IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL THOMAS HARVEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46045

FILED

MAR 14 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's motions to correct an illegal sentence and for a new trial. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge. Appellant Daniel Harvey was sentenced to a prison term of 24-60 months for count I, battery with a deadly weapon. Harvey was sentenced to a prison term of 12-30 months for count II, assault with a deadly weapon. That sentence was suspended with probation not to exceed 5 years.

Harvey contends he should have been granted a new trial based upon newly discovered evidence because a victim statement reveals that multiple victims lied during their testimony. Specifically, he asserts that a victim failed to mention until after trial, that he was grabbing for a rock while Harvey was striking him with a golf club. Harvey contends this statement is newly discovered evidence and conflicts with the police statement and trial testimony of another victim.

To secure a new trial based on newly discovered evidence:

> (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must

> not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.[1]

Moreover, if the newly discovered evidence is being offered, as it is here, only to "contradict, impeach, or discredit, a former witness," that witness must be so critical "that a different result would be reasonably probable."[2]

Because Harvey was present and in fact attacking the victim when he grabbed for the rock, the evidence is not "newly discovered." In the alternative, assuming Harvey was unaware the victim picked up the rock, the evidence does not provide a basis for Harvey to assert self-defense, nor would there be a reasonable probability a jury would find Harvey acted in self-defense. The evidence is neither material nor does it indicate a probability of a different result upon retrial. The marginal difference between the victim's statements to police and post-trial would not have had a material impact on either victim's credibility. Additionally, the statement could not show that Harvey acted in self-defense because he had already initiated the attack on the victim. The trial court's decision to grant or deny a motion for a new trial will not be reversed on appeal absent a clear abuse of discretion.[3]

Next, Harvey asserts that his sentence was illegal because it orders him to serve a probationary sentence consecutive to his prison sentence on count II. NRS 176A.500 prohibits the sentence on a felony from being suspended for more than 5 years. In this case, if Harvey

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[1]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

[2]Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

[3]Id. at 406, 812 P.2d at 1284.

served the maximum period of incarceration on count I, he would have served five years in prison. Accordingly, his second sentence is not inevitably suspended for more than five years, and therefore is not contrary to NRS 176.500A.[4]

Harvey also contends that the sentence is unconstitutional because it violates the separation of powers doctrine. Harvey contends his sentence is the functional equivalent of the one prohibited in State v. District Court[5]. The appellant in State was sentenced to 10 years in prison and 8 of those years were suspended, conditioned upon the appellant serving 2 years in prison, then being placed upon probation on the same count. This court deemed such a sentence, in effect, to be "a delayed parole"[6] and a "judicial invasion into the legislative and executive fields, in contravention of Article 3, Section 1 of the Nevada Constitution."[7]

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[4]See Wicker v. State, 111 Nev. 43, 888 P.2d 918 (1995).

[5]85 Nev. 485, 457 P.2d 217 (1969).

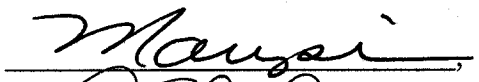
[6]Id. at 487, 457 P.2d at 218.

[7]Id. at 488, 457 P.2d at 218-19; (citing Article 3, § 1: "The powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.")

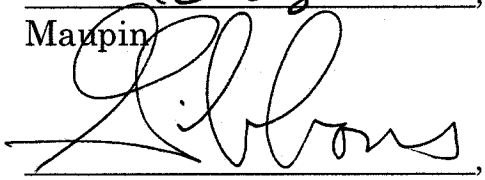
That case is distinguishable from Harvey's. Harvey was sentenced to probation on count II, consecutive to count I. It is within the district court's discretion to impose consecutive sentences.[8]

The district court did not err in denying the motion for a new trial nor did it abuse its discretion in ordering Harvey to serve probation consecutive to a prison term. Therefore we

ORDER the judgment of the district court AFFIRMED.



, J.
Maupin



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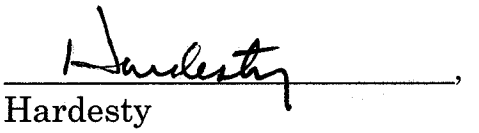

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Hardesty

cc: Hon. David R. Gamble, District Judge
Richard F. Cornell
Attorney General George Chanos/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

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[8]See NRS 176.035(1).