IN THE SUPREME COURT OF THE STATE OF NEVADA

RODERICK LAMAR HYMON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46515

FILED

SEP 0 6 2006

TRACIE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On April 15, 2003, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon, larceny from the person, and assault with a deadly weapon. The district court adjudicated appellant a habitual criminal, and sentenced appellant to serve two consecutive terms and one concurrent term of life in the Nevada State Prison with the possibility of parole after ten years have been served. This court affirmed appellant's conviction on direct appeal.[1] The remittitur issued on August 23, 2005.

[1]Hymon v. State, 121 Nev. ___, 111 P.3d 1092 (2005).

06-18426

On August 19, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 6, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel.[2] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

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[2]Appellant represented himself at trial, but was represented by counsel during pre-trial proceedings. To the extent appellant raised any of his claims independently of his ineffective assistance of counsel claims, we conclude they were waived by appellant's failure to raise them on direct appeal, and appellant failed to demonstrate good cause and prejudice sufficient to overcome that procedural bar. See NRS 34.810(1)(b); NRS 34.810(3).

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

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

Specifically, appellant claimed counsel acted as an "agent of the State" at the preliminary hearing and was ineffective for failing to move for a line-up at the preliminary hearing. It is unclear whether appellant was referring to a physical line-up, a photographic line-up, or something entirely different, nor it is even clear that such a procedure would be feasible during a preliminary hearing. Nevertheless, we conclude that counsel's decision was tactical, as it may have hurt appellant's case to be picked out of any kind of line-up at the preliminary hearing. Counsel's tactical decisions are "'virtually unchallengeable absent extraordinary circumstances,'"[5] which we conclude are not present here. Appellant also claimed counsel forced him to waive his preliminary hearing, but the record reflects counsel stated he was prepared to go forward, and appellant on his own asked to waive the hearing. Appellant also claimed counsel made negative statements about him to the State and the court, but raised no facts to support this claim.[6] Accordingly, we conclude the district court did not err in rejecting this claim.

Appellant also contended that he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of

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[5]See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990)).

[6]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[7] Appellate counsel is not required to raise every non-frivolous issue on appeal.[8] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[9]

First, appellant contended counsel was ineffective for failing to argue that appellant's judgment of conviction did not award him all the jail time credits to which he was entitled. Our review of the record on appeal reveals that appellant was arrested on April 28, 2001, and sentenced on April 3, 2003. This is approximately 700 days, but appellant only received credit for 285 days. Accordingly, this court ordered the State to show cause why this claim should not be remanded to the district court for a hearing on this matter. In its response to our order, the State did not oppose such a remand. Accordingly, we remand this matter to the district court for a hearing to establish whether appellant's judgment of conviction correctly reflects the amount of jail time credits to which appellant is entitled.

Second, appellant contended that appellate counsel was ineffective for failing to properly argue that the district court erred by not

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[7]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

[8]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[9]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

exercising its discretion in adjudicating him a habitual criminal, as required by NRS 207.010. We agree. This issue appears to have stemmed from a possible misapprehension by the State and the district court about the differences between the habitual criminal statute, NRS 207.010, and the habitual felon statute, NRS 207.012. There are two problems here: the first is that while all of appellant's three convictions were eligible for habitual criminal treatment, the district court was required to exercise discretion before adjudicating appellant a habitual criminal. No discretionary finding appears to have been made. The second is that although appellant's sentence on the robbery charge would be valid under the habitual felon statute without a discretionary finding by the district court, the State failed to properly notify appellant of its intent to seek habitual felon treatment. Thus, it appears that appellant's sentences for all three convictions may be invalid.

The habitual criminal statute gives the State the discretion to seek habitual criminal treatment of a defendant who has at least two prior felonies.[10] The district court, in turn, must exercise discretion in determining whether habitual criminal treatment is appropriate in the particular circumstances.[11] In contrast, the habitual felon statute requires the State to include a charge of habitual felon if the defendant is charged with an enumerated crime and has at least two prior enumerated

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[10]NRS 207.010(1)(a), (2).

