IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY GENE KIDMAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 48155
LARRY GENE KIDMAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 48205

FILED

MAR 20 2007

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

ORDER OF AFFIRMANCE

Docket No. 48155 is a proper person appeal from an order of the district court denying appellant's motion to vacate an illegal sentence. Docket No. 48205 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. We elect to consolidate these appeals for disposition.[1]

On September 29, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted sexual assault of a minor under the age of fourteen. The district court sentenced appellant to serve a term of 3 to 15 years in the Nevada State Prison. The district court also imposed a special sentence of lifetime supervision. Appellant did not file a direct appeal.

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[1]See NRAP 3(b). This court considered the record on appeal filed in Docket No. 48205 when resolving the appeal in Docket No. 48155.

Docket No. 48155

On September 8, 2006, appellant filed a proper person motion to vacate an illegal sentence in the district court. The State opposed the motion. On October 4, 2006, the district court denied appellant's motion. This appeal followed.

In his motion, appellant claimed that his sentence was illegal because it did not comply with statutory requirements. Appellant requested the district court to reverse his conviction so that it may be renegotiated, or in the alternative, vacate his sentence. We conclude that the district court did not err in treating the motion as a motion to correct an illegal sentence.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.[2] "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"[3]

Appellant specifically claimed that his sentence was illegal because the statute governing the punishment for his offense provides: "A definite term of 20 years with eligibility for parole after a minimum of 2 years has been served." Appellant asserted that this language prohibited

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[2]Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

[3]Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

the district court from exercising its discretion to impose a sentence within the range of 2 to 20 years.

We conclude that the district court did not err in denying this claim. Appellant failed to demonstrate that the district court was without jurisdiction to impose the sentence. Additionally, appellant's sentence did not exceed the statutory maximum. Finally, this claim lacked merit. Contrary to appellant's assertion, the statute governing the punishment for his offense does not require a definite term of 2 to 20 years. Rather, the relevant statute provides that a person convicted of an attempt of a category A felony should be sentenced "for a minimum term of not less than 2 years and a maximum term of not more than 20 years."[4] This language provides the district court with discretion to impose a sentence within the range of 2 to 20 years, and the district court may depart upwards from the minimum sentence so long as the minimum term does not exceed forty percent of the maximum term.[5] Appellant's sentence was within the range prescribed by statute and the minimum term did not exceed forty percent of the maximum term. Accordingly, we affirm the district court's denial of appellant's motion.

Docket No. 48205

On August 14, 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

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[4]NRS 193.330(1)(a)(1); see also NRS 200.366(3) (providing that sexual assault of a child under 16 is a category A felony).

[5]See NRS 193.130(1).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 2, 2006, the district court denied appellant's petition. This appeal followed.

In his petition appellant claimed that he received ineffective assistance of counsel and his guilty plea was involuntarily entered. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[6] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[7] A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[8] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[9] In determining the

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[6]Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[7]Strickland v. Washington, 466 U.S. 668, 697 (1984).

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

[9]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

validity of a guilty plea, this court looks to the totality of the circumstances.[10]

First, appellant claimed that his counsel was ineffective for advising him to waive his preliminary hearing and plead guilty even though the victim did not appear for the preliminary hearing. Appellant asserted that he could have been exonerated and had he known he could have been exonerated he would not have pleaded guilty. Appellant asserted that the ineffective assistance of his counsel rendered his plea involuntary.

Appellant failed to demonstrate that counsel was deficient or that he was prejudiced by counsel's advice. At a preliminary hearing, the State bears the burden to show "that there is probable cause to believe that an offense has been committed and that the defendant has committed it."[11] Appellant failed to demonstrate that the victim would not have been available for the preliminary hearing, or that in the victim's absence the State could not have met their burden. Additionally, the record reveals that appellant received a substantial benefit from his guilty plea. By pleading guilty to attempted sexual assault, appellant avoided charges for sexual assault with a minor under the age of fourteen and lewdness with a child under the age of fourteen. Had appellant been convicted of the sexual assault charge, he would have faced a term of life with the

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

[11]NRS 171.206.

