

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. MCINERNEY A/K/A
MICHAEL JOSEPH MCINERNEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47781

FILED

NOV 09 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Edwards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of one count of robbery of a victim, 65 years of age or older. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. The district court sentenced appellant Michael Joseph McInerney to serve a prison term of 35 to 156 months for the robbery count, with a 35 to 156 month prison term for the elderly victim enhancement.

On June 5, 2006, the State filed a motion to correct an illegal sentence, arguing that the original judgment of conviction inadvertently omitted a consecutive prison term for the elderly victim enhancement for the robbery count. McInerney opposed the motion. After hearing arguments from counsel, the district court granted the motion and entered an amended judgment of conviction.

McInerney argues that the district court erred by adding a 35 to 156 month prison term for the elderly victim enhancement.

Specifically, McInerney argues that the increase in the severity of his sentence violated the Double Jeopardy Clauses of the United States and Nevada Constitutions because he had a reasonable expectation that the sentence was final. Citing to Miranda v. State,¹ McInerney argues that the illegal sentence could have been corrected by less severe means, namely, by reducing the prison term imposed for the robbery count to 24 to 60 months and then adding an equal and consecutive prison term of 24 to 60 months for the elderly victim enhancement. We disagree.

The "correction of an illegally imposed sentence does not necessarily violate double jeopardy simply because the correction increases the punishment."² However, to comply with double jeopardy principles, a district court may correct an illegal sentence by increasing its severity only when there is no other, less severe means of bringing the sentence into compliance with the pertinent statute.³

The district court did not err by imposing a consecutive prison term of 35 to 156 months for the elderly victim enhancement because there was no less severe means of correcting the illegal sentence. NRS 193.167(1) mandates that the sentencing court impose a prison term for

¹114 Nev. 385, 956 P.2d. 1377 (1998).

²Id. at 386, 956 P.2d at 1378 (quoting U.S v. Garren, 884 F.2d 427, 431 (9th Cir. 1989)).

³Id. at 387, 956 P.2d at 1378.

the commission of a crime against an elderly victim that is "equal to and in addition to the term of imprisonment prescribed by statute" for the primary offense. In this case, the sentence imposed for the primary robbery offense was 35 to 156 months and, pursuant to NRS 193.167(1), an additional consecutive sentence of 35 to 156 month was required. Accordingly, McInerney's double jeopardy rights were not violated.


Citing to Dewitt v. Ventetoulo,⁴ McInerney argues that the correction of his sentence is so unfair as to violate due process. Specifically, McInerney notes that the illegal sentence was not corrected until two years after the initial sentence was imposed, and McInerney was eligible for parole on the robbery charge before the sentence was corrected. We conclude that the district court did not err by rejecting McInerney's argument. We note that, unlike in DeWitt, the State sought to correct the sentencing error within a reasonable time after its discovery, and McInerney was still incarcerated at the time the error was discovered.⁵ Accordingly, McInerney's due process rights were not violated.

⁴6 F.3d 32 (1st Cir. 1993) (listing factors for analyzing whether the correction of an illegal sentence violated due process).


⁵Id. at 35-36 (finding the correction of an illegal sentence violated due process, in part, because the State waited four years to move to correct the sentence and petitioner had already been released from jail).

Having considered McInerney's contentions and concluded that they lack merit, we

ORDER the amended judgment of conviction AFFIRMED.


_____, C.J.
Rose


_____, J.
Gibbons


_____, J.
Maupin

cc: Hon. Douglas W. Herndon, District Judge
JoNell Thomas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk