IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 59839

FILED

NOV 15 2012

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of larceny from the person and grand larceny. Eighth Judicial District Court, Clark County; Doug Smith, Judge. Appellant Marvin Mosby raises multiple arguments on appeal.

First, Mosby argues that his convictions for grand larceny and larceny from a person violate the Double Jeopardy Clause and are redundant because he was convicted twice for the exact same act of stealing a camera. Because the claim involves an issue of constitutional magnitude, it can be considered on appeal even absent an objection. Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (citing Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)). Nevada uses the Blockburger test to determine whether multiple convictions under more than one statute based on a single incident are permissible, or to the contrary, if the charges amount to a lesser-included offense that is barred by double jeopardy. Wilson v. State, 121 Nev. 345, 358, 114 P.3d 285, 294 (2005) (citing Blockburger v. United States, 284 U.S. 299 (1932)). "Under this test, if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense

and the Double Jeopardy Clause prohibits a conviction for both offenses." Wilson, 121 Nev. at 359, 114 P.3d at 294 (internal quotations omitted). The test ultimately resolves itself on whether the provisions of each of the different statutes require the proof of a fact that the other does not. Id. at 359, 114 P.3d at 294-95.

Under a strict application of Blockburger, larceny from the person and grand larceny do not appear to be the same offense. Compare NRS 205.220 with NRS 205.270. Even assuming the two offenses are different under Blockburger, we conclude that multiple larceny convictions for Mosby's one act of stealing a camera are not permissible under the Legislature's intended statutory scheme. See Ebeling v. State, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (noting that a court must strictly construe criminal statutes and presume that a legislature did not intend multiple punishments for the same offense absent a clear expression of legislative intent to the contrary) (internal quotations omitted). Upon a reading of the statutes and an analysis of their origin, we are convinced that larceny from the person and grand larceny are merely variations of the same offense. See Terral v. State, 84 Nev. 412, 413-14, 442 P.2d 465, 466 (1968) ("Thus, an item of little value, . . . if snatched from the person of another will subject the offender to punishment as a felon, whereas the same item, if taken from his 'presence,' and not from his person, would constitute the misdemeanor of petty larceny."); see also People v. McElroy, 48 P. 718, 719 (Cal. 1897) (holding that, historically, an item taken from a person's presence did not constitute larceny from the person and instead constituted petit larceny). Where an item is taken "from the person" of another, the offense is larceny from the person, NRS 205.270; where it is not taken from his person, the offense is larceny – grand or petit based on

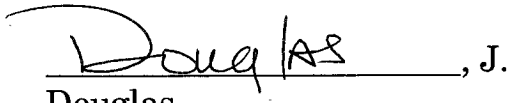
the item's value, NRS 205.220, 205.240. Therefore, multiple convictions for larceny (grand, petit, or from the person) arising out of a single taking of an item are impermissible. Because the evidence in this case more aptly reflects larceny from the person, we reverse Mosby's conviction for grand larceny.

Second, Mosby argues that a life sentence for stealing a camera constitutes cruel and unusual punishment. We primarily note that Mosby was sentenced as a large habitual criminal. Because Mosby does not argue that the habitual criminal punishment statute is unconstitutional, his sentence is within the parameters of that statute, see NRS 207.010, and we are not convinced that the sentence is so grossly disproportionate to the gravity of the offense and Mosby's history of recidivism as to shock the conscience, we conclude the sentence does not violate the constitutional proscriptions against cruel and unusual punishment. See Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion); see also Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

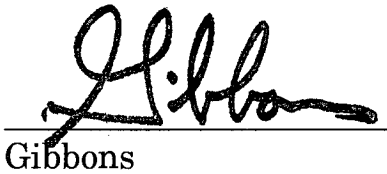
Third, Mosby argues that the district court relied upon highly suspect evidence at sentencing when it considered that he may have committed other crimes but was never caught. However, the record demonstrates that the district court had already sentenced Mosby for the instant crime and the comments were made during sentencing for another case. We therefore conclude that Mosby has failed to demonstrate that the district court erred in this case.

Based upon the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Douglas



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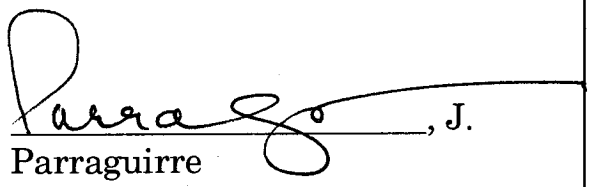

_____, J.
Parraguirre

cc: Hon. Doug Smith, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk