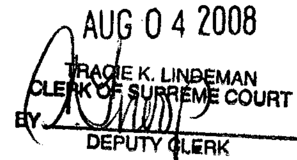
IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY SPINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50425



ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, entered pursuant to a bench trial, of one count each of battery by a prisoner in lawful custody or confinement and battery with the intent to kill. Third Judicial District Court, Churchill County; Robert E. Estes, Judge. The district court merged the sentence for battery by a prisoner with the sentence for battery with the intent to kill and sentenced appellant Anthony Spina to serve a prison term of 8 to 20 years.

First, Spina contends that his convictions for battery by a prisoner and battery with the intent to kill are redundant because they punish the same illegal act. We agree.

Convictions are redundant if "the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant."[1] "[T]his court will

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[1]State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000).

reverse 'redundant convictions that do not comport with legislative intent.'"[2]

During the bench trial, the district court found Spina guilty of both battery by a prisoner and battery with the intent to kill. Thereafter, Spina filed a sentencing memorandum in which he argued that the two offenses merged. At sentencing, the State conceded that the two offenses merged and informed the district court that Spina should only be sentenced for battery with the intent to kill. The district court sentenced Spina for battery with the intent to kill, but entered a judgment of conviction for both offenses. We conclude that the district court erred by convicting Spina for battery by a prisoner and that the conviction must be reversed.[3]

Second, Spina contends that his sentence constitutes cruel and unusual punishment because it is disproportionate to his offense. Spina claims that the battery with intent to kill statute is vague because it focuses entirely on the perpetrator's intent and not on his actual ability to kill the victim. Spina asks this court "to impose or restate the common law rule that the present ability to kill, by the means alleged in the criminal charge, is necessary to support a conviction of battery with the

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[2]State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).

[3]The effect of our reversal of Spina's conviction for battery by a prisoner will be to remove the conviction from his record. It will have no effect on his sentence.

intent to kill."[4] Spina argues that the statute's vagueness coupled with his "severe term of imprisonment" resulted in cruel and unusual punishment.

We have consistently afforded the district court wide discretion in its sentencing decision.[5] We will refrain from interfering with the sentence imposed "[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."[6] Moreover, a sentence that is 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.'"[7]

Spina does not allege that the district court relied on impalpable or highly suspect evidence. To the extent that Spina claims that NRS 200.400(3) is unconstitutional,[8] we note that "[s]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger

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[4]Spina does not cite to any authority in support of this common law rule.

[5]See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

[6]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

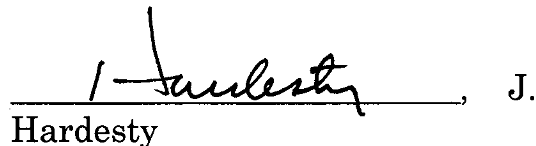
[7]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

[8]NRS 200.400(3) provides: "A person who is convicted of battery with the intent to kill 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 20 years."

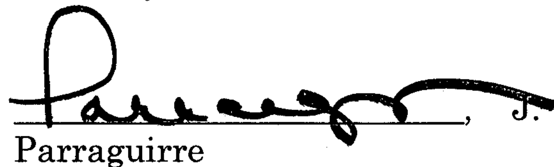
must make a clear showing of invalidity."[9] We have reviewed the statute and considered Spina's argument. We conclude that Spina has not made a clear showing that NRS 200.400 is unconstitutional and, therefore, he has failed to overcome the presumption that the statute is valid. We note that the sentence imposed falls within the parameters provided by the relevant statute, and we conclude that the sentence does not constitute cruel and unusual punishment.

Having considered Spina's contentions and for the reasons discussed above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the battery by a prisoner in lawful custody or confinement conviction and enter a corrected judgment of conviction.



_______________, J.
Hardesty



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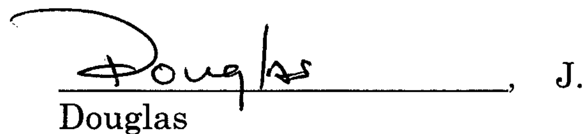

_______________, J.
Douglas

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[9]Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (internal citations omitted).

cc: Hon. Robert E. Estes, District Judge
Law Offices of John E. Oakes
Attorney General Catherine Cortez Masto/Carson City
Churchill County District Attorney
Churchill County Clerk