

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAD JOSEPH FRICKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45742

JAD JOSEPH FRICKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45855

FILED

FEB 24 2006

ORDER OF AFFIRMANCE

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

These are consolidated appeals from an order of the district court denying in part appellant Jad Joseph Fricke's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

In district court case number CR98-2264, Fricke was convicted, pursuant to a guilty plea, of one count of unlawful sale of a controlled substance to a minor. The district court sentenced Fricke to serve a prison term of 20-60 months to run consecutively to the sentence imposed in an unrelated case. Fricke did not pursue a direct appeal from the judgment of conviction.

In district court case number CR98-2062, Fricke was convicted, pursuant to a guilty plea, of attempted murder with the use of a firearm (count I), burglary (count II), and being an ex-felon in possession of a firearm (count III). The district court sentenced Fricke to serve two consecutive prison terms of 96-240 months for count I, a concurrent prison

term of 48-120 months for count II, and a consecutive prison term of 28-72 months for count III. The sentence for count I was ordered to run consecutively to the sentence imposed in district court case number CR98-2264. Fricke was also ordered to pay \$17,123.65 in restitution. Fricke did not pursue a direct appeal from the judgment of conviction.

On December 5, 2000, Fricke filed a timely proper person post-conviction petition for a writ of habeas corpus in district court case number CR98-2062. The district court appointed counsel to represent Fricke and counsel filed a supplement to the petition. In the supplement, among other issues, Fricke claimed that he should be allowed to withdraw his guilty plea in district court case number CR98-2264, despite the fact that a petition in that case would be deemed untimely, because his counsel was ineffective and he was actually innocent of the crime of unlawful sale of a controlled substance to a minor. The State opposed the petition. The district court conducted an evidentiary hearing and denied the petition. The district court found that Fricke failed to establish actual innocence, and therefore, was unable to overcome the procedural defect of a claim pertaining to district court case number CR98-2264. As for the timely claims raised in district court case number CR98-2062, the district court found that counsel was not ineffective and that Fricke's guilty plea was knowingly entered. Fricke timely appealed to this court.

On appeal, Fricke raised issues pertaining to both district court cases. This court rejected all but one of Fricke's claims.¹ We

¹Fricke v. State, Docket No. 39373 (Order Affirming in Part, Reversing in Part and Remanding, August 2, 2002).

concluded that Fricke was improperly deprived of a direct appeal without his consent, and therefore, was entitled to the Lozada remedy.² Specifically, this court stated that on remand, “the district court may consider all issues that could have been raised on direct appeal in case number CR98-2062, except for whether the district court abused its discretion at sentencing, as that issue has already been considered on the merits.”

On remand back to the district court, Fricke filed a petition, which the State opposed, and a reply to the State’s opposition. The district court declined to conduct an evidentiary hearing, and on June 28, 2005, entered an order denying all but one of Fricke’s claims: the district court found that “it was without statutory authority to include lifetime supervision in its sentencing decision” because Fricke “was not convicted of a sexual offense or an attempt to commit one.”³ As a result, the district court also entered an amended judgment of conviction, striking the lifetime supervision requirement from his sentence. This timely appeal followed.

First, Fricke contends that the Lozada remedy is constitutionally inadequate. Fricke claims that asking “the District Court to sit in appellate review of itself makes no sense,” and therefore, he is entitled to file a belated direct appeal in this court. We disagree. The

²Lozada 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. 1001, 103 P.3d 25 (2004).

³See NRS 176.0931.

Lozada remedy is the functional equivalent of a direct appeal, and when a defendant is denied his right to an appeal, as in Fricke's case, a habeas petition is the proper avenue for raising direct appeal issues that would not otherwise be reviewed.⁴ Accordingly, we decline to revisit this issue and conclude that the district court did not err in rejecting this claim.

Second, Fricke contends that the district court erred in not allowing him to withdraw his guilty plea. Specifically, Fricke claims that his guilty plea was coerced by counsel, and therefore, was not entered knowingly and voluntarily. Fricke raised this exact argument in his first appeal in this court. This court rejected Fricke's contention, stating "[t]he district court found that [defense counsel] did not coerce Fricke into pleading guilty, and that Fricke's guilty plea was knowing, voluntary, and intelligent. The district court's finding is supported by the record." Once this court has ruled on the merits of an issue, the ruling is the law of the case and the issue will not be revisited.⁵

Finally, Fricke raises several issues related to the district court's initial imposition of a lifetime supervision requirement as part of

⁴See 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 Gebbers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (approving of the Lozada remedy for meritorious appeal deprivation claims).

⁵See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (stating that the law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same and cannot be avoided by a more detailed and precisely focused argument).

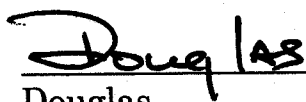
his sentence. During the Lozada proceedings, the district court discovered its error and entered an amended judgment of conviction, striking the requirement. Nevertheless, Fricke now claims that he should be allowed to withdraw his guilty plea and proceed to trial because (1) the district court's remedy of striking the lifetime supervision requirement was inadequate; (2) counsel was ineffective for not objecting to the imposition of the requirement; and (3) he "remains entitled to a jury trial on the question of the sentencing enhancement to the lifetime supervision clause." In effect, Fricke contends that his guilty plea remains somehow invalid even though, with the striking of lifetime supervision requirement, he pleaded guilty to exactly what he intended to. We disagree.


Fricke cannot demonstrate that the district court's sentencing error, and its ultimate correction, affected the validity of his guilty plea in any way. Further, in light of the district court's entry of an amended judgment of conviction correcting its error, Fricke cannot demonstrate that he was prejudiced by counsel's failure to object at the sentencing hearing. Therefore, we conclude that the district court's remedy was proper and that Fricke is not entitled to any additional relief.⁶

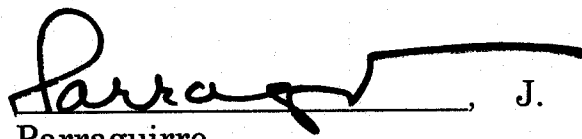
⁶See generally Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994) (remedy for improper imposition of deadly weapon enhancement is vacating the enhancement); Sierra v. State, 100 Nev. 614, 617 n.1, 691 P.2d 431, 432 n.1 (1984) ("We note that in situations in which a defendant has been misinformed of the maximum possible sentence he might receive for a guilty plea, this court will simply modify the defendant's actual sentence to comport with his understanding of the maximum possible sentence.") (citing David v. Warden, 99 Nev. 799, 671 P.2d 634 (1983)).

Having considered Fricke's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

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