IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN SAMUEL BRAUNSTEIN,
A/K/A STEVEN SAMUEL JALBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43404

FILED

JUL 0 1 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court denying appellant Steven Samuel Braunstein's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On July 26, 2000, Braunstein was separately convicted, pursuant to guilty pleas, of one count each of attempted possession of stolen property (district court case no. C158840) and defacing, altering, substituting or removing a vehicle identification number (VIN) (district court case no. C162359). For the attempted possession count, the district court sentenced Braunstein to serve a prison term of 12-34 months to run consecutively to the sentence imposed in district court case no. C159515, and ordered him to pay $5,900.00 in restitution. For the defacing of the VIN count, the district court sentenced Braunstein to serve 6 months in jail to run consecutively to the sentence imposed in district court case no. C159515, and ordered him to pay $6,415.00 in restitution. Braunstein's

untimely direct appeals from his judgments of conviction were dismissed by this court due to a lack of jurisdiction.[1]

On January 10, 2001, Braunstein filed proper person documents in each district court case labeled, "post conviction relief petition for direct appeal." On February 27, 2001, and March 9, 2001, Braunstein filed supplements to the petitions. In the supplemental petitions, Braunstein raised direct appeal issues, and contended that his trial counsel was ineffective for failing to timely file notices of appeal from his judgments of conviction despite his repeated desire to pursue such appeals. The State opposed the petitions. On March 22, 2001, the district court conducted an evidentiary hearing despite Braunstein's absence and on July 2, 2001, entered an order denying his petitions. Braunstein filed timely notices of appeal. On appeal, this court consolidated the cases and concluded, among other things, that the district court violated Braunstein's statutory rights when it conducted the ex parte evidentiary hearing.[2] Accordingly, this court reversed and remanded the matter to a different district court judge for an evidentiary hearing on the merits of Braunstein's petitions.[3]

---

[1]Braunstein v. State, Docket No. 36948 (Order Dismissing Appeal, February 9, 2001); Braunstein v. State, Docket No. 36714 (Order Dismissing Appeal, January 11, 2001).

[2]Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002).

[3]Braunstein v. State, Docket Nos. 37685, 37761 (Order of Affirmance in Part and Reversal and Remand in Part, September 9, 2002). This court determined that the district court did not err in construing Braunstein's petitions to be post-conviction petitions for writs of habeas corpus. See NRS 34.724(2)(b).

On September 23, 2002, appellant filed another proper person document in the district court, titled "Remand Order – Writ of Habeas Corpus," again raising direct appeal issues, and allegations that counsel was ineffective for failing to timely file notices of appeal from the judgments of conviction. The State opposed the petition. On November 25, 2002, the district court orally denied relief and entered a written order on February 7, 2003. Braunstein timely appealed to this court. Because the district court failed to transfer the case to a different district court judge as directed by this court, we concluded that the district court abused its discretion in considering and ruling upon Braunstein's petitions filed in the district court on January 10, 2001, February 27, 2001, March 9, 2001, and September 23, 2002. Accordingly, we once again reversed the order of the district court and remanded the matter to a different district court judge for an evidentiary hearing on the merits of the claims Braunstein raised in his various petitions. In the order, this court also stated that the district court shall provide for Braunstein's presence at the hearing, and in a footnote, directed the district court judge receiving the case upon transfer to enter a final written order resolving all of the claims raised in the aforementioned petitions.[4]

On remand, a different district court judge appointed counsel to represent Braunstein, conducted an evidentiary hearing on June 16, 2003, and determined that Braunstein's counsel was ineffective for failing to file a timely notice of appeal from the judgments of conviction. As a result, the district court stated that Braunstein was now "entitled to

---

[4]Braunstein v. State, Docket Nos. 40677, 40678 (Order of Reversal and Remand, April 9, 2003).

submit all matters which could have been heard on direct appeal in your post-conviction proceeding."[5] Accordingly, on February 20, 2004, Braunstein, with the assistance of counsel, filed supplemental points and authorities in support of his petition. In the supplement, Braunstein contended that: (1) the "oral plea agreement" should be specifically performed; (2) his guilty plea was not entered intelligently due to ineffective assistance of counsel; (3) the restitution award was not supported by sufficient evidence; (4) the justice of the peace abused her discretion in refusing to replace his court-appointed counsel based on a conflict; and (5) District Judge Mosley "was required to recuse himself" after he filed two complaints against the judge "regarding alleged improprieties regarding [the judge's] activities and support of Wildlife activities and organizations." The State opposed the petition. The district court conducted an evidentiary hearing and rejected Braunstein's claims.

On May 10, 2004, the district court entered an order denying Braunstein's petition, calling it his "Lozada Appeal." The district court's order, however, was prepared by the State, and did not address Braunstein's contention that District Judge Mosley was required to recuse himself.[6] Further, the order did not accurately represent the district court's ruling with regard to Braunstein's allegations of ineffective assistance of counsel with regard to the validity of his guilty plea; at the

---

[5]See Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994) ("an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction").

[6]Braunstein has apparently abandoned the issue in his appeal to this court from the district court's order.

evidentiary hearing, the district court concluded that Braunstein's assignments of error were belied by the record, however, the order, instead, erroneously states that "effectiveness of counsel issues are not appropriate for a Lozada appeal." Although this is a misstatement of law and was not even addressed by the State during the evidentiary hearing, we conclude that a remand for further proceedings is not necessary in light of the district court's oral pronouncement which was correct as a matter of law.[7] This timely appeal followed.

First, Braunstein contends that he received ineffective assistance of counsel, and as a result, failed to enter a knowing and intelligent guilty plea. Specifically, Braunstein argues that counsel never explained to him that by pleading to a "wobbler," that he could be sentenced for either a felony or a gross misdemeanor on the count of attempted possession of stolen property. Braunstein also argues that he had an oral plea agreement wherein he would plead guilty to two gross misdemeanors, and he requests that the alleged oral agreement be specifically enforced. We disagree with Braunstein's contentions.

The right to the effective assistance of counsel applies "when deciding whether to accept or reject a plea bargain."[8] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that

---

[7]See generally Means v. State, 120 Nev. ___, 103 P.3d 25 (2004) (nothing precludes simultaneously raising an appeal deprivation claim and traditional post-conviction issues).

[8]See Larson v. State, 104 Nev. 691, 693 n.6, 766 P.2d 261, 262 n.6 (1988) (citing McMann v. Richardson, 397 U.S. 759 (1970)).

counsel's performance fell below an objective standard of reasonableness,[9] and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[10] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[11] Additionally, a guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[12] In determining the validity of a plea, this court looks to the totality of the circumstances[13] and will not reverse a district court's determination absent a clear abuse of discretion.[14]

In this case, we conclude that Braunstein did not receive ineffective assistance of counsel, and our review of the totality of the circumstances reveals that his guilty plea was entered knowingly and intelligently. Further, we conclude that the guilty plea agreement was not breached and the district court did not err in determining that Braunstein's allegations with regard to his plea were belied by the record. The second amended information stated that Braunstein was being

---

[9]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[10]See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[11]Strickland, 466 U.S. at 697.

[12]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[13]State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[14]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

charged with attempted possession of stolen property, a "Category D Felony/Gross Misdemeanor." The formal guilty plea agreement, signed by Braunstein and which he indicated during the plea canvass that he read and understood, stated that "[t]he State has agreed to retain the right to argue at rendition of sentence as to felony or gross misdemeanor treatment." The plea agreement also states:

> I understand that as a consequence of my plea of guilty the Court may elect to treat this offense as a felony or as a gross misdemeanor. If the Court elects to treat this offense as a felony I may be imprisoned . . . for a minimum term of not less than one (1) year and a maximum term of not more than four (4) years.
>
> . . .
>
> I have not been promised or guaranteed any particular sentence by anyone.

During the plea canvass, the following exchange took place:

> COURT: And are you aware, Mr. Braunstein, of the charge set out in the Second Amended Information; that is, attempt possession of stolen property?
>
> DEFENDANT: Yes.
>
> COURT: What is your plea to the charge . . . to be treated as a felony or gross misdemeanor; guilty or not guilty?
>
> DEFENDANT: Guilty, sir.
>
> COURT: Has it been explained to your, sir, how a case can be treated as a felony or a gross misdemeanor?
>
> DEFENDANT: Yes, sir.
>
> COURT: You understand that's my decision to make?
>
> DEFENDANT: Yes, sir.

At the sentencing hearing, the State argued for treating the attempted possession charge as a felony, and discussed Braunstein's criminal history, including the fact that he was serving a life sentence for the sexual assault of a child. The district court addressed Braunstein –

> COURT: Mr. Braunstein, anything you care to say about either of these cases before your attorney speaks?
>
> DEFENDANT: Yes, sir. I pled to both of these as a gross misdemeanor.
>
> . . .
>
> COURT: Just a minute. . . . Did you plead guilty to this, or not?
>
> DEFENDANT: I pled guilty to a gross misdemeanor.
>
> COURT: You pled guilty to attempt possession of stolen property to be treated as a felony or a gross misdemeanor.
>
> DEFENDANT: That's correct, sir.

At the evidentiary hearing on Braunstein's habeas petition, his former counsel testified that there was never an oral agreement or stipulation wherein the attempted possession count would be treated as a gross misdemeanor. Further, counsel stated that he fully explained the plea negotiations to Braunstein prior to the entry of his plea, and that Braunstein understood that the count could be treated either as a felony or a gross misdemeanor, and that the decision was within the district court's discretion. Counsel also testified that he told Braunstein that there no guarantee that the count would be treated as a gross misdemeanor, and that Braunstein never indicated that he would not be willing to accept the plea deal if the count was treated as a felony.

Accordingly, based on all of the above, we conclude that Braunstein is not entitled to relief.

Second, Braunstein contends that he entered his guilty plea unknowingly because "restitution was not part of the plea agreement." Braunstein argues that the subject of restitution was never discussed during the plea canvass or at any of the hearings in the district court. At the evidentiary hearing on Braunstein's petition, the district court concluded that this argument was belied by the record. We agree with the district court. Initially, we note that Braunstein is only challenging the imposition of one of the restitution awards – the $5,900.00 award pertaining to the attempted possession of stolen property count – despite the fact that his guilty pleas in the two cases were entered simultaneously, only one formal guilty plea agreement was signed and filed, and he was sentenced in both cases at the same time. Braunstein assigns no error to the $6,415.00 restitution award in district court case no. C162359 (defacing, altering, substituting or removing a vehicle identification number), although we cannot discern any distinguishing procedural aspects in the two guilty pleas; Braunstein apparently concedes that his guilty plea in district court case no. C162359 was entered knowingly with regard to the possibility of a restitution award. Further, the guilty plea agreement, signed by Braunstein, states:

> I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement.

Therefore, we conclude that Braunstein was adequately advised and received sufficient notice of the restitution obligation by virtue of the fact

that the guilty plea agreement explicitly informed him that, if appropriate, he would be ordered to pay restitution.[15]

Third, Braunstein contends that the district court abused its discretion at sentencing because the restitution award of $5,900.00 was not supported by sufficient evidence. We agree.

"If a sentence of imprisonment is required or permitted by statute, the court shall: . . . [i]f restitution is appropriate, set an amount of restitution for each victim of the offense."[16] A district court retains the discretion "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant."[17] A district court, however, must rely on reliable and accurate information in calculating a restitution award.[18]

In the instant case, Braunstein never requested a hearing to determine the amount of restitution, and he failed to object to the district

---

[15]In Lee v. State, 115 Nev. 207, 209, 985 P.2d 164, 166 (1999), this court stated:

> Although the district court did not personally canvass appellant regarding restitution, appellant was fully informed by the written plea agreement that a requirement to pay restitution was a possible consequence of his plea. Appellant will not now be heard to complain that there is a technical requirement that this information must come directly from the district court.

[16]NRS 176.033(1)(c).

[17]Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

[18]Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

court's imposition of restitution during the sentencing hearing.[19] Nevertheless, our review of the record on appeal reveals that there was no basis provided for the imposition of the restitution award of $5,900.00. When the representative from the Division of Parole and Probation was questioned by the district court about the restitution request in the presentence investigation report, Officer Henderson replied: "It doesn't give an explanation on the restitution of $5900." Further, at the evidentiary hearing on Braunstein's petition, the district court made no finding whatsoever with regard to the sufficiency of the evidence supporting the restitution award. Additionally, the district court's order denying Braunstein's petition does not address the matter. Therefore, we conclude that the district court's order must be reversed in part and the case remanded for the limited purpose of conducting a hearing to determine the proper amount of restitution required in district court case no. C158840 (attempted possession of stolen property).

Finally, Braunstein contends that the justice court erred in denying his request to replace his court-appointed counsel. At the beginning of the preliminary hearing, Braunstein informed the court that he believed he was not receiving adequate representation. In this appeal, Braunstein argues that he was entitled to a hearing. This court, however, has repeatedly stated that, generally, the entry of a plea waives any right to appeal from events occurring prior to the entry of the plea.[20] "[A] guilty

---

[19]See id. at 13, 974 P.2d at 135 ("a defendant is not entitled to a full evidentiary hearing at sentencing regarding restitution, but he is entitled to challenge restitution sought by the state and may obtain and present evidence to support that challenge").

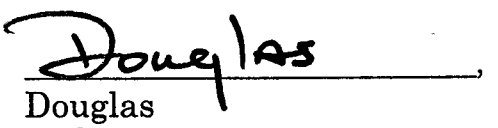
[20]See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

plea represents a break in the chain of events which has preceded it in the criminal process. . . . [A defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[21] Braunstein has not preserved this issue for review on appeal, and it is therefore waived. Therefore, we will not address the issue.[22]

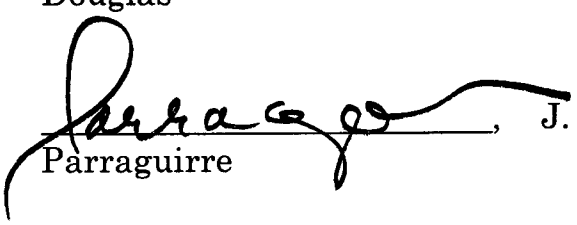
Accordingly, having considered Braunstein's contentions, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for the limited purpose noted above.

_____, J.
Maupin



_____, J.
Douglas



_____, J.
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge
Moran & Associates
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

[21]Id. (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

[22]See NRS 174.035(3).