IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN TOLE MOXLEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 49250
JOHN TOLE MOXLEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 49363

FILED

DEC 10 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 49250 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Docket No. 49363 is a proper person appeal from an order of the district court denying appellant's motion to withdraw his guilty plea. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. We elect to consolidate these appeals for disposition.[1]

On May 26, 2006, the district court convicted appellant, pursuant to a guilty plea, of battery by a prisoner (category B felony). The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of 60 to 240 months in the Nevada State Prison.

[1]See NRAP 3(b).

This court affirmed the judgment of conviction and sentence on direct appeal.[2] The remittitur issued on February 28, 2007.

On March 13, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. Appellant filed a reply to the State's opposition. On April 5, 2007, the district court denied appellant's motion. The appeal in Docket No. 49250 followed.

On March 6, 2007, appellant filed a proper person motion to withdraw his guilty plea in the district court. The State opposed the motion. On March 22, 2007, the district court denied appellant's motion. The appeal in Docket No. 49363 followed.

Docket No. 49250

In his motion to correct an illegal sentence, appellant claimed that (1) he was not given any notice of the State's intent to seek habitual criminal status; (2) the court acted vindictively when it sentenced him as a small habitual criminal; (3) the district court judge, rather than the prosecution, sought the habitual criminal treatment; and (4) counsel was ineffective for advising him to plead guilty.

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.[3] "A motion to correct an illegal sentence

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[2]Moxley v. State, Docket No. 47446 (Order of Affirmance, February 1, 2007).

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

'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"[4]

Our review of the record on appeal reveals that the district court did not err by denying appellant's motion. Appellant's sentence was facially legal,[5] and appellant failed to demonstrate that the district court was not a court of competent jurisdiction. Appellant's specific challenges to his adjudication as a habitual criminal fell outside the scope of claims permissible in a motion to correct an illegal sentence. Therefore, we affirm the denial of appellant's motion.

Docket No. 49363

In his motion to withdraw his guilty plea, appellant claimed that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.[6] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[7] In

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

[5]See NRS 207.010(1)(a).

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

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

determining the validity of a guilty plea, this court looks to the totality of the circumstances.[8]

First, appellant claimed that his guilty plea was not entered knowingly and voluntarily because he did not have an opportunity to read the entire plea agreement. This claim is belied by the record.[9] The record demonstrates that appellant affirmatively stated at the plea canvass that he read the plea agreement and understood everything in it before he signed it. Therefore, we conclude the district court did not err by denying this claim.

Second, appellant claimed that his guilty plea was invalid because his plea agreement did not contain a notice of habitual criminality or a count under NRS 207.010 charging him as a habitual criminal. Appellant failed to demonstrate that, under the totality of the circumstances, his plea was not entered knowingly and intelligently. Although appellant's plea agreement did not contain a notice of habitual criminality, the record demonstrates that the State filed a notice of habitual criminality with the district court on July 19, 2005, ten months before appellant entered his guilty plea. Additionally, although appellant's prior convictions were not listed in the plea agreement or the attached indictment, the plea agreement stipulated to treatment as a small habitual criminal and set forth the possible sentence appellant was facing. At the plea canvass, the district court established that appellant

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

[9]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

understood that the negotiation included a stipulation to small habitual criminal treatment. Because the record indicates that appellant was on notice that the State was seeking habitual criminal treatment, we conclude that appellant failed to demonstrate that his plea was invalid. Therefore, we conclude the district court did not err by denying this claim.

Third, appellant claimed that his plea was invalid because he could not be adjudicated as a habitual criminal based upon a stipulation. Appellant correctly states that a stipulation simply to the status of a habitual criminal, by itself, does not allow for sentencing as a habitual criminal.[10] Here, however, appellant did more than just stipulate to habitual criminal status. The notice of habitual criminality specified five prior convictions the State was relying upon in charging appellant as a habitual criminal. In the plea agreement, and at the plea canvass, appellant stipulated to adjudication as a small habitual criminal. The presentence investigation report identified four prior felony convictions, and during sentencing, the State presented certified copies of three prior judgments of conviction for appellant. Appellant did not dispute the validity of the prior convictions. On the basis of these facts, we conclude that appellant stipulated to or waived proof of his prior convictions, and did not simply stipulate to habitual criminal status. Thus, appellant's stipulation was not improper and did not render his plea invalid.[11] Therefore, we conclude the district court did not err by denying this claim.

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[10]See Hodges v. State, 119 Nev. 479, 484, 78 P.3d 67, 70 (2003).

[11]See id.

Fourth, appellant claimed that his plea was involuntarily entered because the district court, rather than the State, negotiated the plea. Specifically, appellant asserted that his counsel informed him that the district court judge stated she would "only permit [appellant] to plead to the small habitual statute" and "the State had nothing to do with the plea." It appears that appellant asserted that the district court's negotiation of the plea agreement constituted impermissible participation by the district court judge.

A defendant is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims are not belied by the record.[12] This court has held that "'[j]udicial involvement in plea negotiation inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty.'"[13] Because it appeared that appellant's claim that the district court participated in negotiating the plea was not belied by the record, and, if true, may have entitled appellant to relief, we ordered the State to show cause why this appeal should not be remanded for an evidentiary hearing on this issue. In its response, the State claimed that an evidentiary hearing was not warranted because appellant failed to demonstrate a manifest injustice and because the district court judge did not coerce appellant to plead guilty.

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[12]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[13]Standley v. Warden, 115 Nev. 333, 336, 990 P.2d 783, 785 (1999) (quoting Smith v. State, 110 Nev. 1009, 1014, 879 P.2d 60, 63 (1994)) overruled by Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006). The holding in Cripps has prospective effect only and does not apply in this matter.

In Standley, this court held that the district court judge's participation in the plea negotiations was excessive and induced Standley to accept the State's plea offer.[14] This court cautioned against an expansive interpretation of that holding and held that "[o]nly where the judge's conduct is improperly coercive will we consider affording a defendant an opportunity to withdraw his or her plea."[15]

Even assuming that the district court judge stated she would "only permit [appellant] to plead to the small habitual statute," we conclude that this statement was not improperly coercive. It appears that this statement indicated the district court's sentencing inclination. Under the terms of the plea agreement, appellant agreed to stipulate to adjudication as a small habitual criminal, and the State agreed to take no position at sentencing. The State additionally agreed not to oppose concurrent time if the district court sentenced appellant as a small habitual criminal, and the plea agreement was conditioned upon this term. Immediately after accepting the plea, and pursuant to an agreement between the parties, the district court sentenced appellant. The district court adjudicated appellant a small habitual criminal and ordered appellant's sentence to run concurrent to appellant's sentence in district court case number C141521. Thus, it appears that the district court's statement indicated her inclination to sentence appellant pursuant to the terms of the agreement, and it does not appear that the district court judge's statement induced appellant to enter his plea.

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[14]Id. at 337, 990 P.2d at 785.

[15]Id. at 337-38, 990 P.2d at 785.

Appellant's assertion that the State had nothing to do with the plea is not supported by the record. The plea agreement was drafted by the State. Further, it appears that the plea had already been negotiated when the parties appeared before the district court on May 23, 2006. The record reveals that when commencing the hearing on May 23, 2006, the district court judge stated it was her understanding that the matter had been negotiated. Additionally, the parties had agreed to proceed with sentencing on the same date as entry of the plea, and the record reveals that the State came prepared to present and file copies of appellant's prior convictions in support of adjudicating appellant as a habitual criminal. Therefore, we conclude that appellant failed to demonstrate that the district court, rather than the State, negotiated the plea.

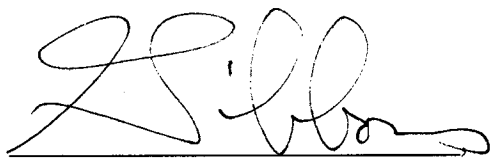
Because appellant failed to demonstrate that the district court judge impermissibly participated in the plea negotiations and failed to demonstrate that the State did not participate in the plea negotiations, we conclude that appellant failed to demonstrate that he would be entitled to relief on his claim that the district court negotiated his plea. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing. Therefore, we affirm the district court's denial of this claim.

Finally, appellant claimed that his counsel was ineffective for advising him to plead guilty and stipulate to habitual criminal adjudication and for promising him that the best way to challenge his conviction was to plead guilty and appeal the denial of self-representation. A motion to withdraw a guilty plea is limited in scope and may only be

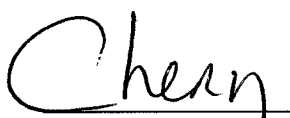
used to raise issues challenging the validity of the plea.[16] Because neither claim challenges the validity of the plea, the claims were improperly raised in appellant's motion to withdraw his guilty plea. Therefore, we conclude the district court did not err by denying these claims.

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.[17] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[18]



_____, J.
Gibbons



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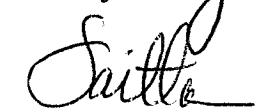

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[16]See Hart v. State, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000).

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

[18]We have reviewed appellant's reply to the State's response to this court's order to show cause in Docket No. 49363, and we conclude that no relief based upon that submission is warranted. To the extent that appellant has attempted to present claims or facts in that submission which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Jackie Glass, District Judge
John Tole Moxley
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk