

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 78590
Electronically Filed
Jul 02 2019 09:28 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

FAST TRACK RESPONSE

ROUTING STATEMENT: This case is presumptively assigned to the Court of Appeals because it involves a challenge to a Judgment of Conviction based on a Guilty Plea. NRAP 17(b)(1).

1. Name of party filing this fast track response:

The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Charles W. Thoman
Clark County District Attorney's Office
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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:

None known.

5. Procedural history:

The relevant procedural history is as follows. In a June 17, 2016 Information, the State charged Appellant with Burglary (Category B Felony). AA 1. It filed a Notice of Intent to Seek Punishment as a Habitual Criminal on November 21, 2016. RA 1. It filed an Amended Notice on August 29, 2017. RA 3.

On November 7, 2018, Appellant pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to Attempt Grand Larceny (Category D Felony/Gross Misdemeanor). AA 4. The State agreed to make no recommendation at the time of sentencing. AA 4. It did, however, reserve the right to argue for habitual treatment if “an independent magistrate, by affidavit review, confirms probable cause against [Appellant] for new criminal charges.” AA 5.

Appellant picked up new criminal charges. The State charged Appellant with Burglary (Category B Felony) and Unlawful Use of Hotel Key (Gross Misdemeanor) in Case No. C-19-338412-1, which is currently pending. AA 19.

Based on that finding of probable cause, the State filed a Motion to Revoke Bail on January 31, 2019. RA 5. Further, as contemplated in the Guilty Plea Agreement, it argued for habitual treatment in a March 6, 2019 sentencing. RA 24. This Court found that the State met the statutory requirements of NRS 207.010 and accordingly sentenced Appellant to between sixty and one hundred seventy-four months in the Nevada Department of Corrections. AA 13.

The Judgment of Conviction was filed on March 12, 2019. AA 13. On March 28, 2019, Appellant filed a Notice of Appeal. AA 14.

6. Statement of Facts:

The Presentence Investigation Report¹ recites the facts of this case as follows:

On April 9, 2013, the victim was staying at the Excalibur Hotel when he awoke due to a strange sound. He saw a man, later identified as the defendant James Howard Hayes, aka, James Howard Hayes Jr., next to the bed. Mr. Hayes was going through some of the belongings of the people staying in the room. The victim jumped out of bed and confronted the defendant. He blocked Mr. Hayes from exiting the room and had him empty his pockets and instructed Mr. Hayes to sit on the bed. He then had Mr. Hayes hand over his Nevada identification and the victim took a picture of it with his phone. The victim asked what he was doing and Mr. Hayes just kept stating he was sorry. He told Mr. Hayes if he took anything he would call the police and at that time Mr. Hayes fled. Security was called and spoke to two of the other room occupants who noticed they were missing a total of \$130.00 dollars. Las Vegas Metropolitan Police Department officers arrived and the victim gave them photos of Mr. Hayes and his identification. A review of hotel records showed the hotel room was left unlocked for about two and a half hours before Mr. Hayes was seen in the room, and it was believed he just pushed the door open. A warrant was issued for the arrest of Mr. Hayes.

On April 2, 2016, police were dispatched to a room robbery at Harrah's casino and discovered the suspect, Mr. Hayes, had outstanding warrants for the instant offense. He was placed under arrest and transported to the Clark County Detention Center where he was booked accordingly.

PSI at 5.

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¹ The State has filed a Motion to Transmit PSI along with this Fast Track Response.

7. Issues on appeal:

I. Whether Appellant's sentence was cruel and unusual.

8. Legal Argument, including authorities:

Appellant's sentence was not cruel and unusual. 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 Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004) (quoting 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)).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[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." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5,

846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)).

As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

Here, Appellant concedes that the “sentence at issue fell within the statutorily established range of punishment.” FTS at 6. In this he does not err. NRS 207.010(1)(a) governs the sentencing of habitual criminals:

1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
 - (a) Any felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.

In its Notice of Intent to Seek Punishment as a Habitual Criminal, the State alleged that Appellant had been previously convicted of two counts of Fraudulent Use/Possession of Personal Identification Information, two counts of Credit Card Abuse, and one count of Attempt Possession of Credit or Debit Card Without Cardholder’s Consent. RA 1-2. Each of those counts is a felony in the State where the crime was committed.

Then, in an Amended Notice of Intent to Seek Punishment as a Habitual Criminal, the State alleged that Appellant had been convicted of Credit Card Abuse,

a Texas felony, Attempt Possession of Credit or Debit Card Without Cardholder's Consent (Category E Felony), and Burglary (Category B Felony). RA 3-4. At sentencing, this Court found that the State carried its burden of proving Appellant's habitual status. RA 24. Accordingly, the State was free to argue for habitual treatment under NRS 207.010(1)(a), and the district court was free to sentence Appellant according to its terms.

It did just that. In accordance with NRS 207.010(1)(a), Appellant was sentenced to between sixty and one hundred seventy-four months in the Nevada Department of Corrections. AA 13; RA 24. He argues that his sentence was disproportionate and "shocks [his] conscience," but unsurprisingly, it is the Legislature and not the criminal defendant himself that gets to determine the severity of his punishment. FTS at 6. Appellant has not challenged the constitutionality of NRS 207.010(1), and his own determination that his sentence is shocking² is not the relevant inquiry under Allred. Appellant has been convicted of multiple penalties, and his sentence adequately reflects the increased punishment associated with habituality. The Eighth Amendment was not violated.

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² Were this the standard, it is difficult to conceive of a convicted criminal who would not also make this argument, and every sentence imposed in the state would suddenly be subject to Eighth Amendment Challenges.

CONCLUSION

For these reasons, the Judgment of Conviction should be affirmed.

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 Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, contains 1,302 words and is 7 pages.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and 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 this 2nd day of July, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Charles W. Thoman*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 2nd day of July, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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BY /s/ J. Garcia
Employee,
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