IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY LYNN FORD, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47635



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court denying appellant Gregory Lynn Ford's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On September 14, 2004, Ford was convicted, pursuant to a jury verdict, of one count of possession of a controlled substance. The jury found Ford not guilty of possession of a controlled substance for the purpose of sale and unlawful offer to sell, supply and/or exchange a controlled substance. The district court sentenced Ford to serve a prison term of 12-48 months. Ford's untimely direct appeal from the judgment of conviction and sentence was dismissed by this court due to a lack of jurisdiction.[1]

On February 22, 2005, Ford filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Ford, and counsel filed a

[1]Ford v. State, Docket No. 44118 (Order Dismissing Appeal, December 10, 2004).

supplement to the petition. In his petition, Ford alleged that he was improperly denied his right to a direct appeal through the ineffective assistance of trial counsel and that the remedy provided for a successful appeal deprivation claim was inadequate.[2] At the hearing on the petition, the State stipulated to Ford's claim that trial counsel failed to timely perfect a direct appeal in violation of Lozada. The district court found that trial counsel was ineffective. On December 5, 2005, the district court entered an order appointing new counsel to represent Ford and directing counsel to file a supplemental petition "specifying all claims which challenge the conviction or sentence, including but not limited to: (1) each issue of law which could have been raised on direct appeal; and (2) each issue of law which could be raised in a post-conviction proceeding." (Emphasis added.)

On February 8, 2006, pursuant to the district court's order, newly appointed counsel filed a supplemental petition on Ford's behalf, raising both direct appeal issues and post-conviction claims of ineffective assistance of counsel. The State opposed the supplemental petition and argued that the ineffective assistance of counsel claims were procedurally barred and not properly raised in a Lozada proceeding. The district court conducted a hearing and on June 9, 2006, entered an order denying Ford's petition. In its order, the district court rejected Ford's direct appeal claims on the merits. The district court dismissed Ford's allegations of ineffective assistance of counsel without consideration, erroneously stating, "they are

---

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

beyond the scope of relief contemplated by Lozada." This timely appeal follows.

Initially, we note that this court has never limited the Lozada proceeding in a manner contemplated by the district court. The district court's finding that ineffective assistance of counsel claims "are beyond the scope of relief contemplated by Lozada" is a misstatement of law. Moreover, as noted above, in its order finding that Ford was improperly denied his right to a direct appeal, the district court expressly directed counsel to file a supplemental petition raising, along with direct appeal issues, "each issue of law which could be raised in a post-conviction proceeding." (Emphasis added.) In raising ineffective assistance claims in his supplemental brief, Ford followed the district court's instructions. Therefore, we conclude that the district court erred by dismissing, without consideration, Ford's post-conviction claims. Accordingly, we reverse the district court's order in part and remand this case to the district court for the limited purpose of properly considering the ineffective assistance of counsel claims raised in Ford's petition.

Next, Ford contends that the district court erred by rejecting his direct appeal claims raised pursuant to Lozada. First, Ford claims that his Sixth Amendment right to counsel was violated by the "complete collapse of the attorney-client relationship." This argument is raised by Ford for the first time on appeal and was not presented in any of the habeas petitions filed below; therefore, the argument was not considered

by the district court. As a result, Ford's argument is not properly raised and we decline to address it.[3]

Second, Ford contends that the district court erred by failing to sua sponte suppress incriminating statements he made to the arresting police officer. Specifically, Ford argues that there was no evidence that he knowingly and voluntarily waived his Miranda rights.[4] Ford concedes that he did not file a pretrial motion to suppress those statements or object to the officer's trial testimony. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.[5] This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.[6] "To be plain, an error must be

---

[3]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004); see also Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (this court has consistently held that an appellant "cannot change [his] theory underlying an assignment of error on appeal").

[4]See U.S. Const. amend. V; Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[5]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[6]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

so unmistakable that it is apparent from a casual inspection of the record."[7]

"A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent. A waiver is voluntary if, under the totality of the circumstances, the [statement] was the product of a free and deliberate choice rather than coercion or improper inducement."[8] Further, it must be shown by a preponderance of the evidence that the defendant's waiver of Miranda rights was knowing and intelligent.[9] The waiver need not be explicit, but may be inferred from "'the particular facts and circumstances surrounding [the] case.'"[10]

In the instant case, Officer Rolando Duenas testified at trial that after finding controlled substances on Ford, he advised Ford of his rights pursuant to Miranda. Ford responded affirmatively to Officer Duenas, indicating that he understood his rights. Nevertheless, Ford continued talking, stating that the jacket he was wearing, where the methamphetamine was discovered, was not his. Officer Duenas proceeded to ask Ford, believing that he was waiving his rights because he

---

[7]Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

[8]Mendoza v. State, 122 Nev. ___, ___, 130 P.3d 176, 181-82 (2006).

[9]Floyd v. State, 118 Nev. 156, 171, 42 P.3d 249, 259 (2002).

[10]Edwards v. Arizona, 451 U.S. 477, 482 (1980) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also U.S. v. Cazares, 121 F.3d 1241, 1244 (9th Cir. 1997) (holding that "[t]o solicit a waiver of Miranda rights, a police officer need neither use a waiver form nor ask explicitly whether the defendant intends to waive his rights").

voluntarily continued talking, if he was employed and how he acquired the small amount of money in his possession.

In its order denying Ford's petition, the district court found that while there was not an explicit waiver of his rights on the record, an explicit waiver was not in fact required, and that Ford understood his rights and chose to talk, offering an exculpatory reason for being in possession of methamphetamine. The district court found that there was no plain error with respect to the admission of Ford's incriminating statements. Additionally, the district court found that assuming, without deciding, "that Ford's statements were secured in violation of Miranda, the error would not be reversible error, because the evidence of guilt was overwhelming."[11] We agree and conclude that the district court did not err by rejecting this claim.

Third, Ford contends that the methamphetamine seized from his person was the result of an unlawful search, and therefore the district court erred by failing to sua sponte suppress evidence of the drugs. Ford points out that he did not consent to the search conducted by Officer Duenas. Once again, Ford concedes that he did not file a pretrial motion to suppress evidence of the drugs or object to the admission of the evidence at trial. Nevertheless, Ford claims that admission of the evidence amounted to plain error. We disagree.

Ford was detained by Harrah's Casino security after witnesses complained about him attempting to sell methamphetamine. Based on the information provided by the witnesses, the police were summoned. Officer

---

[11]See Arizona v. Fulminante, 499 U.S. 279, 295-96 (1991); Mendoza, 122 Nev. at ___ n.28, 130 P.3d at 182 n.28.

Duenas spoke with the witnesses and then conducted a search of Ford, finding a small bag "containing a couple of bindles of [a] crystalline powdery substance" in Ford's right coat pocket.

A search is deemed to be incident to arrest so long as the search is substantially contemporaneous with the arrest, and the search is confined to the immediate vicinity of the arrest.[12] "[T]he authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed."[13] In this case, based on the information provided by the witnesses, there was probable cause to arrest Ford. In denying Ford's petition, the district court found that the seizure of the methamphetamine was incidental to a lawful arrest and the admission of the evidence at trial did not amount to plain error. We agree and conclude that the district court did not err by rejecting Ford's claim.[14]

Fourth, Ford contends that the district court abused its discretion at sentencing by imposing a term of incarceration "highly disproportionate" to the crime. Ford claims that he was "penalized" for going to trial rather than accepting a plea offer, and that his own counsel

---

[12]See Shipley v. California, 395 U.S. 818, 819 (1969).

[13]State v. Greenwald, 109 Nev. 808, 810, 858 P.2d 36, 37 (1993) (citing Chimel v. California, 395 U.S. 752 (1969)).

[14]This court has also stated that even when evidence is obtained through an unlawful search, it may be admitted at trial if the State can prove that the evidence would have inevitably been discovered by lawful means. See Proferes v. State, 116 Nev. 1136, 1141-42, 13 P.3d 955, 958 (2000), overruled on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005). In Ford's case, the methamphetamine located in his coat pocket would have inevitably and lawfully been discovered during the inventory search.

biased the sentencing court against him by allegedly calling him names. We disagree with Ford's contention.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[15] This court has consistently afforded the district court wide discretion in its sentencing decision.[16] The district court's discretion, however, is not limitless.[17] Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[18] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, or the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.[19]

In the instant case, the district court found that Ford could not demonstrate that his sentence was based solely on impalpable or highly suspect evidence or that the relevant sentencing statutes were

---

[15]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

[16]Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[17]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

[18]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (emphasis added).

[19]Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

unconstitutional. The district court noted that the sentence imposed was within the parameters provided by the relevant statutes.[20] The district court found that the sentence imposed was based on "the court's perception of Ford's just deserts [sic], given the facts of the case and his prior record," including prior felony convictions and revoked terms of probation. Additionally, Ford committed the instant offense while he was on probation in another case. Therefore, we conclude that the district court did not err in rejecting this claim.

Finally, Ford contends that the Lozada remedy is constitutionally inadequate. Ford argues that "to allow the District Court to sit in judgment of itself defies logic," and that he should be entitled to a belated direct appeal in this court. We disagree. This court has repeatedly stated that the Lozada remedy is the functional equivalent of a direct appeal, and when a defendant is denied his right to an appeal, as in Ford's case, a habeas petition is the proper avenue for raising direct appeal issues that would not otherwise be reviewed.[21] Therefore, we decline to revisit this issue and conclude that the district court did not err in rejecting this claim.

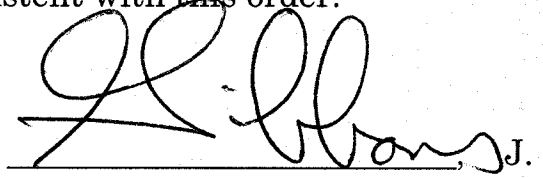
Accordingly, we

---

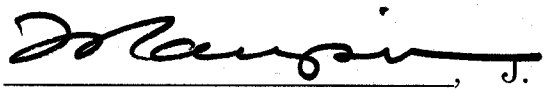
[20]See NRS 453.336; NRS 193.130.

[21]See Evitts v. Lucey, 469 U.S. 387, 399 (1985) (expressing approval of a state court's use of a "post-conviction attack on the trial judgment as 'the appropriate remedy for frustrated right of appeal'") (quoting Hammershoy v. Commonwealth, 398 S.W.2d 883 (Ky. 1966)); see also Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002) and Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (approving of the Lozada remedy for meritorious appeal deprivation claims).

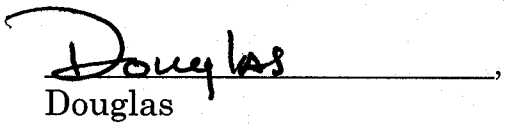
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Gibbons



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk