

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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JAMES CURTIS IVEY, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 75062

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Stefany Miley, District Judge
District Court No. C-12-288764-1

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant:
 - a. Julian Gregory, Esq.
2. Publicly-held Companies Associated:
 - a. N/A
3. Law Firm(s) Appearing in the Court(s) Below:
 - a. Clark County District Attorney
 - b. Law Office of Julian Gregory, L.L.C.
 - c. Law Office of Carmine Colucci

DATED this 11 of June, 2018.

/s/ Julian Gregory

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction signed by the Honorable Stefany Miley. (-- Appellant's Appendix [AA] --.) This Court has jurisdiction to hear this appeal pursuant to NRAP 4(c), which provides for an untimely direct appeal when an appellant has been denied his right to that appeal, and NRS 177.015(3), providing a statutory right to a direct appeal from a final judgment in a criminal case.

ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals because it pertains to a judgment of conviction based upon a plea of guilty. *See* NRAP 17(b)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The sentence in this case violates the Eighth Amendment and Nevada Constitution's prohibitions on cruel and unusual punishment.

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STATEMENT OF FACTS

The facts that follow are those presented at preliminary hearing. On July 1, 2014, Jesus Medina and Donna Dimaria were outside of 4251 West Rochelle in Las Vegas, Nevada, when suddenly three men appeared and one of them put a gun to Mr. Medina's head. (1 AA 21:19-24:5.) Ms. Dimaria identified Appellant James Ivey as the man with the gun. (*Id.* at 24:6-24.) The men ordered Ms. Dimaria to open her car door. (*Id.* at 25:11-12.) They got in the car and began to take the couple's belongings. (*Id.* at 25:25-26:19.) Then the men left in a Toyota Celica. (*Id.* at 27:19-24, 54:23-55:8.)

Baylie Kull testified that on June 30, 2014, she was staying at the Extended Stay hotel at the intersection of Valley View and Flamingo in Las Vegas, Nevada, when she was robbed by three men. (*Id.* at 74:11-76:6.) Ms. Kull identified Mr. Ivey as one of the men, the one who carried a gun. (*Id.* at 78:4-12.) Eventually the men left. (*Id.* at 83:17-25.)

Eola Robinson testified that on July 1, 2014, she was walking home near Lake Mead and Decatur in Las Vegas, Nevada, when she was robbed by three men. (*Id.* at 96:16-98:25.) The men took her purse. (*Id.* at 102:20-25.) Ms. Robinson identified Mr. Ivey's co-defendant, Christopher Roach, as one of the men. (*Id.* at 99:1-100:9.)

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STATEMENT OF THE CASE

On July 7, 2014, the State of Nevada filed a Criminal Complaint against Petitioner James Ivey and co-defendants Cristopher Roach and Jeffrey German charging them with conspiracy to commit robbery, robbery with use of a deadly weapon, possession of stolen property, and possession of credit or debit card without cardholder's consent. (1 AA 1-3.) On July 30, 2014, the State filed a Second Amended Criminal Complaint alleging counts of three counts of conspiracy to commit robbery, coercion, robbery, two counts of robbery with use of a deadly weapon, possession of stolen property, and two counts of possession of credit or debit card without cardholder's consent. (*Id.* at 12-15.) Following a preliminary hearing, the justice court bound the case over for trial in the district court. (*Id.* at 140:14-20.)

The State filed its Information on September 22, 2014. (*Id.* at 159-64.) On March 16, 2015, Mr. Ivey entered a guilty plea agreement to an Amended Information charging him with robbery with use of a deadly weapon and conspiracy to commit robbery; the State retained the right to argue at sentencing. (*Id.* at 181-84.) At sentencing on May 6, 2015, the district court sentenced Mr. Ivey to 60 to 180 months as to count one with a consecutive 60 to 180 months for the weapon enhancement, and a consecutive 13 to 60

months as to count two. (*Id.* at 201:15-202:5.) The Judgment of Conviction was filed May 12, 2015. (*Id.* at 205-06.)

Trial counsel Carmine Colucci filed a Notice of Appeal on June 12, 2015. (*Id.* at 207-08.) Remittitur issued following dismissal of that appeal as untimely. (*Id.* at 209-13.) Mr. Ivey filed a timely proper person post-conviction petition for writ of habeas corpus on May 3, 2016. (*Id.* at 214.) The undersigned counsel supplemented that petition on February 1, 2017. (2 AA 1.) The district court granted that petition and ordered the filing of the instant appeal. (*Id.* at 238-40.)

SUMMARY OF THE ARGUMENT

The district court erred when it sentenced Mr. Ivey to consecutive time, and such a sentence shocks the conscience, warranting reversal.

ARGUMENT ON THE ISSUES

I. The Sentence in this Case Violates the Eighth Amendment Prohibition on Cruel and Unusual Punishment.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments. Article 1, section 6 of the Nevada Constitution echoes this language. The framers made no attempt to define “cruel and unusual” punishments, instead “delegat[ing] that task to future generations of judges.” *Thompson v. Oklahoma*, 487 U.S. 815, 821

(1988). This Court has held that a sentence is unconstitutional “if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends the fundamental notions of human dignity.” *Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978).

In this case, Mr. Ivey entered a guilty plea to robbery with use of a deadly weapon and conspiracy to commit robbery and received an aggregate sentence of 133 to 420 months. At the low end, Mr. Ivey will have served almost twelve years; at the high end, thirty-five. Given that Mr. Ivey entered a plea in this case, thereby accepting responsibility, saving the State the expense of putting on a trial, and saving the witnesses from reliving the robberies, it was unreasonable for the district court to enter consecutive sentences. Such a sentence shocks the conscience and calls for reversal.

CONCLUSION

Mr. Ivey submits that the sentences imposed in this case constitute an Eighth Amendment violation. For that reason, Mr. Ivey would ask that this Court reverse the sentence of the lower court.

ATTORNEY’S CERTIFICATE OF COMPLIANCE

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Microsoft Word 2016, is 11 pages and 1592 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)-(6), as well as the page length requirements of NRAP 32(a)(7)(A). I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page 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.

DATED this 11 of June, 2018.

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I hereby certify that on this 11 of June, 2018, I served this document on the following:

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AFFIRMATION

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ Julian Gregory

Julian Gregory, Esq.

6-11-18

Date