IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ERNEST NICOLAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47872

FILED

FEB 08 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a bench trial, of four counts of theft. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant David Ernest Nicolay to four concurrent prison terms of 12-48 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 5 years.

Nicolay's sole contention is that the district court committed reversible error by conducting a bench trial without first obtaining either a written or oral waiver of his right to a jury trial. Nicolay claims that there is "absolutely nothing in the record" indicating that he knowingly and intelligently waived his right to a jury trial and therefore he is entitled to a new trial. We disagree.

NRS 175.011(1) provides, in part, that "[i]n a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the

07-03155

consent of the state." Nevertheless, this court has not found a written waiver to be an absolute requirement when the waiver appears to be knowing, intelligent, and voluntary.[1]

In this case, we conclude that the district court did not commit reversible error. Initially, Nicolay was tried by a jury on the instant offense, however, that trial resulted in a mistrial. Therefore, it is clear that Nicolay was aware of his option to have a trial by jury. Thereafter, defense counsel, Daniel J. Albregts, who is also Nicolay's appellate counsel, corresponded with the State and on several occasions communicated Nicolay's desire and intent to waive his right to a jury trial and proceed to a bench trial. In his letters to the State, Albregts indicated that he had discussed the matter with Nicolay.[2] Additionally, at a calendar call one week before the start of the trial, Albregts informed the district court that he "confirmed" with Nicolay his desire for a bench trial. Once the bench trial started, Nicolay never objected or articulated his desire for another jury trial. Therefore, the record on appeal indicates that Nicolay knowingly, intelligently, and voluntarily waived his right to a jury trial.

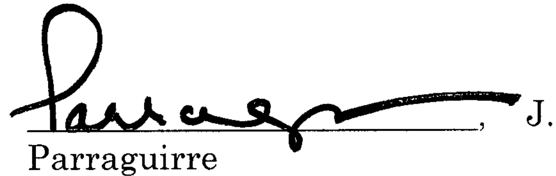
---

[1]See Gallimort v. State, 116 Nev. 315, 318-20, 997 P.2d 796, 798-99 (2000); see also Brown v. Burns, 996 F.2d 219, 220-21 (9th Cir. 1993).

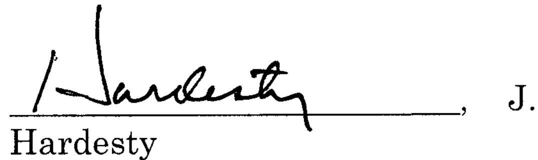
[2]See Adams v. U.S. ex rel. McCann, 317 U.S. 269, 277 (1942).

Having considered Nicolay's contention and concluded that it is without merit, we

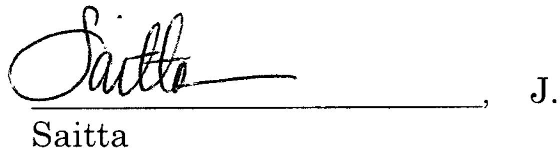
ORDER the judgment of conviction AFFIRMED.[3]



_______________________, J.
Parraguirre



_______________________, J.
Hardesty



_______________________, J.
Saitta

---

[3]We note that there is a clerical error in the judgment of conviction. The judgment incorrectly states that Nicolay was convicted pursuant to a jury trial. In fact, Nicolay was convicted pursuant to a bench trial. Following this court's issuance of its remittitur, the district court shall correct this error in the judgment of conviction. See NRS 176.565 (providing that clerical error in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that district court does not regain jurisdiction following an appeal until supreme court issues its remittitur).

cc: Hon. Stewart L. Bell, District Judge
Daniel J. Albregts, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk