IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE SIMS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 49710
WAYNE SIMS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 49899

FILED

OCT 29 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying appellant's post-conviction petition for a writ of habeas corpus and motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. We elect to consolidate these appeals for disposition.[1]

On May 19, 2005, the district court convicted appellant, pursuant to a guilty plea, of attempted lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve a term of sixty to one hundred and eighty months in the Nevada State Prison. The district court suspended the sentence and placed appellant on probation

[1]NRAP 3(b).

07-23713

for a period not to exceed five years. No direct appeal was taken from the judgment of conviction.

On September 26, 2006, the district court revoked appellant's probation, executed the original sentence, and amended the judgment of conviction to provide 170 days of credit for time served. This court affirmed the order revoking probation on appeal.[2] The remittitur issued on March 27, 2007.

Docket No. 49710

On February 5, 2007, 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 22, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel at the probation revocation hearing. We note that this court has recognized that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel.[3] It appears that the district court conceded that appellant was entitled to the effective assistance of

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[2]Sims v. State, Docket No. 48150 (Order of Affirmance, January 9, 2007).

[3]See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

counsel because the district court reviewed appellant's claims of ineffective assistance of counsel without any reference as to whether appellant was entitled to effective assistance of counsel in the probation revocation proceeding.[4] Therefore, we will review appellant's ineffective assistance of counsel claims on the merits.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the result of the proceeding unreliable.[5] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[6]

First, appellant claimed that his counsel was ineffective for stipulating to appellant's felony conviction despite never seeing the judgment of conviction. Appellant failed to establish that his counsel was

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[4]See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that counsel is required if the probationer requests counsel and makes a colorable claim that (1) he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to present); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon).

[5]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[6]Strickland, 466 U.S. at 697.

deficient or that he was prejudiced. The decision to revoke probation is within the broad discretion of the district court, and will not be disturbed absent a clear showing of abuse of that discretion.[7] Evidence supporting a decision to revoke probation must merely be sufficient to reasonably satisfy the district court that the conduct of the probationer was not as good as required by the conditions of probation.[8] The record on appeal contains a document that indicates appellant was convicted for failure to register as a sex offender in California during his term of probation. Thus, there was sufficient evidence to find that appellant violated his term of probation regardless of whether appellant's counsel stipulated to the probation violation. Appellant failed establish that the result of the revocation hearing would have been different had his counsel not stipulated to the violation. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to subpoena witnesses or present mitigating evidence at the revocation hearing. Specifically, appellant claimed that his counsel failed to subpoena his probation officer, cousin, and cousin's wife so that they could present evidence of appellant's good behavior while on probation. Appellant failed to establish that his counsel was deficient or that he was prejudiced. Appellant's counsel argued that appellant's violation of

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[7]Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974).

[8]Id.

probation was not substantial, but merely technical. However, the district court indicated that appellant received a substantial benefit when appellant first received probation and the court was unwilling to be so lenient a second time. In light of the evidence of the violation and statement by the court, appellant did not establish that had the court received the proffered evidence it would not have found that appellant violated the terms of his probation or would have found that appellant deserved a lesser sentence. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to object to the district court's admonition for appellant to be quiet. Appellant failed to establish that he was prejudiced. A probationer has a due process right to speak on his own behalf at his probation revocation hearing.[9] However, appellant did not allege what evidence he would have presented had the court not admonished him to be quiet.[10] To the extent that appellant would have testified to facts about his good behavior while on probation, as noted above, he did not show that the court would not have found that he violated the terms of his probation or would have seen

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[9]Anaya v. State, 96 Nev. 119, 122, 606 P.2d 156, 158 (1980) (citing Morrissey v. Brewer, 408 U.S. 471, 485-87 (1972)).

[10]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims, which are unsupported by specific facts, are insufficient to grant relief).

fit to grant him further leniency. Therefore, the district court did not err in denying this claim.

Accordingly, we affirm the denial of appellant's post-conviction petition for a writ of habeas corpus.

Docket No. 49899

On July 3, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On July 24, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the district court erred in imposing appellant's sentence. In particular, he claimed that the district court failed to impose the condition of sex offender registration and lifetime supervision in appellant's presence. Appellant asserted that the conditions were not added to his sentence until days after his sentencing hearing when he had already left the State of Nevada.

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.[11] "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to

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

challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"[12]

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's claims fell outside the scope of a motion to correct an illegal sentence. Appellant's sentence was facially legal, and there is no indication that the district court was not a court of competent jurisdiction.[13] Moreover, as a separate and independent ground to deny relief, appellant's claim lacked merit. The oral pronouncement of appellant's sentence remained modifiable until the judgment was signed and entered by the clerk.[14] The special sentence of lifetime supervision and sex offender registration were mandatory.[15] Thus, the district court was required to impose lifetime supervision and sex offender registration in its written judgment, regardless of whether it imposed the sentences in the oral pronouncement. Therefore, we affirm the order of the district court denying appellant's motion.

Conclusion

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

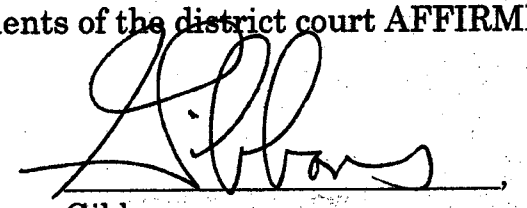
[13]See 2003 Nev. Stat., ch. 461, § 2 at 2826 (NRS 201.230); NRS 193.330; 2003 Nev. Stat., ch. 261, § 7 at 1381 (NRS 176.0931).

[14]Bradley v. State, 109 Nev. 1090, 864 P.2d 1272 (1993).

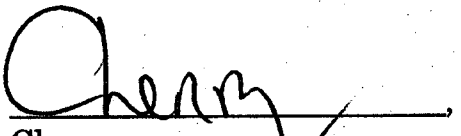
[15]2003 Nev. Stat., ch. 461 § 2 at 2826 (NRS 176.0931(1)); 2003 Nev. Stat., ch. 99 § 2 at 565 (NRS 176.0927(1)).

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.[16] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[17]



_____, J.
Gibbons



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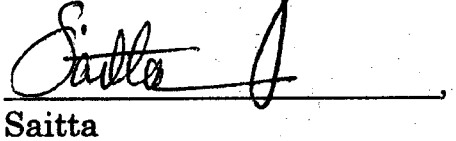

_____, J.
Saitta

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

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

[17]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.