

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES CURTIS IVEY, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 75062

RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

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ROUTING STATEMENT

This appeal is appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction based on a plea of guilty.

STATEMENT OF THE ISSUES

1. Whether Appellant’s sentence does not constitute cruel and unusual punishment.

STATEMENT OF THE CASE

On September 22, 2014, James Curtis Ivey (hereinafter “Appellant”) was charged by way of Information with the following: Count 1—CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147);

Count 2—ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); Count 3— COERCION (Category B Felony - NRS 207.190 - NOC 53159); Count 4— CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); Count 5— Robbery (Category B Felony - NRS 200.380); Count 6— CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); Count 7— ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); and Count 8— POSSESSION OF STOLEN PROPERTY (Category C Felony - NRS 205.275 - NOC 56057). 1 Appellant's Appendix (hereinafter "AA") 160-162.

On March 16, 2015, the State filed an Amended Information charging Appellant with the following: Count 1— ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138) and Count 2—CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147). 1 AA 181-182. On the same day, Appellant also pleaded guilty to the charges as alleged in the Amended Information. 1 AA 183. As part of the Guilty Plea Agreement the State retained the right to argue at sentencing. 1 AA 183.

On May 6, 2015, Appellant was sentenced as follows: as to Count 1— a maximum of one hundred eighty (180) months and a minimum of sixty (60) months

in the Nevada Department of Corrections, plus a consecutive sentence of a maximum of one hundred eighty (180) and a minimum of sixty (60) months for the use of a Deadly Weapon. 1 AA 201. As to Count 2—a maximum of sixty (60) months and a minimum of thirteen (13) months in the Nevada Department of Corrections to run consecutive to Count 1. 1 AA 202. Appellant received 309 days credit for time served. 1 AA 202.

On May 12, 2015, Appellant’s Judgment of Conviction was filed. 1 AA 205-206. Appellant filed a Notice of Appeal on June 12, 2015, however it was dismissed by this Court for being untimely. 1 AA 207, 201. On May 3, 2016, Appellant filed a Petition for Writ of Habeas Corpus. 1 AA 214-239. On August 10, 2016, the Court appointed Post Conviction counsel, and February 1, 2017, Appellant’s Supplement to Petition for Writ of Habeas Corpus was filed. 2 AA 1-7. On June 21, 2017, the District Court found Appellant’s counsel had failed to file a direct appeal and found Appellant could file an untimely appeal. Appellant filed his Notice of Appeal on February 6, 2018.

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STATEMENT OF THE FACTS

July 30, 2014

A female victim left work walking from the Rio Hotel when she ran into three males. Presentence Investigation Report (hereinafter “PSI”), p. 4.¹ Christopher Roach (hereinafter “Roach”) asked her for directions, as she pointed where to go, one of them grabbed her cell phone from her hand and said, “Bitch be quiet, we have a gun.” Id. Jeffrey German (hereinafter “German”) then lifted his shirt and exposed a handgun on his waist. Id. Roach grabbed her again and took her fanny pack. Id. Roach then asked for the pin to her credit cards which she stated she did not know since the cards were not hers. Id. Roach then demanded that she show him how to unlock her phone. Id. Roach then grabbed her arm and told her to keep her mouth shut and pushed her into the entryway of Flamingo Palms Condos. Id. Roach then told her to walk backwards towards the Rio Casino and if she turned around they would shoot her. Id. Appellant was standing by the victim to keep her from escaping and ransacked her backpack. Id.

July 1, 2014

A male and female victim were sitting in their car when Roach, German, and Appellant ran towards them and Roach pointed a semiautomatic gun at the male

¹ The State has filed a Motion to Transmit PSI contemporaneously with the filing of this brief.

victim's head. Id. Roach then stated, "What do you got in your pockets?" Id. At that time, an unidentified male suspect arrived on the scene and told the female victim to move from the driver's seat to the passenger seat of the car. Id. The unidentified male suspect then placed his hand around the back of the female victim's neck and squeezed it as he pushed her head forward. Id. He then instructed the male victim to get in the rear passenger seat. Id. Appellant then entered the vehicle and sat to the right while Roach entered and sat to the left while pointing the gun at the male victim's head. Id. German remained outside the vehicle. Id. The unidentified male suspect went to the driver's seat again and placed his hand around the female victim's neck. Id. He dug his nails into her neck and pushed her head forwards. Id. He then demanded that she give him her credit cards and driver's license. Id. She handed over \$500 and her credit and debit card. Id. He then asked for both the victim's cell phone and keys to the female victim's residence and vehicle. Id. at 5. The suspects then fled through the complex. Id.

Furthermore, the Court also heard argument from the State at sentencing explaining in detail the culpability of Appellant and his specific actions and involvement. 1 AA 192-204.

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SUMMARY OF THE ARGUMENT

Appellant alleges that his sentence amounts to cruel and unusual punishment. However, Appellant's sentence is within the statutory parameters and is proportional to the crimes he committed.

ARGUMENT

I. APPELLANT'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Eighth Amendment and Nevada Constitution do not require the sentence to be strictly proportionate to the crime; they only forbid a sentence that is grossly disproportionate to the crime. Chavez v. State, 125 Nev. 328, 347-348 (2009). A sentence within the statutory limits is "not considered cruel and unusual punishment unless (1) the statute fixing punishment is unconstitutional or (2) the sentence is so unreasonably disproportionate to the offense as to shock the conscience." Id.

Additionally, the district court has wide discretion when sentencing. Id. at 348. This Court will not interfere with an imposed sentence unless the record shows prejudice from facts based on "impalpable or highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161. The sentence should not be overruled absent an abuse of discretion. Houk, 103 Nev. at 664, 747 P.2d at 1379. A punishment is excessive

“if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.” Pickard v. State, 94 Nev. 681, 684 (1978). Further, the sentencing judge may consider a variety of information to ensure “the punishment fits not only the crime, but also the individual defendant.” Martinez v. State, 114 Nev. 735, 738 (1998).

NRS 200.380 states:

A person who commits robbery is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.

NRS 193.165 states:

any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years.

Appellant was sentenced to 60 to 180 months plus a consecutive sentence of 60 to 180 months for Count 1. Thus, this is a legally valid sentence within the statutory parameters.

Furthermore, NRS 199.480 states:

If the conspiracy was to commit robbery, sexual assault, kidnapping in the first or second degree, arson in the first or second degree, involuntary servitude in violation of NRS 200.463 or 200.464, a violation of any provision of NRS 200.465, trafficking in persons in violation of NRS 200.467 or 200.468, sex trafficking in violation of NRS 201.300 or a violation of NRS 205.463, by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years [.]

Appellant was sentenced to 13 to 60 months for Count 2. Thus, Appellant's sentence was within the statutory parameters and is a legal sentencing. Moreover, the Court listened to the State's arguments at sentencing and reviewed the victim impact statement and PSI that was submitted to the Court. 1 AA 194. The State argued that Appellant had a gun in his waistband when Appellant and his co-defendants robbed the victim on June 30, 2014, and that Appellant also pointed a firearm at one of the victims on July 1, 2014. 1 AA 193, 294. The State also told the Court there was another victim that was robbed on June 30, 2014, after the first female victim. 1 AA 193-194. Based on the nature of the offense, Appellant's sentence is not so disproportionate with the crime that it shocks the conscience.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

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Dated this 13th day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 1,629 words and 8 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.

Dated this 13th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 13th day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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