenge the constitutionality of any of the governing statutes in this case, and concedes the prison term imposed is well within the statutory limits of the charges to which he entered a guilty plea by way of *Alford*. Additionally, Appellant received a lower sentence than the statutory maximum of the charges to which he entered his plea, and a significantly lower sentence than the statutory maximum of the charges brought against him at trial. Therefore, the sentence does not constitute cruel and unusual punishment, and Appellant's Appeal should be denied.

VI. CONCLUSION

For the reasons discussed above, it is clear there was no abuse of discretion, and Appellant's sentence does not constitute cruel and unusual punishment. Accordingly, the judgement of conviction should be affirmed, and Appellant's appeal must be DENIED.

Dated this 28th day of February, 2022.

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VI. VERIFICATION AND CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting, typeface, and style requirements of NRAP 32(a)(4), NRAP 32(a)(5), NRAP 32(a)(6), and NRAP 32(a)(7) because:

[X] This Answering Brief has been prepared in a proportionally spaced type face using Microsoft Word 2010 in 14 point Times New Roman font.

2. I further certify that this Answering Brief statement complies with the page limitations stated in Rule 32(a)(7)(A)(ii), because it is proportionally spaced, has a typeface of 14 points or more, and it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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I therefore certify that the information provided in the Respondent's Answering Brief is true and complete to the best of my knowledge, information, and belief.

Dated this 28th day of February, 2022.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on this 28th day of February, 2022. Electronic service of this document will be made in accordance with the Master Service List as Follows:

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