IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

KENDALL NORRIS McKINNEY,
Defendant-Appellant.

Supreme Court Case No. CRA16-013
Superior Court Case No. CF0535-13

OPINION

Cite as: 2018 Guam 10

Appeal from the Superior Court of Guam
Argued and submitted on May 16, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

CARBULLIDO, J.:

[1] Defendant-Appellant Kendall Norris McKinney appeals the Superior Court's denial of his motion to reduce his sentence. McKinney argues that his sentence for his conviction on the charges of Burglary, Theft of Property, and Theft by Receiving is illegal because it constitutes multiple punishments for the same crime in violation of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. For the reasons discussed below, we affirm the Superior Court's denial of McKinney's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] McKinney was indicted for Burglary, Theft of Property, and two counts of Theft by Receiving Stolen Property. The burglary charge was based on his act of entering the home of Romeo and Aurora Reyes with the intent to commit the crime of theft once inside, on or about July 21, 2013. The theft of property charge was based on his taking and exercising unlawful control over the Reyeses' movable property, namely, a laptop, a television, and other items, as part of the same incident upon which the burglary charge was based. Count one of the theft by receiving stolen property charge was based on his receipt, retention, or disposal of Romeo Reyes's 2006 Chevrolet Trailblazer, on or about August 29, 2013. Count two was for his receipt, retention, or disposal of Aurora Reyes's 2012 Mazda CX7, on or about September 11, 2013.

[3] McKinney went to trial on the charges, and the jury found him guilty of all charges except the count involving the Mazda. McKinney was sentenced to ten years' imprisonment for burglary, five years' imprisonment for theft of property, and ten years' imprisonment for count one of theft by receiving stolen property. The sentences for burglary and theft of property were

to run concurrently, while the sentence for theft by receiving was to run consecutively with the other two sentences, for a total of twenty years' imprisonment.

[4] McKinney appealed the judgment, arguing: (1) that there was insufficient evidence to sustain his convictions for burglary, theft of property, and theft by receiving the Mazda and (2) that the trial court erred in imposing consecutive terms of imprisonment for burglary and theft by receiving the Mazda.

[5] This court upheld his conviction, finding that there was sufficient evidence to sustain the jury's verdict on the charges of burglary and theft of property. This court recognized that McKinney intended to challenge his conviction for theft by receiving the Trailblazer, but this court declined to address the issue because McKinney failed to properly present such argument. Similarly, this court declined to address the sentencing issue raised by McKinney in his first appeal because he predicated his argument on the charge for which he was acquitted.

[6] McKinney filed a Suggestion for Rehearing En Banc, which this court converted to a Petition for Rehearing—finding that a Rehearing En Banc was not possible for the case. This court denied the Petition.

[7] Following this court's denial of McKinney's motion for a rehearing, McKinney brought before the trial court a motion for reduction of sentence, arguing that it was a violation of his protection against double jeopardy for the court to impose consecutive sentences for burglary and theft by receiving the Trailblazer because both crimes arose from the same act: burglary of a home. The trial court denied McKinney's motion, finding that the crime of burglary and the crime of theft by receiving each required proof of an additional fact that the other did not and, therefore, the imposition of consecutive sentences was proper under *People v. Palisoc*, 2002 Guam 9. McKinney appeals this denial of his motion for reduction of sentence.

II. JURISDICTION

[8] This court has jurisdiction over an appeal from a final order of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-196 (2018)); 7 GCA § 3107(b) (2005); *see also* 8 GCA § 130.15 (2005); *People v. White*, 2005 Guam 20 ¶ 3 (finding appellate jurisdiction over Superior Court's denial of post-conviction motion).

III. STANDARD OF REVIEW

[9] Alleged violations of the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution are reviewed *de novo*. *People v. San Nicolas*, 2001 Guam 4 ¶ 8. "The legality of [a] sentence is also reviewed *de novo*." *Id.*

IV. ANALYSIS

[10] "The court may correct an illegal sentence at any time . . . ." 8 GCA § 120.46 (2005).[1] An illegal sentence is "a sentence that is not authorized by the judgment of conviction or that is greater or less than the permissible statutory penalty for the crime." *People v. Mallo*, 2008 Guam 23 ¶ 13. While McKinney frames his appeal as a challenge to an illegal sentence, he argues, in essence, that his sentence violates double jeopardy because his *conviction* violates double jeopardy. This court has yet to address the issue of whether a defendant can question the validity of an underlying conviction when challenging an illegal sentence.

[11] There are two general approaches in assessing an illegal sentence claim. Under the first, narrow approach, challenges to an illegal sentence are limited to the sentence itself and cannot include arguments relating to the impropriety of the underlying conviction. *See, e.g.*, *United States v. Jeffers*, 388 F.3d 289, 292 (7th Cir. 2004) (affirming a lower court's denial of a motion

[1] This provision is identical to the former Rule 35(a) of the Federal Rules of Criminal Procedure. 8 GCA § 120.46, NOTE.

to correct a sentence because the defendant had "identified no error in his sentence per se; the sentence is improper only to the extent that the Double Jeopardy Clause precludes his [continuing criminal enterprise] *conviction*" (citations omitted)); *United States v. Furman*, 112 F.3d 435, 438 (10th Cir. 1997); *Rainey v. State*, 182 A.3d 184, 188 (Md. Ct. Spec. App. 2018); *State v. Ertelt*, 1997 ND 15, ¶ 6, 558 N.W.2d 860, 860; *State v. Oscarson*, 2006 VT 30, ¶¶ 8-15, 179 Vt. 442, 898 A.2d 123; *Evans v. State*, 892 P.2d 796, 797 (Wyo. 1995). Arguments must be limited to the sentence itself—for example, that there has been no conviction warranting any sentence or that the sentence is not a permitted one for the conviction. *See, e.g.*, *Rainey*, 182 A.3d at 188; *Oscarson*, 2006 VT 30, ¶ 10. Under the second, broad approach, challenges to an illegal sentence may include arguments relating to the underlying conviction. *See, e.g.*, *United States v. Prestenbach*, 230 F.3d 780, 782 (5th Cir. 2000) (considering defendant's argument that sentence was illegal because the conviction violated double jeopardy); *United States v. Rivera Ramos*, 856 F.2d 420, 422 (1st Cir. 1988) (same); *United States v. Sutton*, 700 F.2d 1078, 1079 (6th Cir. 1983) (same); *Nelms v. United States*, 291 F.2d 390, 392 (4th Cir. 1961) (same); *State v. Garza*, 2014 SD 67, ¶ 6, 854 N.W.2d 833, 836 (same). Under neither the narrow nor the broad approach may a court vacate the underlying conviction, but may only correct the sentence. *See, e.g.*, *Jeffers*, 388 F.3d at 292; *Prestenbach*, 230 F.3d at 782.

[12] Although this court has yet to address the issue of whether a defendant can question the validity of the underlying conviction when challenging an illegal sentence, we find it unnecessary to do so here, as McKinney's appeal fails under both approaches.

A. Under the Narrow Approach, McKinney's Appeal Fails Because He Did Not Challenge His Conviction in His First Appeal and Has, Therefore, Waived the Issue

[13] Under the narrow approach, McKinney's appeal cannot be characterized as a challenge to an illegal sentence because the appeal hinges on his argument that the underlying conviction for

burglary, theft of property, and theft by receiving violate double jeopardy. As McKinney's appeal, under the narrow approach, is not a proper challenge to an illegal sentence, it can only be characterized as a challenge to his conviction. This is McKinney's second appeal, and he failed to challenge his conviction of theft by receiving the Trailblazer in his earlier, direct appeal. *See People v. McKinney*, 2016 Guam 3 ¶ 31. By failing to challenge this conviction in his first appeal, McKinney has waived the issue. *See People v. Tedtaotao*, 2017 Guam 12 ¶ 6. Therefore, under the narrow approach, McKinney's appeal fails because it includes arguments that the underlying conviction is improper, is consequently a challenge to his conviction—rather than his sentence—and McKinney has waived such a challenge under *Tedtaotao*.

B. Under the Broad Approach, McKinney's Appeal Fails Because the Sentences Do Not Violate Double Jeopardy

[14] Under the broad approach, McKinney's argument on appeal is proper—even though it challenges the underlying conviction—and timely brought because, under 8 GCA § 120.46, a court may correct an illegal sentence at any time. *See* 8 GCA § 120.46.

1. The trial court did not err in setting the sentence for theft by receiving to run consecutively with the burglary and theft of property sentences because McKinney's actions did not constitute a continuing course of conduct

[15] McKinney argues that the trial court's setting of the sentence for theft by receiving to run consecutively with the burglary and theft of property sentences is illegal, as it violates double jeopardy because all acts committed in these charges constituted a continuing course of conduct. Appellant's Br. at 7-8 (Jan. 23, 2017). McKinney was charged with burglary and theft of property for allegedly entering and taking from the Reyeses' residence a laptop, television, and other items, on or about July 21, 2013. Record on Appeal ("RA"), tab 61.01 at 1-2 (Am. Superseding Indictment, Dec. 24, 2013). He was charged with theft by receiving for receiving, retaining, or disposing of Romeo Reyes's 2006 Chevrolet Trailblazer, on or about August 29,

2013. *Id.* at 2. Despite these disparate dates in the indictment, McKinney argues that his acts constituted a continuing course of conduct because he actually stole the Trailblazer on July 21, 2013. Appellant's Br. at 11-12. No such evidence was put on at trial. Rather, both Romeo and Aurora Reyes testified that the Trailblazer had been parked in front of or close to their house, Transcript ("Tr.") at 77, 107 (Jury Trial, Dec. 19, 2013), and Romeo Reyes testified that the Trailblazer went missing during the last week of August 2013, *id.* at 75.

[16] Given that (1) McKinney was charged with receiving, retaining, or disposing of the Trailblazer on or about August 29, 2013, (2) Romeo Reyes testified that the vehicle went missing in late August, and (3) McKinney did not suggest at trial that he stole the Trailblazer on the same day as the burglary, we have no factual basis by which to find that McKinney's acts constitute a continuing course of conduct. As McKinney's acts do not constitute a continuing course of conduct, his argument that the trial court's setting of the sentence for theft by receiving to run consecutively with the burglary and theft of property sentences violates double jeopardy fails.

2. The trial court did not err in sentencing McKinney for both theft of property and theft by receiving because these charges did not involve the same property

[17] McKinney contends that under *Palisoc*, 2002 Guam 9, his sentence for both theft of property and theft by receiving is illegal because the convictions "involved the same conduct"—theft of the Trailblazer. Appellant's Br. at 13-14. In *Palisoc*, this court held that a defendant could not be convicted of both theft and theft by receiving of the same property. 2002 Guam 9 ¶ 42. *Palisoc* does not apply to the case at hand because the theft of property and theft by receiving charges were for separate pieces of property.

[18] McKinney was not charged with, and therefore not convicted of, stealing the Trailblazer. *See* RA, tab 61.01 at 1-2 (Am. Superseding Indictment). Rather, the charge relating to the Trailblazer was theft by receiving; the theft of property charge was for the theft of "a laptop, a

television, and other items." *Id.* While McKinney argues that the "other items" language includes the Trailblazer, there is no evidence in the record to support this. *See* Appellant's Br. at 13. If the People had wanted to charge McKinney with *stealing* the Trailblazer, the People would have been required to do so explicitly under different language of the applicable theft statute. Under 9 GCA § 43.20, theft constitutes a second-degree felony if the amount involved exceeds $1,500 *or* if the property stolen is an automobile. 9 GCA § 43.20(a) (2005). Rather than charging McKinney with theft as a second-degree felony for stealing an automobile, the People charged McKinney with, and the court instructed the jury on, theft as a second-degree felony on the basis that the amount involved exceeded $1,500. RA, tab 61.01 at 1-2 (Am. Superseding Indictment); Tr. at 126-27 (Jury Instrs., Dec. 30, 2013). Therefore, the Trailblazer is not included in "other items." Given that McKinney's convictions of theft of property and theft by receiving were for distinct pieces of property, his dual conviction and sentence for these charges were not in error.

V. CONCLUSION

[19] This court has yet to address the issue of whether a defendant can make arguments regarding the validity of the underlying conviction when bringing an illegal sentence motion, but we find it unnecessary to do so here, as McKinney's appeal fails under both approaches. Under the narrow approach, McKinney's appeal fails because it includes arguments that the underlying conviction is improper, is consequently a challenge to his conviction—rather than his sentence—and McKinney has waived such a challenge.

[20] Under the broad approach, McKinney's appeal fails because the challenged sentences do not violate double jeopardy. The trial court did not err in setting the sentence for theft by receiving to run consecutively with the burglary and theft of property sentences because

McKinney's actions did not constitute a continuing course of conduct. The trial court also did not err in sentencing McKinney for both theft of property and theft by receiving because these charges did not involve the same property. Accordingly, we **AFFIRM** the trial court's denial of McKinney's motion to reduce his sentence.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice