IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM J. IRWIN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34937

FILED

SEP 08 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of possession of stolen property and failure to stop on signal of peace officer. Pursuant to NRAP 34(f)(1), we have concluded that oral argument is not warranted.

On appeal, appellant William J. Irwin, Jr. contends that: (1) the district court abused its discretion in adjudicating him as a habitual criminal; (2) use of a prior conviction, which was not entered until after the instant offense was committed, for adjudicating him as a habitual criminal violates the Double Jeopardy Clause; (3) NRS 205.275 is unconstitutional because it removes the requirement of mens rea as an element of the offense of possession of stolen property; and (4) there was insufficient evidence to support the conviction for failure to stop on signal of peace officer. We conclude that these contentions lack merit.

First, Irwin argues that the district court abused its discretion in adjudicating him as a habitual criminal because his prior convictions were nonviolent, because one of the prior convictions was not entered until after the instant offense was committed and because he was adjudicated as a habitual criminal on both charges, but the amended information only listed in one count the elements necessary to adjudicate him as a habitual criminal.

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A district court has wide discretion in imposing a sentence and we will not disturb that sentence absent an abuse of discretion. Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723 (1980). The only threshold required in order to trigger the habitual criminal statute is that the prior conviction be of felony status. McGervey v. State, 114 Nev. 460, 467, 958 P.2d 1203, 1208 (1998). The statute makes no allowance for the nonviolence of the previous crime. Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

In addition, the plain language of the habitual criminal statute indicates that it is the status of the defendant at the time he is convicted that is relevant, not his status at the time the offense was committed. See NRS 207.010(1)(a) (a "person convicted in this state of . . . any felony, who has previously been two times convicted, . . . is a habitual criminal" (emphasis added)).

Finally, "[i]t is uniformly held that the purpose of a habitual criminal act is not to charge a separate substantive crime but it is only the averment of a fact that may affect the punishment." Lisby v. State, 82 Nev. 183, 189, 414 P.2d 592, 595 (1966). "'A statement of a previous conviction does not charge an offense.'" Id. at 189, 414 P.2d at 596 (quoting State v. Bardmess, 54 Nev. 84, 7 P.2d 817 (1932)). Therefore, the State was not required to list twice in the information the elements necessary to adjudicate Irwin as a habitual criminal; once was sufficient.

Therefore, we conclude that the district court did not abuse its discretion in adjudicating Irwin as a habitual criminal.

Second, Irwin contends that use of a prior conviction, which was not entered until after the instant

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offense was committed, for adjudicating him as a habitual criminal violates the Double Jeopardy Clause.

We conclude that Irwin's diversion status was not revoked due to his actions on March 30, 1999. Irwin had already violated the terms of his diversion status and a bench warrant had been issued for his arrest. Even if the revocation of diversion status and entry of a judgment of conviction for possession of a controlled substance were based on Irwin's actions in the instant offense, that would not constitute double jeopardy. First, there is more than one act in question - possession of a controlled substance, and the acts of March 30, 1999 which were possession of stolen property and failure to stop on signal of peace officer. Second, the test - whether each provision requires proof of a fact which the other does not - simply does not apply to these facts. See Blockburger v. United States, 284 U.S. 299 (1932).

Third, Irwin contends that NRS 205.275 is unconstitutional because it provides that a person can be convicted for possession of stolen property under a reasonable person standard. We have previously considered a similar argument and rejected it. See Gray v. State, 100 Nev. 556, 688 P.2d 313 (1984). We conclude that Irwin has not overcome the presumption that the statute is constitutional. See Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991).

Finally, Irwin contends that there was insufficient evidence to support the conviction for failure to stop on signal of police officer. We conclude that, based on the testimony of the sheriff's deputies, and viewed in the light most favorable to the prosecution, a "'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" See Koza v. State, 100 Nev. 245, 250, 681

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P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 433 U.S. 307, 319 (1979)).

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

ORDER this appeal dismissed.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. John P. Davis, Judge
Attorney General
Robert E. Glennen III
Nye County District Attorney
Nye County Clerk

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