

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC W. ZESSMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47498

FILED

FEB 08 2007

ERIC W. ZESSMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48046

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

ERIC W. ZESSMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48134

ORDER OF AFFIRMANCE

Docket No. 47498 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 48046 is a proper person appeal from an order of the district court denying appellant's motion to withdraw his guilty plea. Docket No. 48134 is a proper person appeal from an order of the district court denying appellant's motion requesting sentence modification. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. We elect to consolidate these appeals for disposition.<sup>1</sup>

<sup>1</sup>See NRAP 3(b). We have considered the records filed in Docket No. 47498 and Docket No. 48046 when resolving all three appeals.

On June 20, 2003, the district court convicted appellant of one count of conspiracy to commit robbery pursuant to a guilty plea and one count of robbery pursuant to a plea of nolo contendere.<sup>2</sup> The district court sentenced appellant to serve a term of twenty-four to seventy-five months in the Nevada State Prison for robbery and a concurrent term of twelve to thirty months for conspiracy. This court affirmed the judgment of conviction on direct appeal.<sup>3</sup> The remittitur issued on October 21, 2003.

Docket No. 47498:

On March 28, 2006, 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 June 5, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant challenged his parole release date. Appellant specifically argued that under NRS 213.1215 his mandatory parole release date should be April 2006, not August 2006, because he was projected to expire his term in April 2007. Appellant also claimed that the Department of Corrections has stopped applying good time and work time credits because he will be released on mandatory parole.

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<sup>2</sup>The district court entered amended judgments of conviction on August 5, 2003, and September 9, 2003.

<sup>3</sup>Zessman v. State, Docket No. 41490 (Order of Affirmance, September 24, 2003).

NRS 213.1215(1) requires eligible prisoners to be released on parole 12 months prior to the expiration of their maximum term. NRS 213.1215(6) provides that "the determination of the 12-month period before the end of a prisoner's term must be calculated without consideration of any credits he may have earned to reduce his sentence had he not been paroled." Appellant failed to demonstrate that his mandatory parole release date was not calculated accurately. Appellant failed to demonstrate that the alleged April 2007 expiration date was calculated without consideration of any credits. Further, appellant's claim that the Department of Corrections has stopped applying good time and work time credits was a bare and naked claim unsupported by any factual allegations.<sup>4</sup> Accordingly, we conclude the district court did not err in denying appellant's petition.

Docket No. 48046:

On August 1, 2006, appellant filed a proper person motion to withdraw his guilty plea in the district court. The State opposed the motion and specifically pleaded laches. Appellant filed a reply to the State's opposition. On August 31, 2006, the district court denied appellant's motion. This appeal followed.

In his motion appellant claimed that the guilty/nolo contendere plea is fatally defective because he was improperly informed that he was eligible for probation and is invalid because his codefendants never admitted to conspiring with him. Appellant also claimed that the

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<sup>4</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

judgment of conviction improperly requires him to pay restitution to the victim's insurance company, and that requiring payment to the insurance company violates double jeopardy.

This court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches.<sup>5</sup> Application of the doctrine 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."<sup>6</sup>

Based on our review of the record on appeal, we conclude that appellant's motion is subject to the equitable doctrine of laches. Appellant filed his motion nearly three years after his direct appeal was resolved. Appellant failed to provide any explanation for the delay. Further, it appears that the State would suffer prejudice if it were forced to proceed to trial after such an extensive delay. We conclude that the doctrine of laches would preclude consideration of appellant's motion on the merits. Accordingly, the district court did not err in denying appellant's motion.

Moreover, as a separate and independent ground to deny relief, appellant's claims lacked merit. Under most circumstances, robbery and conspiracy to commit robbery are probationable offenses.<sup>7</sup>

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<sup>5</sup>See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

<sup>6</sup>Id. at 563-64, 1 P.3d at 972.

<sup>7</sup>See NRS 176A.100; see also Wicker v. State, 111 Nev. 43, 888 P.2d 918 (1995).

Additionally, the record reveals that appellant admitted to conspiring to commit robbery with his codefendant, Richard Gonce. Appellant's admissions were sufficient to support the conviction for conspiracy to commit robbery. Further, the record reveals that appellant's guilty plea was knowingly and voluntarily entered.<sup>8</sup> Finally, this court has already considered and rejected appellant's claim that the judgment of conviction improperly requires him to pay restitution to the victim's insurance company.<sup>9</sup> "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."<sup>10</sup> Accordingly, we affirm the order of the district court denying appellant's motion.

Docket No. 48134:

On August 11, 2006, appellant filed a proper person motion requesting sentence modification in the district court. The State opposed the motion. On September 22, 2006, the district court denied appellant's motion. This appeal followed.

A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which

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<sup>8</sup>See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

<sup>9</sup>See Zessman v. State, Docket No. 41490 (Order of Affirmance, September 24, 2003).

<sup>10</sup>Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

work to the defendant's extreme detriment."<sup>11</sup> A motion to modify a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied.<sup>12</sup>

In his motion, appellant requested that the district court impose his sentences to run concurrently with his life sentence imposed in another case. Appellant argued that, because his judgment of conviction is silent as to whether the sentences will be served consecutive to or concurrent with his life sentence, NRS 176.035(1) requires the sentence to run concurrently. This claim fell outside the narrow scope of claims permissible in a motion to modify a sentence. Appellant did not argue that the district court relied on any mistaken assumptions about his criminal record when sentencing him. Accordingly, we conclude the district court did not err in denying appellant's motion.

Moreover, as an independent and separate ground to deny relief, appellant's claim lacked merit. Whenever a person who is under a sentence of imprisonment for committing a felony commits another felony, the sentence imposed for the latter felony must be imposed to run consecutively to the sentence for the prior felony.<sup>13</sup> The record on appeal indicates that at the time appellant committed the instant offenses, he was on parole from a separate felony conviction. Therefore, appellant's

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<sup>11</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

<sup>12</sup>Id. at 708-09 n.2, 918 P.2d at 325 n.2.

<sup>13</sup>NRS 176.035(2).

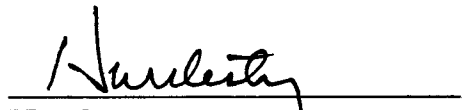
sentences for the instant offenses must be imposed to run consecutively to his prior terms.

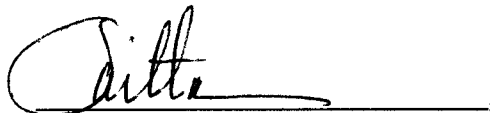
Conclusion:

Having reviewed the records on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>14</sup> Accordingly, we

ORDER the judgments of the district court AFFIRMED.

 J.  
Parraguirre

 J.  
Hardesty

 J.  
Saitta

cc: Hon. Jackie Glass, District Judge  
Eric W. Zessman  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>14</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).