

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JAMES SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52119

**FILED**

**NOV 13 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART, AND  
REMANDING

This is an appeal from a judgment of conviction entered pursuant to a bench trial of one count of felony possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Michael James Smith to serve a prison term of 32 to 72 months.

Sufficiency of the Evidence

Smith contends that insufficient evidence was presented at trial to support his conviction for possession of a stolen vehicle. He specifically asserts that there was no evidence that he knew or should have known that the vehicle was stolen. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). In particular, we note that the State presented evidence that the 2007 Mercedes Benz that Smith was found in was stolen and it was worth \$85,400. After Smith was ordered out of the Mercedes, he put his hands in the air and said, "You got me." Smith told a police detective that: (1) he rented the car at one o'clock

in the morning in the area of Lake Mead and H Street from someone named Mo for \$50, (2) he did not know Mo's last name or how to get ahold of him, (3) he did not honestly believe that the registered owner of the vehicle would rent it for \$50, and (4) Mo was not the owner of the car. We conclude that the trial court could reasonably infer from this evidence that Smith knew or should have known that the vehicle was stolen, and we will not disturb the trial court's finding of guilt on appeal where, as here, substantial evidence supports the finding. See id.

#### Motion for New Trial

Smith contends that the district court abused its discretion by denying his motion for a new trial. Smith claims that he was coerced into waiving his right to a jury trial and his right to testify on his own behalf. Smith asserts that the district court abused its discretion by allowing him to waive these rights and therefore it abused its discretion by denying his motion for a new trial.

“The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse.” Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

Before the trial, Smith filed a written motion for a bench trial, the district court thoroughly canvassed him regarding the motion, and Smith specifically acknowledged that no one had threatened or coerced him into requesting a bench trial. After the trial, the district court held an evidentiary hearing to determine whether defense counsel had coerced Smith into waiving his right to testify. Counsel testified that Smith sat through a practice cross-examination, they had some grave concerns about

his defense, and they advised him not to testify. However, counsel also testified that Smith was told that “if he thought he might regret not testifying, that he should testify.” The district court found that there was no evidence of coercion and denied Smith’s motion for a new trial. We conclude from these circumstances that Smith has failed to demonstrate that the district court abused its discretion in this regard.

### Judicial Bias

Smith contends that judicial bias deprived him of his right to due process and a fair trial. Smith asserts that the district judge revealed her bias against him during the evidentiary hearing on his motion for a new trial by stating that “Mr. Smith’s waiver of his right to testify was irrelevant as she would not have believed Mr. Smith anyway.” Smith acknowledges that this statement does not appear in the rough draft transcripts he provided for our review and suggests that the statement might appear in a certified transcript. We note that the appellant has the burden to make a proper appellate record, Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), and we conclude that Smith has failed to demonstrate that he was deprived of due process and a fair trial.

### Illegal Sentence

Smith contends that the sentence imposed by the district court is illegal because it violates the 40 percent rule. In its response, the State claims that the 40 percent rule in NRS 193.130(1) does not apply to sentences imposed pursuant to NRS 205.273(4). Accordingly, Smith’s contention presents a question of statutory construction.

Generally, statutes are given their plain meaning, construed as a whole, and read in a manner that makes the words and phrases essential and the provisions consequential. Mangarella v. State, 117 Nev.

130, 133, 17 P.3d 989, 991 (2001). “Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results.” Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001). Additionally, criminal statutes are interpreted liberally and any inconsistencies or ambiguities are construed in the defendant’s favor. Id.

NRS 193.130(1) requires the district court to sentence a person convicted of a felony to a minimum prison term and a maximum prison term and states that “[t]he minimum term of imprisonment that may be imposed must not exceed 40 percent of the maximum term imposed.” NRS 193.130(2) identifies the categories of felonies and the minimum and maximum prison terms that may be imposed for each category of felony.

NRS 205.273 defines offenses involving stolen vehicles and sets forth the penalties for these offenses. NRS 205.273 provides in relevant part that:

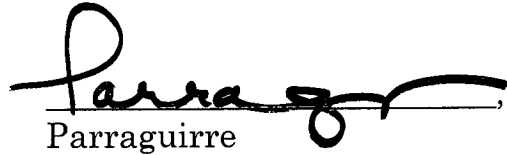
3. Except as otherwise provided in subsection 4, a person who violates the provisions of subsection 1 is guilty of a category C felony and shall be punished as provided in NRS 193.130.

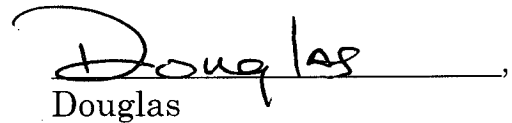
4. If the prosecuting attorney proves that the value of the vehicle involved is \$2,500 or more, the person who violated the provisions of subsection 1 is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years . . . .

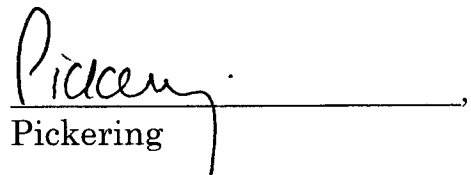
Nothing in the plain language of these statutes renders the 40 percent rule in NRS 193.130(1) inapplicable when imposing punishment pursuant to NRS 205.273(4). Because the district court sentenced Smith

to a prison term of 32 to 72 months and 32 is greater than 40 percent of 72, we conclude that Smith's sentence violates the 40 percent rule, is unlawful, and must be vacated. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for resentencing.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. Michelle Leavitt, District Judge  
Draskovich & Oronoz, P.C.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk