

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES JEFFERSON KENNER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50441

**FILED**

AUG 22 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant James Jefferson Kenner was charged in 2005 with one count of felony driving under the influence (DUI). The offense was charged as a felony because Kenner had previously been convicted of felony DUI in 1996.<sup>1</sup> On March 7, 2006, the district court convicted Kenner, pursuant to a guilty plea, of felony DUI. Kenner was sentenced to a term of 5 to 15 years in prison. He filed a untimely proper person notice

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<sup>1</sup>NRS 484.3792(2) (providing that a person who has previously been convicted of felony DUI and who commits another DUI is guilty of a category B felony and is subject to a sentence of 2 to 15 years in prison). This provision was added to the statute in 2005 and applies to Kenner, who committed the charged offense in December 2005. See 2005 Nev. Stat., ch. 193, § 3, at 608 (amendments to subsection 2 of NRS 484.3792); id. § 14, at 617 (setting forth effective date).

of appeal from the judgment of conviction, which this court dismissed for lack of jurisdiction.<sup>2</sup>

On November 7, 2006, Kenner filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, who filed a supplement to the petition. The State filed a motion to dismiss the petition. Thereafter, the district court granted the motion in part and ordered an evidentiary hearing on the remaining claims. Following the evidentiary hearing, the district court denied the petition. This appeal followed.

On appeal, Kenner raises four issues related to sentencing, the validity of his guilty plea, and the performance of defense counsel. We conclude that these arguments lack merit.

First, Kenner argues that the district court abused its discretion in denying his claim that the court violated his rights at sentencing. Because this claim could have been raised on direct appeal, it has been waived.<sup>3</sup> Moreover, this claim falls outside the limited scope of a post-conviction petition for a writ of habeas corpus that challenges a judgment of conviction based on a guilty plea because it does not challenge

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<sup>2</sup>Kenner v. State, No. 47855 (Order Dismissing Appeal, September 12, 2006).

<sup>3</sup>See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (explaining that issues that could be raised on direct appeal, including “a challenge to the sentence imposed on constitutional or other grounds,” must be raised on direct appeal or they will be waived in subsequent proceedings), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

the validity of the plea or the effectiveness of counsel.<sup>4</sup> For these reasons, the district court properly rejected this claim.

Second, Kenner argues that the district court abused its discretion in denying his claim that his guilty plea was not knowingly and intelligently entered. In particular, he complains that he did not understand the maximum sentence that could be imposed as a result of his plea. We conclude that this claim is belied by the record and therefore lacks merit.

When the district court canvassed Kenner regarding his guilty plea, the court started to explain that Kenner faced a sentence of 1 to 6 years when defense counsel interrupted and noted that there was an error in the written plea agreement with respect to the sentence. Counsel clarified and explained that Kenner faced a sentence of 24 to 180 months. The district court then repeated that information at least twice, and each time Kenner acknowledged that he understood the possible penalty. The written guilty plea agreement included a correction, handwritten by defense counsel, noting that Kenner could be imprisoned for up to 180 months. Given the totality of the circumstances, the district court did not abuse its discretion in rejecting Kenner's challenge to his guilty plea because the record demonstrates that he understood the possible penalty.<sup>5</sup>

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<sup>4</sup>NRS 34.810(1)(a).

<sup>5</sup>Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994) (stating that district court's decision regarding validity of a guilty plea will not be reversed absent an abuse of discretion); State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000) (stating that court will look to the totality of the circumstances when considering the validity of a guilty plea).

Third, Kenner argues that the district court abused its discretion in denying his claim that trial counsel provided ineffective assistance by failing to object when the district court continued the sentencing hearing. We disagree for two reasons.

First, it does not appear that this issue was raised in the post-conviction proceedings in the district court. And although Kenner suggests that the claim was raised at the evidentiary hearing, apparently on the basis that he examined trial counsel regarding the failure to object, it appears that this claim was not properly raised and the district court did not explicitly allow Kenner to expand the issues previously pleaded.<sup>6</sup> Accordingly, this issue was not properly pleaded below and cannot be considered on appeal.<sup>7</sup>

Second, even assuming the district court exercised its discretion to allow Kenner to expand the issues at the evidentiary hearing, Kenner's claim lacks merit. The district court continued the sentencing hearing so that it could get more information regarding Kenner's 1965 conviction for involuntary manslaughter, which was included in the presentence investigation report. In particular, the district court was concerned about whether that prior offense involved a DUI. The court observed that given Kenner's 15 prior DUI convictions, if Kenner had killed someone as the result of a DUI, the court was not inclined to impose the sentence recommended by the parties (2 to 6 years). Accordingly, the

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<sup>6</sup>See Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006) (explaining that district court may allow petitioner to raise new issues at evidentiary hearing but must explicitly find good cause to do so and must allow the State an opportunity to respond to the new issues).

<sup>7</sup>See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (stating that petitioner cannot change theory on appeal).

district court continued the sentencing hearing so that the parties could look into the circumstances surrounding the involuntary manslaughter conviction. As this court recognized in Denson v. State, “[p]ossession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment.”<sup>8</sup> Under the circumstances, the district court did not abuse its discretion in continuing the sentencing hearing to ensure that it would have accurate information related to Kenner’s character and criminal history.<sup>9</sup> For this reason, Kenner cannot demonstrate that counsel was deficient in failing to object to the continuance.<sup>10</sup>

Finally, Kenner argues that the district court abused its discretion in denying his claim that trial counsel provided ineffective assistance by failing to advise him of his right to a direct appeal. We disagree. As this court held in Thomas v. State, counsel does not have an absolute duty to advise a defendant who pleads guilty of the right to appeal.<sup>11</sup> Rather, counsel has a duty to so advise a defendant “under

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<sup>8</sup>112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

<sup>9</sup>Kenner’s reliance on Robertson v. State, 109 Nev. 1086, 863 P.2d 1040 (1993), overruled by Krauss v. State, 116 Nev. 307, 998 P.2d 163 (2000), is misplaced. Unlike the situation in Robertson, the district court in this case did not impose a sentence and enter a judgment after the first sentencing hearing and the district court had not been divested of its jurisdiction through a timely filed notice of appeal before the continued sentencing hearing.

<sup>10</sup>See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985) (setting forth test for ineffective assistance of counsel when the defendant pleaded guilty); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (same).

<sup>11</sup>115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

certain circumstances,” including “when the defendant inquires about an appeal” or “when the situation indicates that the defendant may benefit from receiving the advice, such as the existence of a direct appeal claim that has a reasonable likelihood of success.”<sup>12</sup>

Here, the testimony at the evidentiary hearing demonstrates that Kenner did not inquire about an appeal. And trial counsel, Maizie Pusich, testified at the evidentiary hearing that she did not believe Kenner had any direct appeal issues with a reasonable likelihood of success and therefore did not discuss an appeal with him. On appeal, Kenner summarily states that “[t]here were two issues that could have been raised on direct appeal,” but he does not specifically identify them. To the extent that he believes the continuance of the sentencing hearing was one of those issues, we disagree because, as explained above, the district court did not abuse its discretion in continuing the sentencing hearing and therefore any claim based on the continuance would not have had a reasonable probability of success on appeal. Similarly, to the extent that Kenner believes that an alleged breach of the plea agreement was a meritorious direct appeal claim, we disagree for two reasons. First, it was the district court, not the prosecutor, who focused on the involuntary manslaughter conviction and asked the prosecutor for additional information on that conviction. Second, when it appeared that the prosecutor could be heading toward a breach of the agreement but had not yet done so, the district court interrupted and the prosecutor then specifically complied with the plea agreement and requested a sentence of 24 to 72 months, stating “the State at this point in time, even based on the record as it is shown, will honor its recommendation and commitment

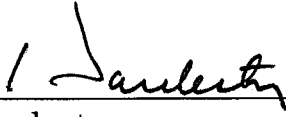
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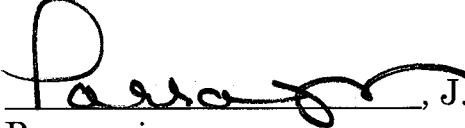
<sup>12</sup>Id.

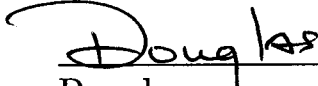
under the plea agreement to the defendant.” The district court imposed a harsher sentence based on Kenner’s lengthy history of offenses involving drinking and driving, including the 1965 conviction that resulted in a death, and Kenner was informed and understood that sentencing was entirely within the district court’s discretion. Under the circumstances, we conclude that there is no reasonable likelihood that a breach-of-the-plea-agreement claim would have been successful on appeal.<sup>13</sup> Because Kenner failed to demonstrate that he would have benefited from advice regarding a direct appeal, we conclude that the district court did not abuse its discretion in denying his claim that counsel provided ineffective assistance by failing to discuss an appeal with him.

Having considered Kenner’s claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Patrick Flanagan, District Judge  
Eric W. Lerude  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>13</sup>See Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (explaining that prosecutor is held to high standards in the performance of a plea agreement and that violation of the agreement’s terms or spirit requires reversal).