possibility of parole after 20 years,[12] and if appellant had been convicted of the lewdness charge, appellant would have faced a term of life with the possibility of parole after 10 years.[13] Appellant failed to demonstrate that his plea was not knowingly and voluntarily entered. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective and his guilty plea was involuntarily entered because he was advised of, and agreed to, a minimum 2 year parole eligibility term. Appellant failed to demonstrate that his counsel was ineffective or the guilty plea was not entered knowingly or intelligently. The guilty plea agreement, which appellant acknowledged having read, understood and signed, informed appellant that he was facing a term of between 2 to 20 years and the minimum term could not exceed forty percent of the maximum term. At the guilty plea canvass appellant affirmatively acknowledged that he would receive a sentence of between 2 to 20 years. Further the guilty plea agreement stated that the State retained the right to argue at sentencing. Appellant's sentence fell within the permissible range of punishment,[14] and appellant failed to demonstrate that he was promised he would receive a minimum term of 2 years. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as

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[12]See NRS 200.366(3)(c).

[13]See NRS 201.230(2).

[14]See NRS 193.330(1)(a)(1); NRS 200.366(3).

involuntary and unknowing.[15] Accordingly, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to advise him that he had a statute of limitations defense and this rendered his plea involuntary. Appellant asserted that the statute governing secret offenses was not in effect at the time he allegedly committed the offense, and even if the statute was in effect, the statute did not apply because the offense was not a secret offense.

Appellant failed to demonstrate that his counsel was deficient for failing to advise him of the potential defense because the defense did not exist. Contrary to appellant's assertion, the statute governing secret offenses, NRS 171.095(1)(a), was in effect at the time of the offense.[16] We agree with appellant however that this statute did not establish the statute of limitations for the offense. Rather, because the record indicates that the victim was approximately thirteen years old at the time the offense occurred, NRS 171.095(1)(b)(1) governed.[17] The record indicates that the victim was seventeen years old when the information was filed,

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[15]See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

[16]See 1999 Nev. Stat. ch. 631, § 18 at 3525.

[17]See id. (NRS 171.095(1)(b)) ("An indictment must be found, or an information or complaint filed, for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the sexual abuse is: (1) Twenty-one years old if he discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age"); NRS 432B.100(4) (defining sexual abuse to include sexual assault under NRS 200.366); see also Bailey v. State, 120 Nev. 406, 91 P.3d 596 (2004).

therefore the statute of limitations had not run. Because a statute of limitations defense was not available to appellant, appellant failed to establish that the plea was not entered knowingly and intelligently. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective and his plea was involuntary because he was not informed of the specific conditions of lifetime supervision. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The particular conditions of lifetime supervision are tailored to each individual case and are not determined until after a hearing is conducted just prior to the expiration of the sex offender's completion of a term of parole or probation, or release from custody.[18] Thus, all that is constitutionally required is that the totality of the circumstances demonstrate that a defendant was aware that he would be subject to the consequence of lifetime supervision before entry of the plea and not the precise conditions of lifetime supervision.[19] Here, appellant was informed in the written guilty plea agreement that he was subject to the special sentence of lifetime

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[18]See NRS 213.1243(1); NAC 213.290.

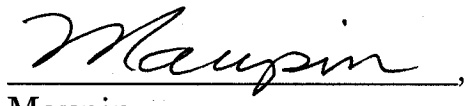
[19]Palmer v. State, 118 Nev. 823, 831, 59 P.3d 1192, 1197 (2002). We note that in Palmer this court recognized that under Nevada's statutory scheme, a defendant is provided with written notice and an explanation of the specific conditions of lifetime supervision that apply to him "[b]efore the expiration of a term of imprisonment, parole or probation." Id. at 827, 59 P.3d at 1194-95 (emphasis added).

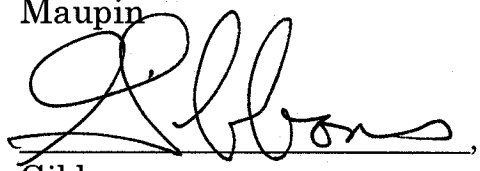
supervision. Therefore, appellant failed to demonstrate that his plea was not entered knowingly and intelligently. Accordingly, we conclude that the district court did not err in denying this claim.

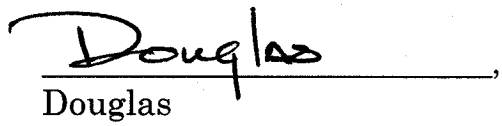
Conclusion

Having reviewed the record 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.[20] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[21]

 , C.J.
Maupin

 , J.
Gibbons

 , J.
Douglas

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

[21]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Eighth Judicial District Court Dept. 17, District Judge
Larry Gene Kidman
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk