

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAN DELGADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45964

FILED

FEB 17 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant's motion to modify his sentence or, in the alternative, motion to withdraw the guilty plea. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Adan Delgado contends that the district court abused its discretion by denying his post-conviction motion to withdraw his guilty plea because his plea was based on an illusory promise. In particular, Delgado argues that his guilty plea was induced by the promise of probation that was legally impossible due to his immigration status. Delgado further argues that the State breached the plea agreement because "[i]nstead of assisting Delgado in his desire to complete his probation," the Division of Parole and Probation actively assisted the Division of Homeland Security in arresting Delgado. Finally, Delgado argues that he should be allowed to withdraw his plea because the Division has a policy to recommend confinement for illegal aliens and that "policy is clearly meant to thwart any pleas or negotiations that Defendants such as Mr. Delgado enter into." We conclude that Delgado's contentions lack merit.

NRS 176.165 provides, in part, that a defendant may be permitted to withdraw his guilty plea after sentencing "[t]o correct manifest injustice." This court presumes "that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion."¹

We conclude that Delgado has not demonstrated that there has been a manifest injustice. The plea bargain was not illusory and, in fact, Delgado received a substantial benefit in that the State fulfilled its promise to dismiss the conspiracy to commit murder count and the attempted murder count and recommend probation.² We further note that, prior to pleading guilty, Delgado was advised that he could be deported if he was not a United States citizen. Finally, Delgado has failed to show that the Division of Parole and Probation discriminated against him based on his illegal immigration status and, to the contrary, Delgado actually received probation in this case. Accordingly, the district court did not abuse its discretion by denying the motion.

Citing to Roper v. Simmons,³ Delgado also argues that his sentence constitutes cruel and unusual punishment. Specifically, Delgado argues that the prison sentence is too harsh given his age and the fact that he attempted in good faith to comply with the conditions of his probation.

¹Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

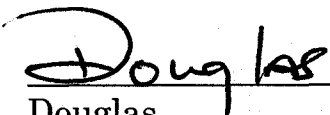
²Cf. Gamble v. State, 95 Nev. 904, 909, 604 P.2d 335, 338 (1979) ("if the bargain which is part of the inducement of the plea is removed, the plea itself becomes a nullity").

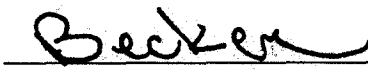
³543 U.S. 551 (2005) (holding that the constitutional prohibition of cruel and unusual punishment precludes the execution of offenders who were under 18 years of age when their crimes were committed).

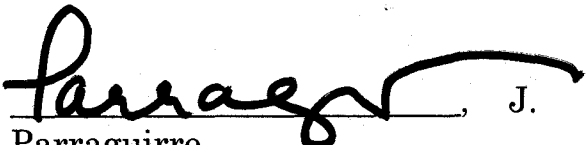
Delgado waived his right to challenge the severity of the sentence imposed by failing to raise it on direct appeal from the judgment of conviction.⁴ We therefore decline to consider it. To the extent that Delgado contends that the district court abused its discretion in denying his motion to modify his sentence, we reject that contention. Delgado has failed to show that his sentence was illegal, or that the district court based his sentence on a mistaken assumption that worked to his extreme detriment.⁵

Having considered Delgado's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

⁴See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁵See Edwards v. State, 112 Nev. 704, 707-08, 918 P.2d 321, 324 (1996).

cc: Honorable Jackie Glass, District Judge
Theresa M. Quackenbush
Joseph A. Scalia II
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk