

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN MOSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59836

FILED

NOV 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of felon in possession of a firearm. Eighth Judicial District Court, Clark County; Doug Smith, Judge. Appellant Martin Mosby raises two arguments on appeal.

First, Mosby argues that there was insufficient evidence to support his conviction because no reasonable juror could conclude beyond a reasonable doubt that he was in actual or constructive possession of a firearm between January 1 and February 17, 2011. We disagree. On February 10, Mosby was taken into custody after exiting his Chrysler Pacifica. That same day, Mosby used the prison telephone to call his girlfriend and directed her to remove a firearm from the back seat of the vehicle. After listening to the conversation via a prison recording system, police officers spoke with Mosby's girlfriend who told officers that she moved the firearm to a storage unit owned by Mosby where it was subsequently recovered. Sometime later, Mosby was recorded saying that he had wiped his fingerprints from the firearm before he was incarcerated. The charging document alleged that Mosby was in possession of the firearm between the dates of January 1 and February 17, 2011.

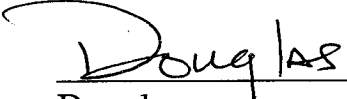
Considering the evidence in the light most favorable to the prosecution, we conclude that a rational juror could find beyond a reasonable doubt that Mosby was in possession of a firearm within the charged time frame. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). Mosby's own statements indicating actual possession of the firearm prior to his incarceration were sufficient to support the conviction. However, we further conclude that Mosby's direction to his girlfriend to remove the firearm from his vehicle while incarcerated demonstrated constructive possession. See Glispey v. Sheriff, 89 Nev. 221, 224, 510 P.2d 623, 624 (1973) (holding that an accused has constructive possession of an item if he maintains the right to exercise dominion or control over it and if another person possesses the item pursuant to his direction or permission); see also United States v. Smith, 413 F. App'x 912, 914 (7th Cir. 2011) (finding constructive possession where the defendant called his girlfriend and told her to retrieve a firearm from his home and then directed an informant to pick up the firearm from his girlfriend).

Second, Mosby argues that his sentence of life in prison without the possibility of parole constitutes cruel and unusual punishment because some of the underlying felony offenses resulting in his habitual offender treatment were remote and none were violent. We disagree. See Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (“[The habitual offender statute] makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.”). Mosby does not argue that the NRS 207.010 is unconstitutional, and we are not convinced that the sentence imposed is so grossly disproportionate to the

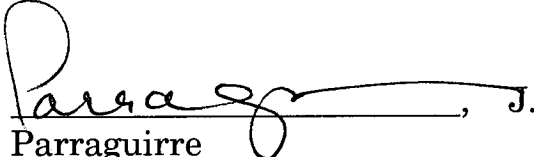
offense and Mosby's history of recidivism as to shock the conscience. See Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Doug Smith, District Judge
Cannon & Tannery
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk