IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAVID RUTHERFORD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44878
JAMES DAVID RUTHERFORD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44882
JAMES DAVID RUTHERFORD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44884

FILED

JAN 12 2006

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

ORDER OF AFFIRMANCE

These are consolidated appeals from an order of the district court denying appellant James David Rutherford's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On November 13, 1996, in district court case no. CR96-1737, Rutherford was convicted, pursuant to a guilty plea, of one count of fraudulent use of a credit card. The district court sentenced Rutherford to a prison term of 12-36 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 3 years. One of the many terms of Rutherford's probation required him to pay

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$4,600.02 in restitution. Rutherford did not pursue a direct appeal from the judgment of conviction and sentence.

On May 15, 1998, in district court case no. CR97-2266, Rutherford was convicted, pursuant to a guilty plea, of one count of uttering a forged instrument. The district court sentenced Rutherford to a prison term of 12-34 months to run consecutively to the sentence imposed in district court case no. CR97-0133, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 3 years. The probationary period was ordered to run concurrently with the probationary period granted in district court case no. CR97-0133. One of the many terms of Rutherford's probation required him to pay $3,275.00 in restitution. Rutherford did not pursue a direct appeal from the judgment of conviction and sentence.

On April 6, 2001, in district court case no. CR99-1692, Rutherford was convicted, pursuant to a guilty plea, of one count of theft. The district court sentenced Rutherford to serve a prison term of 36-120 months to run consecutively to the sentences imposed in district court case nos. CR96-1737 and CR97-2266, and ordered him to pay $202.50 in restitution. Rutherford's untimely direct appeal from the judgment of conviction was dismissed by this court for lack of jurisdiction.[1] Also, on April 6, 2001, the district court entered orders revoking Rutherford's probation in district court case nos. CR96-1737 and CR97-2266.

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[1]Rutherford v. State, Docket No. 37869 (Order Dismissing Appeal, July 6, 2001).

On March 21, 2002, Rutherford filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, Rutherford raised issues pertaining to all three district court cases. The State filed a motion for partial dismissal of Rutherford's petition. The district court appointed counsel to represent Rutherford and counsel filed an opposition to the State's motion for partial dismissal. On October 29, 2002, the district court entered an order denying the petition. On November 13, 2002, Rutherford filed a motion for reconsideration of the order denying his petition. The district court conducted a hearing and ultimately directed the parties to file additional pleadings. On July 3, 2003, the district court conducted another hearing and found that due to ineffective assistance of counsel, Rutherford was deprived of a direct appeal in district court case no. CR99-1692.[2] As a result, the district court ordered additional briefing pursuant to the mandate of Lozada v. State.[3] On February 8, 2005, the district court entered an order denying all of Rutherford's claims. This timely appeal followed.[4]

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[2]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"); Means v. State, 120 Nev. ___, 103 P.3d 25 (2004).

[3]110 Nev. at 359, 871 P.2d at 950; see also Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).

[4]The appendix submitted by Rutherford in this appeal does not include the initial district court order denying his habeas petition, his motion for reconsideration, or the State's response to the motion for reconsideration filed on November 27, 2002. This court has repeatedly

continued on next page . . .

First, Rutherford contends that the district court erred in finding that the Lozada remedy is constitutionally adequate. Rutherford argues that "conduct[ing] appellate briefing in front of the same court that sentenced a defendant is constitutionally infirm," and therefore, he is entitled to file a belated direct appeal in this court. We disagree with Rutherford's contention. The Lozada remedy is the functional equivalent of a direct appeal, and when a defendant is denied his right to an appeal, as in Rutherford's case, a habeas petition is the proper procedure for raising direct appeal issues that would not otherwise be reviewed.[5] Accordingly, we decline to revisit this issue and conclude that the district court did not err in rejecting this claim.

. . . *continued*
stated that "[a]ppellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (quoting NRAP 30(b)(3)). Nevertheless, our review of the record reveals sufficient documentation for the disposition of this appeal.

[5]See Evitts v. Lucey, 469 U.S. 387, 399 (1985) (expressing approval of a state court's use of a "post-conviction attack on the trial judgment as 'the appropriate remedy for frustrated right of appeal'") (quoting Hammershoy v. Commonwealth, 398 S.W.2d 883 (Ky. 1966)); see also Mann, 118 Nev. 351, 46 P.3d 1228 and Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (approving of the Lozada remedy for meritorious appeal deprivation claims).

Second, Rutherford contends that his Sixth Amendment right to counsel[6] was violated when, without the representation of counsel, he agreed to extend the length of his probationary period in district court case no. CR96-1737. Shane Martin Lees, an officer with the Division of Parole and Probation, testified at the evidentiary hearing that, at the time, he was supervising Rutherford on three separate cases when one of the cases was nearing its probationary expiration date and Rutherford "still owed a sizable amount of restitution." Officer Lees stated that the general practice in such a situation was to offer the probationer the option of extending the probationary period in order to allow for the continued payment of restitution, or alternatively, "we can take you back to Court and recommend that your probation be revoked." On October 20, 1999, Rutherford agreed to extend his probation and signed a waiver of appearance in court. Officer Lees testified that whenever a probationer agrees to a modification of the terms of probation, a waiver is signed and forwarded to the district court. In this appeal, Rutherford claims that he did not voluntarily waive his right to counsel and a hearing and that he was denied access to counsel. We disagree.

Initially, we note that Rutherford has not even alleged that the district court erred in rejecting this claim. Further, we conclude that Rutherford is not entitled to relief. Rutherford is apparently claiming that amending the terms of probation is a critical stage in criminal proceedings requiring counsel under the Sixth Amendment. According to Rutherford's

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[6]U.S. Const. amend. VI.

argument, a probation officer is therefore required to advise a probationer of his right to counsel at such a juncture and actually ensure that counsel has been contacted for the probationer. Rutherford has not offered any cogent argument or relevant authority supporting such a proposition. In fact, case law supports a contrary holding,[7] and several states have expressly refused "to recognize a due process right to a hearing for probation extension or modification."[8]

Additionally, Rutherford has not demonstrated that he was either coerced by Officer Lees into signing the waiver and extending his probation or denied access to counsel. Officer Lees testified at the evidentiary hearing that he did not, in fact, advise Rutherford to consult with counsel prior to extending his probation, and he did not contact Rutherford's counsel, he merely explained options available to Rutherford. Officer Lees also testified that he did not prohibit Rutherford from consulting with counsel, and he denied threatening Rutherford with certain revocation if he did not agree to the extension. Based on all of the

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[7]See U.S. v. Stocks, 104 F.3d 308, 312-13 (9th Cir. 1997) (holding that the advice of counsel prior to modification of terms of probation is not required); United States v. Chambliss, 766 F.2d 1520 (11th Cir. 1985); United States v. Warden, 705 F.2d 189 (7th Cir. 1982).

[8]State v. McDonald, 32 P.3d 1167, 1172 (Kan. 2001); see also State v. Smith, 769 A.2d 698 (Conn. 2001); State v. Hardwick, 422 N.W.2d 922 (Wis. App. 1988); State v. Campbell, 632 P.2d 517 (Wash. 1981), superseded by statute on other grounds as stated in State v. Alberts, 754 P.2d 128 (Wash. 1988); Ockel v. Riley, 541 S.W.2d 535 (Mo. 1976).

above, we conclude that Rutherford has failed to demonstrate that he is entitled to any relief.

Third, Rutherford contends that the district court abused its discretion in revoking his probation in district court case no. CR96-1737. Without citation to case law or any relevant authority, Rutherford claims that "[non]payment of restitution cannot be the only reason for revocation of probation or America has returned to the days of when and why we left England." We disagree.

The decision to revoke probation is within the broad discretion of the district court and will not be disturbed absent a clear showing of abuse.[9] Evidence supporting a decision to revoke probation must merely be sufficient to reasonably satisfy the district court that the conduct of the probationer was not as good as required by the conditions of probation.[10]

Initially, we once again note that Rutherford has failed to even allege that the district court erred in rejecting this claim. Further, Rutherford is unable to demonstrate that the district court abused its discretion in revoking his probation. Rutherford's probation in district court case no. CR96-1737 was revoked on April 6, 2001, when he appeared for sentencing in district court case no. CR99-1692; in that case, Rutherford pleaded guilty to one felony count of theft. There is no indication in the record that Rutherford's probation was revoked due to his

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[9]Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974).

[10]Id.

failure to pay restitution. Instead, the State argued that "revocation of probation is appropriate when a defendant has committed a subsequent felony offense while on probation and admitted to doing that." In fact, Rutherford pleaded guilty to three felony offenses subsequent to his conviction in district court case no. CR96-1737. Accordingly, based on all of the above, we conclude that Rutherford's conduct was not as good as required by the conditions of his probation, and that the district court did not err in rejecting this claim.[11]

Finally, Rutherford contends that the district court erred in rejecting his claim that he received an illegal sentence in district court case no. CR99-1692. Pursuant to NRS 205.0835(4), the district court imposed a prison term of 36-120 months for the one count of theft, a category B felony. At the evidentiary hearing, the district court determined that the amended criminal information, guilty plea memorandum, and judgment of conviction all contained a clerical error. Specifically, those documents listed subsection (3) as the sentencing statute, and NRS 205.0835(3), a category C felony, provides for a prison term of only 1-5 years. On appeal, Rutherford argues that "[t]he Double Jeopardy Clause of the United States Constitution precludes courts from increasing a sentence when the defendant has a reasonable expectation that the sentence is final." Rutherford claims that the district court erred

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[11]See generally McNallen v. State, 91 Nev. 592, 540 P.2d 121 (1975) (revocation of probation affirmed where violation by probationer not refuted).

in refusing to reduce his sentence. We disagree with Rutherford's contention.

> NRS 173.075(3) provides that –
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> > The indictment or information must state for each count the official or customary citation of the statute . . . which the defendant is alleged therein to have violated. Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

In this case, we conclude that the district court did not err in rejecting Rutherford's claim. Our review of the record reveals that although the documents noted above listed subsection (3) as the sentencing statute, Rutherford was advised, at every stage of the proceedings leading up to his sentencing hearing, that he was facing a sentence of 1-10 years. Specifically, we note that (1) the text of the amended criminal information charged Rutherford with an offense consistent with a violation of NRS 205.0835(4); (2) the guilty plea memorandum advised Rutherford that he could be sentenced to a prison term of 1-10 years; (3) at the plea canvass, Rutherford was informed by the State and advised by the district court that he could be sentenced to a prison term of 1-10 years; and (4) at the sentencing hearing, the district court sentenced Rutherford to serve a prison term of 3-10 years. Therefore, we conclude that the record clearly demonstrates that the district court did not err in finding that the clerical mistake did not mislead Rutherford to his detriment.

Accordingly, having considered Rutherford's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk