

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY CLAYTON, AKA TERRY LEE
CLAYTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46434

FILED

AUG 23 2006

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

ORDER OF AFFIRMANCE IN PART AND
DISMISSING APPEAL IN PART

This is a proper person appeal from an order of the district court denying a document labeled "motion for specific performance," and an appeal from the judgment of conviction and amended judgment of conviction. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On March 18, 2003, the district court convicted appellant, pursuant to a guilty plea, of five counts of attempted sexual assault, one count of attempted lewdness with a minor under the age of fourteen (Category C felony), and two counts of attempted lewdness with a minor under the age of fourteen (Category B felony). The district court sentenced appellant to serve five consecutive terms of 36 to 240 months in the Nevada State Prison for the attempted sexual assault counts and concurrent terms of 12 to 32 months for the Category C lewdness count and 24 to 96 months for each of the Category B lewdness counts. No direct appeal was taken.

On March 18, 2003, appellant filed a motion to withdraw the guilty plea in the district court. The State opposed the motion. On April 11, 2003, the district court denied the motion. No appeal was taken.

On July 15, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On October 7, 2003, the district court denied the petition. This court dismissed appellant's subsequent appeal because the notice of appeal was untimely filed.¹

On July 19, 2005, appellant filed a motion to withdraw the guilty plea. On August 9, 2005, the district court denied the motion. No appeal was taken.

On September 21, 2005, appellant filed a proper person document labeled "motion for specific performance." The State opposed the motion. Appellant filed a response. On October 20, 2005, the district court amended the judgment to reflect that the sentence for count 5 was a term of 24 to 240 months, and on June 19, 2006, the district court denied his motion. Appellant then filed notices of appeal from the order denying his motion for specific performance, the judgment of conviction and the amended judgment of conviction.²

Appeal from the Denial of the Motion for Specific Performance

In his motion, appellant contended that he should be allowed to withdraw his guilty plea because the district court imposed a sentence greater than he bargained for in the plea negotiations. Appellant claimed

¹Clayton v. State, Docket No. 42597 (Order Dismissing Appeal, February 19, 2004).

²Subsequent to the decision on the motion, appellant filed a request for the appointment of counsel. The district court denied the request. To the extent that appellant appeals from the denial of his request, this court dismisses the appeal as no court rule or statute permits an appeal from a decision of the district court denying a request for counsel. See Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

that he entered a conditional plea to a minimum sentence of no greater than fourteen years, but that the district court imposed a minimum sentence of fifteen years. Pursuant to the terms of the plea agreement, he was to be allowed to withdraw the plea if the district court was inclined to give a sentence greater than fourteen years. Appellant sought to withdraw his guilty plea.

Because appellant sought to withdraw his guilty plea, we conclude that appellant's motion is properly construed to be a post-sentence motion to withdraw the guilty plea.³ This court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches.⁴ Application of the doctrine requires consideration of various factors, including: "(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State."⁵ Failure to identify all grounds for relief in a prior proceeding seeking relief from a judgment of conviction should weigh against consideration of a successive motion.⁶

Based upon our review of the record on appeal, we conclude that appellant's motion is subject to the equitable doctrine of laches. Appellant filed his motion approximately two and one-half years after the judgment of conviction was entered. Appellant's claim was reasonably available to him immediately following entry of the original judgment of

³See NRS 176.165.

⁴See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

⁵Id. at 563-64, 1 P.3d at 972.

⁶Id. at 564, 1 P.3d at 972.

conviction in 2003. Yet, appellant waited until 2005 to raise the claim. Appellant failed to provide any explanation for the delay. Appellant previously pursued two motions to withdraw the guilty plea and a post-conviction petition for a writ of habeas corpus. Appellant failed to demonstrate that could not have litigated the claim in a more timely fashion. Finally, it appears that the State would suffer prejudice if it were forced to proceed to trial after such an extensive delay. Accordingly, we conclude that the doctrine of laches precludes consideration of appellant's motion on the merits, and we affirm the order of the district court denying his motion.⁷

Appeal from the Judgment of Conviction and Amended Judgment of Conviction

It appears that in filing his third notice of appeal, appellant was attempting to appeal from the judgment of conviction and the amended judgment of conviction. This court's review of this portion of the appeal reveals a jurisdictional defect. Specifically, the district court entered the judgment of conviction on March 18, 2003, and the amended judgment of conviction on October 20, 2005. Appellant did not file the notice of appeal, however, until December 20, 2005, well after the expiration of the thirty-day appeal period prescribed by NRAP 4(b). An

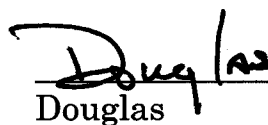
⁷Although appellant's motion was precluded by the equitable doctrine of laches, the district court amended the judgment of conviction to reflect a combined minimum term of fourteen years as set forth in the plea negotiations. Because there is no indication that the district court was refusing to follow the terms of the conditional plea, it appears that the amendment was a correction of a misstatement at sentencing, and as such, the district court did not abuse its discretion in amending the judgment of conviction.


untimely notice of appeal fails to vest jurisdiction in this court.⁸ Accordingly, we conclude that we lack jurisdiction to consider the appeal from the judgment of conviction and amended judgment of conviction, and we dismiss this portion of the appeal.

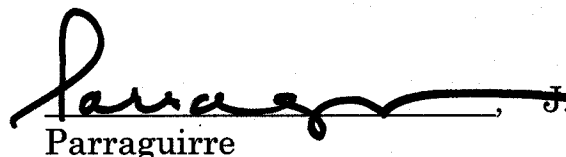
Conclusion

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED in part and the appeal DISMISSED in part.¹⁰

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

⁸See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Honorable Jackie Glass, District Judge
Terry Clayton
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk