IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MCKENDRICK,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79372

RESPONDENT'S ANSWERING BRIEF

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

KARA M. SIMMONS
Nevada Bar #014621
Deputy Public Defender
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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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 that challenges only the sentence imposed based on a plea of guilty.

STATEMENT OF THE ISSUE

1. Whether Appellant's sentence as a habitual criminal under NRS 207.010 did not constitute cruel and unusual punishment.

STATEMENT OF THE CASE

On February 20, 2019, Sean McKendrick (hereinafter "McKendrick" or "Appellant") was charged by way of Grand Jury Indictment with two counts of Battery by Prisoner (Category B Felony – NRS 200.481(2)(F)- NOC 50229); one

count of Attempt Murder (Category B Felony-NRS 200.010, 200.030, 193.330-NOC 50029); and one count of Attempt Battery With Substantial Bodily Harm (Category D Felony/Gross Misdemeanor- NRS 200.481, 193.330-NOC 50244/50245). Appellant's Appendix ("AA") 1-2.

On February 27, 2019, at Initial Arraignment, McKendrick pled not guilty and invoked the sixty (60) day rule. AA 81.

Following negotiations, McKendrick pled guilty to Battery By Prisoner on March 27, 2019. AA 39-43. The Guilty Plea Agreement ("GPA") was filed the same day in open court. AA 39-43.

On June 10, 2019, the district court filed a Bench Warrant for failure to appear. Respondent's Appendix ("RA") 000001-2. On June 14, 2019, the court filed a Notice of Intent to Forfeit due to McKendrick's failure to appear in court on June 10. AA 58-59. On June 20, 2019, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. AA 60-61.

On July 15, 2019, McKendrick was sentenced to Life in the Nevada Department of Corrections with minimum parole eligibility after ten (10) years; fifty-nine (59) days credit for time served. AA 86. On July 23, 2019, the Judgment of Conviction was filed. AA64-65.

On August 8, 2019, McKendrick filed a Motion for Additional Credit for Time Served requesting one hundred-eight (108) days credit. AA 70-73. The district court

granted the motion. AA 87. The Amended Judgment of Conviction was filed to reflect ninety-eight (98) days credit for time served as of July 15, 2019. AA 78-79; 87.

On August 15, 2019, McKendrick filed a Notice of Appeal. AA74-77. The State's response now follows.

STATEMENT OF THE FACTS

The district court relied on the following factual summary in sentencing Appellant:

> On January 29, 2019, The Alternative to Incarceration Office received a phone call from the brother and sister in law of the defendant, Sean McKendrick. They requested for an officer to conduct a random Urinalysis test to determine if the defendant was under the influence of a controlled substance as he was acting bizarre.
>
> Officers arrived at the residence and Mr. McKendrick opened the door, he was acting bizarre and officers attempted to place him in handcuffs. Once the left handcuff was placed he started questioning and challenging officers' asking why he was going back to jail. He then physically resisted, pulling away from offers and throwing his body weight and right closed fist striking the officer, Victim #1 on his chest and leg. He struck Victim #1 and #2 another officer several times with a closed fist and hitting Victim #1 in the abdomen and leg area. During the struggle Victim #2 was thrown into a table causing the table to break on his back. The victim called for backup and the fight continued outside of the apartment on the balcony, where Victim #2 was rushed by the defendant attempting to push him over the railing of the 2nd floor. However, Victim #1 was able to prevent this from happening by placing the defendant in a restraint and giving verbal commands. The defendant continued to be

> physical with the victims ignoring the commands. A physical restraint rendered Mr. McKendrick unconscious and subdued for a short period of time, being place in handcuffs. When the defendant woke up he began yelling an attempting to fight officers. Mr. McKendrick showed signs of being under the influence and was transported to the hospital for further evaluation.
>
> While being transported to the Clark County Detention Center he attempted to kick the window out of the vehicle. He was booked accordingly.

Presentence Investigation Report ("PSI") 5-6.[1]

SUMMARY OF THE ARGUMENT

Appellant claims that his sentence as a habitual criminal pursuant to NRS 207.010 is cruel and unusual punishment. Appellant's claim is belied by the record and without merit. Appellant's Guilty Plea Agreement stipulated that the State retained the right to argue habitual treatment for failure to appear at subsequent hearings. Appellant failed to appear in court at a subsequent hearing after entering his plea. Additionally, Appellant was convicted of three prior felonies, rendering him eligible as a habitual criminal. Further, Appellant admits that his sentence is within the parameters of NRS 207.010 and does not dispute his three prior felonies.