[11]NRS 207.010(2).

felony convictions.[12] The habitual felon statute gives the district court no discretion to determine whether a habitual felon finding is appropriate; a finding of habitual felon status is mandatory once the State proves the prior felonies.[13]

The judgment of conviction indicates appellant was adjudicated a habitual criminal and sentenced accordingly on all three convictions. However, our review of the record on appeal indicates the district court may not have exercised discretion in adjudicating appellant a habitual criminal. In fact, our review of the record indicates the district court may have misapprehended whether appellant was being charged as a habitual criminal, a habitual felon, or both, and what was required under the two statutes. At the sentencing hearing, the district court stated "you are adjudged guilty to. . . robbery with use of a deadly weapon includes habitual violent felony; larceny from the person, again includes the habitual; assault with a deadly weapon, again, includes the habitual."[14] This would suggest the district court was referring to habitual felon treatment, which bars the district court from exercising discretion. Further, the district court made no comments about appellant's record, his present crimes, or anything else to indicate it weighed whether a habitual criminal finding was appropriate in

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[12]NRS 207.012(2).

[13]NRS 207.012(3).

[14]Emphasis added.

appellant's case. At the close of the sentencing, the following exchange took place between appellant, his standby counsel, Mr. Denue, and the district court:

> APPELLANT: Is it proper and just?
>
> MR. DENUE: That's what we're here to --
>
> APPELLANT: No. He's supposed to tell me is it proper and just. Why did you give me habitual criminal? Why is he doing it?
>
> THE COURT: For the record – because you qualify. For the --
>
> APPELLANT: Thank you very much.

The State also appears to have been confused by the two statutes. After the State went over appellant's prior convictions and noted that appellant had finished serving a prison term just a few weeks before committing one of the qualifying prior robberies, the State advised the district court that, even if did not consider a prior felony that appellant was disputing, appellant still had a total of four "qualifying felonies, so he is a mandatory habitual felon under NRS 207.012." This was incorrect; although appellant did have four prior felonies, only two of them were enumerated as qualifying felonies by the habitual felon statute.[15] Further, the State failed to follow up its statement by noting that only appellant's robbery conviction was eligible for habitual felon treatment and that

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[15]NRS 207.012(2).

larceny from the person and assault with a deadly weapon are not eligible, per the statute, for habitual felon treatment.[16]

In addition, although the habitual felon statute would render appellant's sentence on the robbery charge valid without a discretionary finding, the State appears not to have given appellant proper notice that it intended to seek habitual felon treatment for the robbery charge. The information filed by the State on October 22, 2002 charged appellant as a habitual criminal under NRS 207.010; it also purported to charge him as a habitual felon, but erroneously cited NRS 207.010, not NRS 207.012, as the authority for that charge.

Thus, our review of the record on appeal indicates that the district court may have been under the erroneous impression that all three of appellant's convictions required mandatory habitual felon treatment and that no discretionary finding was required or allowed. Without a discretionary finding of habitual criminality, only appellant's robbery sentence would be valid; however, due to the mistake in the charging information, appellant may not have been provided with adequate notice that habitual felon treatment was being sought, and the robbery sentence would be invalid as well. It therefore appears to this court that appellate counsel may have been ineffective for failing to argue that appellant's sentence was improper and invalid. Failure to challenge a facially invalid sentence is objectively unreasonable when it results in a defendant serving

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[16]See id.

a longer sentence than allowed by law; appellant was prejudiced by counsel's failure because he was sentenced based on a habitual criminal adjudication without the required discretionary finding. We foresee no tactical reason to explain counsel's failure to raise such an argument.

Accordingly, this court ordered the State to show cause why this matter should not be remanded for further proceedings. In its response to the order to show cause, the State argued that this claim was barred by the law of the case because appellant argued it in his direct appeal.[17] We disagree. Appellate counsel on direct appeal only argued that the judgment of conviction failed to specify which statute had been used to subject appellant to habitual offender treatment; counsel did not argue that a finding under both statutes was required in this case and that use of only one statute, regardless of which, would render at least two of the sentences invalid. Because counsel did not make this argument and this court did not address the claim on its merits, it was not barred by the law of the case.[18]

Therefore, we remand this matter for further proceedings consistent with this order. If the district court determines counsel was ineffective, it should conduct a new sentencing hearing, after ensuring the State files notices of intent to seek habitual felon and/or habitual criminal

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[17]See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

[18]See id.

treatment that properly notify appellant of the State's intentions by citing to the correct statute.

Third, appellant claimed appellate counsel was ineffective for failing to challenge counsel's performance at the preliminary hearing on direct appeal. As stated above, this claim lacked merit, and the district court did not err in rejecting this claim.

Fourth, appellant claimed appellate counsel was ineffective for failing to argue that the bailiff at the preliminary hearing threatened to duct tape appellant's mouth shut. This claim was belied by the record,[19] which indicates that the bailiff did stand appellant up and instruct him to be quiet, but did not threaten to duct tape appellant's mouth shut. Accordingly, we conclude the district court did not err in rejecting this claim.

Fifth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred in denying his request for a continuance on the day of the preliminary hearing so he could obtain private counsel.[20] Our review of the record indicates appellant had almost three weeks to obtain private counsel before the hearing. The public defender and the State were ready to proceed with the hearing, and appellant admitted he had made no attempts to obtain private counsel

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[19]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[20]See NRS 171.196.

before the preliminary hearing. Accordingly, we conclude the district court did not err in rejecting this claim.

Sixth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by denying appellant's pretrial motion to dismiss without a hearing despite the State's failure to include Points and Authorities in its response to appellant's motion. The record belies these contentions.[21] The State did include Points and Authorities in its response, and the district court minutes indicate the motion was heard and denied on September 11, 2001. Accordingly, we conclude the district court did not err in rejecting this claim.

Seventh, appellant claimed appellate counsel was ineffective for failing to argue that the district court conducted an insufficient Faretta[22] canvass. This claim is belied by the record.[23] This court found on direct appeal that the Faretta canvass was sufficient.[24] Accordingly, we conclude the district court did not err in rejecting this claim.

Eighth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias when it

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[21]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[22]See Faretta v. California, 422 U.S. 806 (1975).

[23]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[24]Hymon, 121 Nev. at ___, 111 P.3d at 1102.

refused to instruct the jury that the charge of drawing a deadly weapon in a threatening manner[25] was a lesser included offense of robbery and of assault with a deadly weapon. "[I]f the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense" of the second offense.[26] An instruction on a lesser included offense may properly be refused when "the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial tending to reduce the greater offense" to the lesser offense.[27] Our review of the record in this case indicates the prosecution had met its burden of proving the elements of robbery with the use of a deadly weapon and assault with a deadly weapon, and the district court therefore properly refused the instruction. Accordingly, we conclude the district court did not err in rejecting this claim.

Ninth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by limiting appellant's opening and closing arguments. In his opening argument, appellant attempted to discuss the law, and the district court instructed him he could only argue what he believed the evidence would show. This

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[25]NRS 202.320.

[26]Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[27]Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966) (emphasis in original).

was not an error.[28] In his closing argument, the district court stopped appellant from reading case law to the jury. This was proper under Cosey v. State.[29] Appellant also claimed the district court stopped him from reading NRS 200.380, 193.165, 205.270, and 175.211 to the jury. This claim is belied by the record, which does not indicate appellant attempted to read these statutes during closing.[30] Accordingly, we conclude the district court did not err in rejecting this claim.

Tenth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by giving an erroneous flight instruction to the jury. Appellant claimed he ran to get away from the victim. "Where there is evidence . . . of flight as a deliberate attempt to avoid apprehension, a flight instruction is proper."[31] We conclude the instruction was proper; one witness testified that he saw appellant running with the victim's purse in his hand and he chased appellant, and the arresting officer also testified that appellant ran from her. Accordingly, we conclude the district court did not err in rejecting this claim.

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[28]See, e.g., Leonard v. United States, 277 F.2d 834, 841 (9th Cir. 1960) (holding that an opening statement should be limited to a statement of facts that counsel expects or intends to prove and should not be argumentative).

[29]93 Nev. 352, 566 P.2d 83 (1977).

[30]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[31]McGuire v. State, 86 Nev. 262, 266, 468 P.2d 12, 15 (1970).

Eleventh, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by refusing appellant's request to give "cautionary jury instruction on alleged confession to police not notifying jury of circumstances for allowing confession," "cautionary identity jury instructions," and "impeachment witness jury instructions." This claim is belied by the record,[32] which indicates appellant did not request such instructions. Accordingly, we conclude the district court did not err in rejecting this claim.

Twelfth, appellant claimed appellate counsel was ineffective for failing to argue that the district court misstated the law to the jury by telling them during the victim's testimony that larceny from the person did not require a taking from the person, only the taking of something of which the victim was in control or had the right to control. We conclude the error was harmless. The jury instruction correctly defined larceny from the person as requiring a taking from the person. The victim testified numerous times that the strap of the purse was around her finger, and the property was therefore on her person. Accordingly, we conclude the district court did not err in rejecting this claim.

Thirteenth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by refusing to issue an order to the jail allowing appellant to see an eye doctor to obtain prescription eyeglasses for use at trial. This claim is

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[32]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

belied by the record.[33] The district court issued the order, but it was not carried out before trial. Accordingly, we conclude the district court did not err in rejecting this claim.

Fourteenth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by refusing to let him call two attorneys to the stand to "help marshall [sic] the law to the jury of the case." We disagree. It is the court's province to instruct the jurors on the law. Accordingly, we conclude the district court did not err in rejecting this claim.

Fifteenth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by allowing the State to file a third and fourth amended information. Appellant failed to show the filing of the third amended information prejudiced him, as the only change was dropping the deadly weapon enhancement from the robbery charge. The fourth amended information added the enhancement back in, and was filed two weeks before trial. However, appellant and his counsel were present when the State sought to file the fourth amended information, and did not object. Further, appellant had notice that the State was considering charging use of a deadly weapon, as the first and second amended informations both included the enhancement. Accordingly, we conclude the district court did not err in rejecting this claim.

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[33]See id.

Sixteenth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by ordering psychiatric evaluations of appellant before trial. However, appellant had withdrawn his Faretta waiver and was represented by counsel when the district court issued this order, and the order was issued upon defense counsel's motion. Accordingly, we conclude the district court did not err in rejecting this claim.

Seventeenth, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred and showed bias by ordering, or allowing the State to order, the Parole and Probation department to amend the PSI to recommend habitual felon treatment. We disagree. The change to the PSI was required, as habitual felon treatment was mandatory pursuant to the NRS 207.012 due to appellant's prior felonies. Accordingly, we conclude the district court did not err in rejecting this claim.

Eighteenth, appellant claimed appellate counsel was ineffective for failing to argue that appellant was denied the right to be represented at sentencing. Our review of the record on appeal reveals that appellant's Faretta waiver was still in effect at sentencing, and that when the sentencing began, appellant indicated he wanted to represent himself. Accordingly, we conclude the district court did not err in rejecting this claim.

Nineteenth, appellant claimed appellate counsel was ineffective for failing to argue that habitual felon treatment was improper

because two of the robberies supporting habitual felon treatment were "on same complaint."[34] However, appellant's PSI suggests the two robberies at issue were two different crimes, and the subject of two different cases. Appellant submitted no exhibits or facts to support his claim that the cases were consolidated and could only be counted as one prior conviction.[35] Appellant also contended the State denied him "complete discovery for sentencing to submit complaint and transcripts of negotiation" to bolster his claim that the two robberies could only be counted as one prior felony. Appellant failed to specify what documents existed, how they would have supported his claim, or that they were unavailable to him through any process but discovery from the State.[36] Accordingly, we conclude the district court did not err in rejecting this claim.

Twentieth, appellant claimed appellate counsel was ineffective for failing to argue that the district court relied on an "infirm felony conviction in a traffic stop for battery by a prisoner" in giving him habitual criminal treatment, and that the district court denied him "complete

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[34]See generally Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979) (holding that, for the purposes of applying the habitual criminal statute, convictions that "grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information," only count as one prior conviction).

[35]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[36]See id.

discovery for sentencing to submit police reports." The PSI reflects a 1984 conviction for battery by a prisoner (felony). Appellant failed to state how this conviction was infirm, or that he ever sought these documents himself.[37] Accordingly, we conclude the district court did not err in rejecting this claim.

Twenty-first, appellant claimed appellate counsel was ineffective for failing to argue that the State violated Brady v. Maryland[38] by not turning over the investigation report of the first prosecutor on the case, Danae Adams. Appellant claimed the second prosecutor induced the victim to change her testimony and say that she had her finger hooked into the purse strap; appellant claimed Adams' report would reveal the victim's original version of events, which was that the purse was on a chair and the victim was not touching it. Appellant failed to show such a report even existed, or that it would be material and exculpatory. The victim testified that she told the first officer she spoke to that she had her finger in the purse strap, and that no one had told her to change her testimony. Accordingly, we conclude the district court did not err in rejecting this claim.

Twenty-second, appellant claimed appellate counsel was ineffective for failing to argue that appellant could not be convicted of both larceny from the person and robbery, because the former is a lesser

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[37]See id.

[38]Brady v. Maryland, 373 U.S. 83 (1963).

included offense of the latter. This argument could only have merit if the two convictions were for the same act. However, appellant's larceny from the person and robbery charges stemmed from two entirely different acts: larceny from the person for taking the victim's purse from her grasp, and robbery for using the threat of force to retain possession of the purse from persons who were in the victim's company when her purse was taken.[39] Thus, both convictions were proper. Appellant also claimed Estabillo and Turner, two store employees who chased appellant after he took the victim's purse, were not in the victim's presence when the purse was taken, and counsel was ineffective for failing to argue that the robbery conviction could not stand.[40] We disagree. Turner testified they were six feet from the door into the waiting area, where the victim was. Estabillo and Turner were also close enough that, when they heard the victim scream and turned around, they saw appellant running out of the waiting area. Accordingly, we conclude the district court did not err in rejecting these claims.

Twenty-third, appellant claimed appellate counsel was ineffective for failing to argue that appellant was unable to see during trial due to his poor eyesight. The record belies this claim.[41] During trial, appellant used exhibits and read from documents and never complained

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[39]See NRS 200.380(1).

[40]See id.

[41]See Hargrove, 100 Nev. at 503, 686 P.2d 225.

he could not see anything. Accordingly, we conclude the district court did not err in rejecting this claim.

Twenty-fourth, appellant claimed appellate counsel was ineffective for failing to argue that the evidence supporting the assault with a deadly weapon charge was insufficient because the State never proved how far appellant was from Turner when appellant swung the knife at Turner. The record belies this claim.[42] At trial, Turner indicated a distance, but no one estimated that distance for the record. However, the exchange between Turner and the State suggests Turner was close enough to touch appellant: "Q: 'Did you touch him? Or?' A: 'No. He had the knife.'" Accordingly, we conclude the district court did not err in rejecting this claim.

Appellant's claims that the district court erred and showed bias when it received an ex parte communication and did not disclose the communication, that a pocketknife with a four-inch blade is a tool, not an inherently dangerous weapon, and that the evidence supporting his conviction for robbery with the use of a deadly weapon was insufficient were decided against appellant in his direct appeal.[43] Relitigation of these claims is barred by the law of the case.[44]

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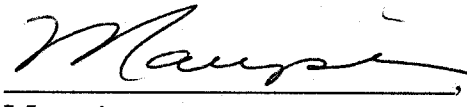
[42]See id.

[43]Hymon, 121 Nev. at ___ n. 2, 111 P.3d at 1097 n. 2.

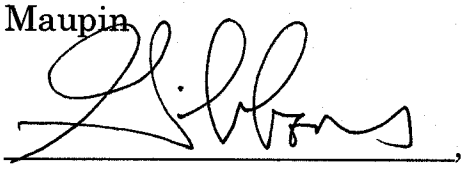
[44]See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is entitled to relief as stated above and that briefing and oral argument are unwarranted.[45] Accordingly, we

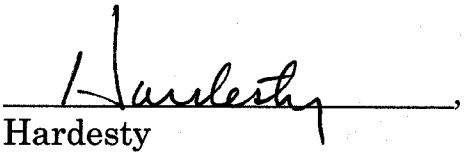
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[46]



_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

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

[46]We 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. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Eighth Judicial District Court Dept. 16, District Judge
Roderick Lamar Hymon
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk