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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FRANK LEO EPPLER, III, Appellant.	)	2 CA-CR 2011-0110 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093482001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Nicole Farnum — Phoenix
Attorney for Appellant

B R A M M E R, Judge.

¶1 Frank Leo Eppler, III, was convicted after a jury trial of illegally conducting a criminal enterprise, conspiracy to possess and/or transport marijuana for sale, three counts of transportation of marijuana for sale, and two counts of attempted transportation of marijuana for sale. For each of those convictions, the jury found Eppler was a serious drug offender pursuant to A.R.S § 13-3410(B). Eppler also was convicted of aggravated assault and kidnapping. For the serious drug offender convictions, the trial court, pursuant to § 13-3410(B), imposed concurrent, mandatory terms of life imprisonment without the possibility of release for twenty-five years. The court also sentenced Eppler to concurrent prison terms of 7.5 years for aggravated assault and 10.5 years for kidnapping. On appeal, Eppler argues the mandatory life prison terms constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. We affirm.

¶2 The Eighth Amendment "bars the infliction of 'cruel and unusual punishments,'" and the United States Supreme Court "has long recognized that [it] limits permissible sanctions in various contexts." *State v. Berger*, 212 Ariz. 473, ¶¶ 8-9, 134 P.3d 378, 380 (2006), *quoting* U.S. Const. amend. VIII. But, although the Eighth Amendment may prohibit lengthy prison terms in some circumstances, "courts are extremely circumspect" in their review of such terms, applying "a 'narrow proportionality principle' that prohibits only sentences that are 'grossly disproportionate' to the crime." *Id.* ¶ 10, *quoting Ewing v. California*, 538 U.S 11, 20, 23 (2003).

¶3 In determining whether a prison term violates the Eighth Amendment, we "first determine[] if there is a threshold showing of gross disproportionality by comparing

'the gravity of the offense [and] the harshness of the penalty.'" *Id.* ¶ 12, *quoting Ewing*, 538 U.S at 28 (alteration in *Berger*). In evaluating this threshold question, we "must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Id.* ¶ 13. We "must first determine whether the legislature 'has a reasonable basis for believing that [a sentencing scheme] advance[s] the goals of [its] criminal justice system in any substantial way.'" *Id.* ¶ 17, *quoting Ewing*, 538 U.S. at 28. We "then consider[] if the sentence of the particular defendant is grossly disproportionate to the crime he committed." *Id.* The "sentence is not grossly disproportionate, and [we] need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference.'" *Id.*, *quoting Ewing*, 538 U.S. at 30. Only if the sentence does not do so do we further consider "the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *Id.* ¶ 12.

¶4 Eppler asserts that, absent the serious drug offender sentence enhancement, he would have been sentenced to far lesser terms of imprisonment and observes that "life imprisonment is not a required sentence for many violent crimes in Arizona." Eppler's argument does not recognize that his conduct encompassed more than the underlying crimes—in order to find he was a serious drug offender, the jury was required to conclude, in addition to the elements of the underlying offenses, that the offense was a serious drug offense, that Eppler "committed the offense as part of [his] association with and participation in the conduct of an enterprise . . . which is engaged in dealing in substances controlled by this chapter, and [that he] organized, managed, directed,

supervised or financed the enterprise with the intent to promote or further its criminal objectives." § 13-3410(B).

¶5 Our supreme court has recognized that the legislature has a profound interest in curbing the sale and distribution of prohibited drugs. *See State v. Jonas*, 164 Ariz. 242, 247, 792 P.2d 705, 710 (1990). And, as Justice Kennedy of the United States Supreme Court has observed, violence and collateral crimes are inherent in the trafficking of illegal drugs, and the possession of large amounts of illegal drugs "is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Harmelin v. Michigan*, 501 U.S. 957, 1002-03 (1991) (Kennedy, J., concurring). Against this backdrop, there is no serious question that the legislature has a valid interest in punishing those who organize, manage, direct, supervise, or finance drug enterprises more severely than those who participate in such an enterprise in some lesser capacity.

¶6 Moreover, Eppler has provided no basis to conclude that his sentences are grossly disproportionate to his crimes. As he admits, his serious drug convictions are based on his hiring individuals to transport hundreds of pounds of marijuana and providing those individuals with the means to do so. And, as we noted above, Eppler ignores the jury's finding that he did so in a supervisory capacity to further the interests of a criminal enterprise. That the individuals Eppler hired may have faced lesser prison sentences does not make Eppler's sentences unconstitutional.

¶7 Finally, as our supreme court pointed out in *Berger*, the United States Supreme Court has upheld lengthy sentences for conduct far less serious than Eppler's, including "a sentence of twenty-five years to life for the grand theft of three golf clubs

worth nearly $1200 by a recidivist felon" and "a sentence of life in prison without parole for a first-time offender possessing 672 grams of cocaine." *Berger*, 212 Ariz. 473, ¶ 30, 134 P.3d at 384, *citing Ewing*, 538 U.S. at 30-32, *Harmelin*, 501 U.S. at 996. And the court observed that, in another case, it "upheld a sentence of twenty-five years without parole for a twenty-one-year-old defendant convicted of selling a $1 marijuana cigarette to a fourteen-year-old." *Id.*, *citing Jonas*, 164 Ariz. at 249, 792 P.2d at 712. In light of these decisions, Eppler's life sentences clearly do not fall within the "'exceedingly rare'" case where a prison sentence violates the Eighth Amendment. *Id.* ¶ 17, *quoting Ewing*, 538 U.S. at 22.

¶8 Indeed, the court noted in *Berger* that "only once in the past quarter-century has the Supreme Court sustained an Eighth Amendment challenge to the length of a prison sentence."[1] *Id.* ¶ 31. That case, *Solem v. Helm*, 463 U.S. 277 (1983), does not resemble the circumstances present here. Helm, a non-violent repetitive offender, pled guilty to "uttering a 'no account' check for $100," and was sentenced pursuant to the state's recidivist statute to life imprisonment without the possibility of parole. *Solem*, 463 U.S. at 279-82. Acknowledging that a state "is justified in punishing a recidivist more severely," the Court nonetheless found that sentence violated the Eighth Amendment, noting, inter alia that "Helm's crime was 'one of the most passive felonies a

[1]Outside of the context of the death penalty, since *Berger* was decided, the Supreme Court has held that the Eighth Amendment categorically prohibited life imprisonment without the possibility of release for juvenile offenders not convicted of murder. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010). This case does not aid Eppler's argument.

person could commit,'" and that "[i]t involved neither violence nor threat of violence to any person." *Id.* at 296, *quoting State v. Helm*, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting). Eppler's crimes cannot reasonably be characterized as passive or nonviolent.

¶9 In light of the foregoing, we conclude Eppler's prison terms imposed pursuant to § 13-3410(B) "arguably further[] the State's penological goals and thus reflect[] 'a rational legislative judgment, entitled to deference.'"[2] *Berger*, 212 Ariz. 473, ¶ 17, 134 P.2d at 382, *quoting Ewing*, 538 U.S. at 30. Eppler's convictions and sentences are therefore affirmed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

[2]We therefore need not reach Eppler's argument that his sentences match or exceed the sentences imposed for homicide, acts of terrorism, or "sex crimes against children." *See Berger*, 212 Ariz. 473, ¶ 17, 134 P.2d at 382.