IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT N. WORDLAW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47073

FILED

JAN 11 2007

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

ORDER AFFIRMING IN PART
AND DISMISSING IN PART

This is a proper person appeal from orders of the district court denying a motion to correct an illegal sentence and a separate motion for a new trial. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. For the reasons stated below, we affirm the district court's order denying the motion for a new trial, and we dismiss for lack of jurisdiction that portion of the appeal from the order denying the motion to correct the alleged illegal sentence.

Factual and procedural history

The State filed an information charging appellant Robert Wordlaw with battering the victim, Andrea Jones, with the use of a deadly weapon (a beer bottle). Jones did not appear to testify against Wordlaw at his preliminary hearing or his trial. Nevertheless, on December 11, 2002, the jury found Wordlaw guilty as charged.

Prior to sentencing, Wordlaw's trial counsel filed a motion for a new trial based on newly discovered evidence. The district court conducted a hearing on the motion. Defense counsel presented evidence at the hearing establishing that more than three weeks after the trial ended,

Jones delivered an affidavit to the office of Wordlaw's counsel, recanting her prior statement to the police that Wordlaw had beaten her with a beer bottle. Defense counsel argued that the affidavit was newly discovered evidence, that Jones was now locatable and available to testify, and that a different result would be reasonably probable if her testimony was presented at a new trial.

The district court denied the motion and subsequently adjudicated Wordlaw a habitual criminal pursuant to NRS 207.010. The district court then sentenced Wordlaw to serve a term of ten to twenty-five years in the Nevada State Prison. This court affirmed the conviction and the district court's denial of the motion for a new trial on direct appeal.[1] The remittitur issued on February 24, 2004.

On June 22, 2004, Wordlaw filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On May 11, 2005, the district court entered an order denying the petition. On appeal, this court affirmed the district court's order.[2]

On August 25, 2005, Wordlaw filed a proper person motion to correct an illegal sentence in the district court. The State filed an opposition, and on September 16, 2005, the district court denied the motion. On February 24, 2006, Wordlaw filed a proper person motion for a new trial in the district court. The State filed an opposition, and on March

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[1]Wordlaw v. State, Docket No. 40988 (Order of Affirmance, January 27, 2004).

[2]Wordlaw v. State, Docket No. 45238 (Order of Affirmance, November 10, 2005).

16, 2006, the district court denied the motion. This appeal from the district court's orders of September 16, 2005, and March 16, 2006 followed.

The proper person motion for a new trial

In his proper person motion for a new trial, Wordlaw presented a letter dated December 23, 2005, from the property manager of the apartment complex where Jones formerly resided. The letter stated that Jones moved into an apartment in the complex in August of 2002 and moved out in February of 2003, when she was evicted. Wordlaw argued that this letter was newly discovered evidence warranting a new trial because it demonstrated that Jones was still residing at the same address where the alleged battery occurred throughout his initial trial. Thus, he claimed, the letter contradicted the statements of the prosecutor and his counsel at the trial that Jones could not be located to testify at the preliminary hearing and trial. The district court rejected Wordlaw's contentions and denied the motion.

To warrant a new trial, newly discovered evidence must meet the following requirements:

> (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.[3]

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[3]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

The grant or denial of a new trial based on newly discovered evidence is within the discretion of the trial court and will not be reversed absent an abuse.[4] Further, newly discovered evidence must be presented within two years from the verdict.[5] We conclude that the district court did not abuse its discretion in denying appellant's proper person motion.

First, Wordlaw's proper person motion failed to establish that the information in the property manager's letter was newly discovered evidence that could not have been produced for trial, or that the information in the letter refuted either the prosecutor's or his trial counsel's representations at trial that Jones could not be located. The mere fact that Jones was not evicted from her apartment until February 2003 does not establish that she could have been located at the apartment and produced as a witness at Wordlaw's preliminary hearing or trial.

Second, this court has previously concluded on appeal that the district court did not err in rejecting Wordlaw's first motion for a new trial based on Jones' belated affidavit denying that Wordlaw battered her with a beer bottle. In our order affirming the judgment of conviction, this court explained:

> The district court also noted that the new evidence would have been countered by the three police officers who testified at trial that the victim informed them that Wordlaw did indeed strike her over the head with a bottle. Additionally, when the officers knocked down the apartment door

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[4]Funches v. State, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997).

[5]NRS 176.515(3).

> after hearing sounds of an attack, they testified that they saw Wordlaw holding the neck of a beer bottle in his hand. Therefore, the district court concluded that the evidence presented in the notarized statement would not render a different result probable upon retrial. We agree and conclude that the district court did not err or abuse its discretion in denying Wordlaw's motion because the evidence in question, based on all of the above, does not establish grounds for a new trial.[6]

Third, in our prior order affirming the district court's denial of Wordlaw's post-conviction petition for a writ of habeas corpus, this court explained that there was no indication in the record that the State and the defense did not use due diligence in attempting to locate Jones. We further noted that trial counsel stated that at the time of trial, she did not know how to locate Jones, that Jones did not appear at the preliminary hearing, and in fact a bench warrant had been issued for her arrest with respect to a pending misdemeanor case in Las Vegas.

Thus, to the extent that Wordlaw contends that a different result is reasonably probable if he were to be granted a new trial based on Jones' partial recantation, that issue has been extensively litigated previously and rejected by both the district court and this court. This court's prior decision on that issue is the law of the case and bars reconsideration of the issue.[7] We emphasize that, even if defense counsel's

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[6]Wordlaw v. State, Docket No. 40988 (Order of Affirmance, January 27, 2004) at page 6.

[7]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

performance at trial may have fallen below an objective standard of reasonableness with respect to assuring Jones' presence, this court and the district court have already concluded that her testimony would not have made a different result reasonably probable due to the overwhelming evidence presented at trial that Wordlaw struck Jones with a beer bottle.

Finally, Wordlaw failed to produce the property manager's letter within the time required by statute. NRS 176.515(3) provides that "a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt." Here, the jury returned its verdict finding Wordlaw guilty as charged on December 11, 2002. Wordlaw did not file his motion for a new trial until February 24, 2006, well after the 2-year statutory period. Thus, the district court did not err in denying Wordlaw's motion for a new trial for this reason as well.

The motion to correct an illegal sentence

As noted, the district court entered the written order denying Wordlaw's proper person motion to correct an illegal sentence on September 16, 2005. Wordlaw did not file the notice of appeal, however, until April 4, 2006, well after the expiration of the thirty-day appeal period prescribed by NRAP 4(b). An untimely notice of appeal fails to vest jurisdiction in this court.[8] Accordingly, this court lacks jurisdiction to consider that portion of the appeal challenging the district court's order of September 16, 2005, and we order that portion of the appeal dismissed.

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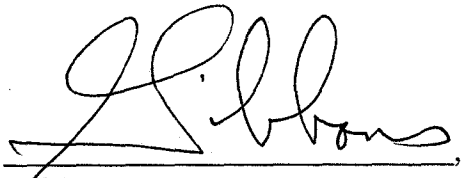
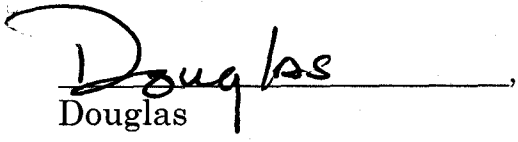
[8]Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Wordlaw is not entitled to relief and that briefing and oral argument are unwarranted.[9] Accordingly, we affirm the district court's order denying Wordlaw's proper person motion for a new trial, and we dismiss as untimely that part of Wordlaw's appeal challenging the order of the district court denying the motion to correct an illegal sentence.

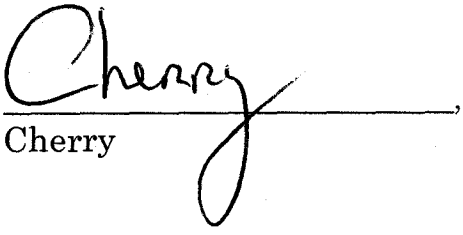
IT IS SO ORDERED.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. Donald M. Mosley, District Judge
Robert N. Wordlaw
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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