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[1] The State contemporaneously submitted a Motion to Transmit Appellant's Presentence Investigation Report to this Court.

ARGUMENT

I. APPELLANT'S SENTENCE AS A HABITUAL CRIMINAL UNDER NRS 207.010 DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Appellant claims that his sentence, as determined by NRS 207.010, constitutes cruel and unusual punishment. Appellant's Opening Brief ("AOB") 7-8. Appellant's claim is belied by the record and without merit.

The Eighth Amendment to the United States Constitution as well as Article 1 §6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Nevada Supreme Court has ruled that this prohibition "forbids [an] extreme sentence that [is] 'grossly disproportionate' to the crime." Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004) (*citing* Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680 (1991)).

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. E.g., 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, 221-222 (1979)). A punishment is constitutionally impermissible if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. Schmidt v. State, 94 Nev. 665,668, 584 P.2d 695, 697 (1978).

In this case, Appellant's plea deal stipulated that the State could argue to increase his sentence as a habitual criminal. See AA 39-40. Appellant's GPA provides:

> I understand and agree that, if I fail to interview with the Department of Parole and Probation, **fail to appear at any subsequent hearings in this case**…The State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions **I may have to increase my sentence as an habitual criminal** to five (5) to twenty (2) years, life without the possibility of parole, life with possibility of parole after ten (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years.

AA 39-40 (emphasis added).

Appellant signed and affirmed his GPA, stipulating that the State reserved the right to argue habitual treatment if he failed to appear at subsequent hearings. AA 39-40, 43. On June 10, 2019, Appellant failed to appear in court, resulting in a Bench Warrant. RA 000001-2. Appellant's failure to appear in court and pursuant to his GPA, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. AA 60-61. Therefore, Appellant's argument that his agreed-upon sentence is "cruel and unusual punishment" is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). In fact, Appellant's habitual

treatment was at his own hand because he failed to appear in court. Thus, Appellant's claim is belied by the record.

Even still, Appellant was charged as a habitual offender under NRS 207.010 and received a sentence of Life with minimum parole eligibility after ten (10) years. AA 86. Appellant's sentence was within the statutory range of NRS 207.010. NRS 207.010 provides in relevant part:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
> …
> (b) **Any felony, who has previously been three 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 A felony by imprisonment in the state prison:**
> **(1) For life without the possibility of parole;**
> **(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or**
> **(3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.**

(emphasis added).

Clearly, Appellant was sentenced within the parameters of NRS 207.010(b)(2). Appellant even admits that the sentence falls within the statutory range, and that he had three prior felonies. Appellant's multiple felonies include ones such as, Assault of Police with a Deadly Weapon and Battery with a Deadly Weapon Causing Substantial Bodily Harm. See PSI 4.

Nevertheless, Appellant attempts to argue that NRS 207.010 somehow does not apply to him because he "had not killed anyone." AOB 7. However, this Court has consistently held that the habitual criminal statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety. LaChance v. State, 130 Nev. 263, 321 P.3d 919 (2014). And, that NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions. Christie v. State, 281 P.3d 1161 (Nev. 2009) (quoting Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992)). Further, an actual killing is not the determining factor of habitual criminality.

Appellant fails to contest his three prior felonies, and his criminal history dates back to 2003. AA 108-111. It is evident that Appellant is a habitual offender per the requirements of NRS 207.010. Appellant has had multiple opportunities over the past sixteen (16) years to demonstrate to the Court that he is able to refrain from this negative conduct in the community. However, he has failed to do so. Appellant's charges under NRS 207.010 are, thus, proportionate given his extensive history of committing repeatedly violent felonies. Therefore, the Court properly sentenced Appellant pursuant to NRS 207.010, as it is of no consequence that his offenses did not effectuate a "killing." Thus, Appellant's sentence does not constitute cruel and unusual punishment.

/ / /

CONCLUSION

Wherefore, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 17th day of March, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,759 words and 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.

Dated this 17th day of March, 2020.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 17, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

KARA M. SIMMONS
Deputy Public Defender

JOHN NIMAN
Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

JN/Maggie Christiansen/ed