IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IRVIN EUGENE MCQUEEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76748-COA

IRVIN EUGENE MCQUEEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76751-COA

FILED

DEC 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from two amended judgments of conviction entered pursuant to guilty pleas of attempted injuring or tampering with a motor vehicle and possession of a controlled substance. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

In Docket No. COA-76748, Irvin Eugene McQueen appeals from the amended judgment of conviction entered in district court case number CR6639, wherein he was convicted of attempted injuring or tampering with a motor vehicle. He claims that his 19- to 48-month prison sentence, which was imposed to run consecutive to the sentence in another case, constitutes cruel and unusual punishment because it "is so unreasonably disproportionate to the offense as to shock the conscience."

We conclude McQueen's cruel-and-unusual-punishment claim is properly raised in this appeal from an amended judgment of conviction. This is because (1) the original judgment of conviction was entered pursuant to a guilty plea and contemplated restitution in an uncertain amount, *see*

Slaatte v. State, 129 Nev. 219, 222, 298 P.3d 1170, 1171 (2013) (a judgment of conviction entered pursuant to a guilty plea that imposed restitution in an uncertain amount is not a final appealable judgment), and (2) based on the record before this court, we conclude McQueen did not treat the original judgment of conviction as final. *But see Witter v. State*, 135 Nev., Adv. Op. 55, *8-9, ___ P.3d ___, ___ (2019) (holding that, even though the original judgment of conviction included an indeterminate restitution provision, Witter was limited to raising issues stemming from the amendment to the judgment of conviction because his conviction arose from a jury verdict and, more importantly, Witter treated his original judgment of conviction as final by filing a direct appeal and seeking postconviction relief wherein he did not raise issues about the indeterminate restitution provision).

Regardless of its severity, a sentence that falls 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.'" *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)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

McQueen's sentence falls within the parameters of the relevant statutes, and he does not allege that any of these statutes are unconstitutional. *See* NRS 193.130(2)(c); NRS 193.155(1); NRS 193.330(1)(a)(4); NRS 205.274(1). We note the district court has discretion to impose consecutive sentences. *See* NRS 176.035(1); *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015). And we conclude the

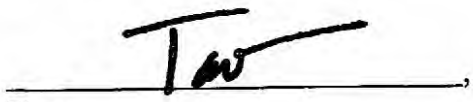
sentence imposed is not so grossly disproportionate to McQueen's crime so as to constitute cruel and unusual punishment.

In Docket No. COA-76751, McQueen appeals from the amended judgment of conviction entered in district court case number CR7614A, wherein he was convicted of possession of a controlled substance. He claims that his 19- to 48-month prison sentence, which was imposed to run consecutive to the sentence in another case, constitutes cruel and unusual punishment and the district court was biased against him and should have recused itself.

We conclude McQueen's cruel-and-unusual-punishment and judicial-bias claims are not properly raised in this appeal from an amended judgment of conviction. This is because these claims could have been raised in an appeal from the original judgment of conviction. "[I]n an appeal taken from an amended judgment of conviction, the appellant may only raise challenges that arise from the amendments made to the original judgment of conviction." *Jackson v. State*, 133 Nev. 880, 882, 410 P.3d 1004, 1006 (Ct. App. 2017). Accordingly, McQueen waived these claims by not raising them in an appeal from his original judgment of conviction.

Having concluded that McQueen is not entitled to relief, we ORDER the amended judgments of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kimberly A. Wanker, District Judge
David H. Neely, III
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk