IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL BENNET NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47285

FILED

AUG 0 1 2006

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

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On February 26, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault on a minor under the age of sixteen years. The district court sentenced appellant to serve two consecutive terms of five to twenty years in the Nevada State Prison. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.[1]

On April 5, 2006, appellant filed a proper person motion to withdraw a guilty plea in the district court. The State opposed the motion. On May 3, 2006, the district court summarily denied appellant's motion. This appeal followed.

In his motion, appellant claimed that his guilty plea was not entered knowingly and voluntarily because he was not informed of the constitutional rights he waived by entry of his guilty plea and because he was not advised that his offenses were not probationable. In relation to

[1]Nelson v. State, Docket No. 45321 (Order Dismissing Appeal, July 6, 2005).

the latter claim, appellant further asserted that he had been misinformed that he could receive probation if he was certified that he did not pose a high risk to reoffend when in fact probation is not available to a defendant who commits the crime of sexual assault.[2]

A motion to withdraw a guilty plea filed after sentencing will only be granted to "correct manifest injustice."[3] A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.[4] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[5] Information about whether probation is available is a direct consequence of the plea, and a defendant must be correctly informed about the availability of probation.[6]

The State opposed the motion on the merits arguing that appellant had failed to demonstrate manifest injustice. The State asserted that appellant's claim that he had not been informed of the constitutional rights he waived by entry of his guilty plea was belied by the record on appeal. The State further argued that appellant knew that

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[2]See NRS 176A.100(1)(a).

[3]See NRS 176.165.

[4]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[5]State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[6]See Skinner v. State, 113 Nev. 49, 930 P.2d 748 (1997); Meyer v. State, 95 Nev. 885, 603 P.2d 1066 (1979) overruled in part and modified by Little v. Warden, 117 Nev. 845, 34 P.3d 540 (2001).

probation was not available because he stipulated to receive two consecutive sentences of five to twenty years.

Although the State opposed the motion on the merits, it appears that the equitable doctrine of laches may have been applicable in the instant case.[7] Application of the equitable doctrine of laches 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."[8]

In examining the factors of the equitable doctrine of laches and the facts in the instant case, it appears that application of the equitable doctrine of laches may have been appropriate. Appellant made no attempt to explain the two-year delay in filing his motion and the error relating to probation was reasonably available to appellant to raise within one year of entry of the judgment of conviction. Thus, it appears that appellant may have acquiesced in the existing conditions. It further appears that the State may be prejudiced if forced to try appellant for the original charges due to the passage of time.[9]

The district court summarily denied the motion, and consequently, it is not clear whether the district court denied the motion on the merits or denied the motion based upon the equitable doctrine of

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

[8]Id. at 563-64, 1 P.3d at 972.

[9]The original charges included: ten counts of sexual assault on a minor under the age of sixteen, two counts of sexual assault, two counts of statutory sexual seduction, and three counts of open or gross lewdness.

laches.[10] Because consistent application of the equitable doctrine of laches is necessary and because the reason for the district court's decision is not entirely clear, this court reverses the order of the district court and remands this matter to the district court to consider whether the equitable doctrine of laches would preclude consideration of the motion on the merits. If the district court determines that the equitable doctrine of laches precludes review of the motion on the merits, the district court shall state this determination in a written order denying the motion. In the event the district court determines that the equitable doctrine of laches does not preclude consideration of the motion on the merits, the district court shall conduct an evidentiary hearing on whether appellant was correctly advised by his counsel, or otherwise, that probation was not available in this case.[11] Any final, written order addressing the merits of appellant's claims shall contain specific findings of fact and conclusions of

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[10]The minutes of the district court appear to indicate that the district court denied the motion on the merits, but no reference is ever made of the equitable doctrine of laches.

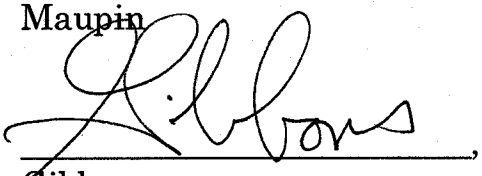
[11]The plea agreement advised appellant that he could receive probation if he was certified not to be a high risk to reoffend. We note that this language in the plea agreement is legally incorrect. Probation was not available in this case regardless of whether appellant was certified as not being a high risk to reoffend. See NRS 176A.100(1)(a). Thus, appellant may be entitled to relief if the erroneous advice worked a manifest injustice. See NRS 176.165; Skinner, 113 Nev. 49, 930 P.2d 748. The district court may determine that appellant's claim relating to probation was without merit because he stipulated to receive a sentence of a term of imprisonment. See Little, 117 Nev. at 852, 34 P.3d at 545. The district court should determine whether the claim was belied by the record under the facts in this case—appellant was misinformed about the availability of probation and informed that the district court was not required to accept the stipulation and could exercise its discretion at sentencing.

law addressing appellant's claims that his guilty plea was not entered knowingly and voluntarily.

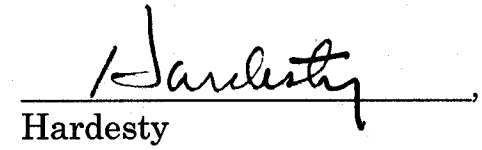
Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.[12] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[13]

_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
Michael Bennet Nelson
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[13]We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.