

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIAN THERESA AUSIELLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50729

FILED

JUN 09 2008

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

ORDER DISMISSING APPEAL

This is a proper person appeal from a purported final judgment or order entered in the district court. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On December 7, 2007, appellant filed a proper person notice of appeal in the district court. In her notice of appeal, appellant stated that she was appealing from "the final judgement [sic] or order entered in this action on the 5 day of December, 2007." However, the documents before this court did not indicate that any such judgment or order was entered on December 5, 2007.

Rather, it appeared that the judgment of conviction was originally entered on September 15, 2006, and appellant filed a direct appeal from that judgment of conviction. On appeal, this court determined the district court had abused its discretion at sentencing and vacated the sentence imposed in the original judgment of conviction because the district court had failed to consider a presentence motion to withdraw a guilty plea and had failed to consider whether appellant had

rendered substantial assistance; thus, this court remanded the matter for the district court to conduct further proceedings.¹ The minute entries for December 4, 2007, indicated that the district court considered and denied the presentence motion to withdraw a guilty plea and considered and denied substantial assistance claims. Mr. Jose Pallares represented appellant at this hearing. Although the district court resolved the presentence motion to withdraw a guilty plea and the substantial assistance claims at the December 4, 2007 hearing, it was unclear from the minute entries whether the December 4, 2007 hearing was the final sentencing hearing in this matter. At the time appellant had filed her notice of appeal, no judgment of conviction had been entered.

Therefore, it was unclear whether this court had jurisdiction over this appeal. Because no independent appeal lies from the denial of a presentence motion to withdraw a guilty plea and because this court vacated the sentence in the original judgment of conviction and it was not clear that there was a final, appealable decision,² this court directed Mr. Pallares to show cause why this appeal should not be dismissed. On January 17, 2008, Mr. Pallares filed a motion to withdraw as counsel indicating that the district court had entered an order terminating his representation of appellant and that appellant wished to proceed in forma pauperis or request appointed counsel.

¹Ausiello v. State, Docket No. 48244 (Order Vacating Sentence and Remanding, October 17, 2007).

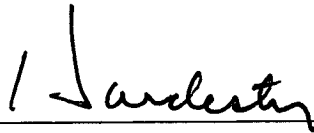
²See Hargrove v. State, 100 Nev. 498, 502, n.3, 686 P.2d 222, 225, n.3 (1984).

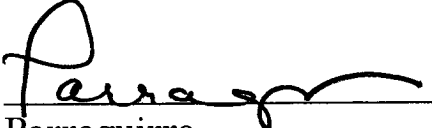
On February 13, 2008, this court denied Mr. Pallares' motion and again directed Mr. Pallares to file a response informing this court of the procedural posture of the case. This court noted that Mr. Pallares' response failed to inform this court of the status of the proceedings in the district court—information that was critical in this court's determination of jurisdiction and critical to whether Mr. Pallares may withdraw from representation in this case pursuant to NRAP 3C (fast track rules). On March 17, 2008, Mr. Pallares submitted an affidavit reiterating that his representation had been terminated at the December 4, 2007 hearing and stating that Mr. Harold Kuehn had been appointed to represent appellant in "various post-conviction matters." Mr. Pallares indicated that the December 4, 2007, was not a final order as there existed "pending post-conviction matters" before the court. On February 13, 2008, Mr. Kuehn filed a letter informing this court that he was not the attorney of record in this appeal, but appointed in a "post-conviction matter" and that he would file a "timely appeal after the amended judgment of conviction is filed." The State filed a response indicating that it believed the December 4, 2007 hearing was a final hearing, but that no judgment of conviction had been entered. The State further stated that on March 10, 2008, "the court met 'for re-entry of judgment' and sentenced [appellant] to the identical sentence previously rendered." The State attached a copy of the amended judgment of conviction.


Because it appeared from these responses that the December 4, 2007 hearing was not a final hearing, this court granted Mr. Pallares' motion to withdraw as counsel in this court. Further, because it appeared that appellant's proper person notice of appeal was premature, in that it was filed before the final sentencing hearing, this court directed Mr.

Kuehn, as the attorney of record at the final sentencing hearing,³ to show cause why this appeal should not be dismissed for lack of jurisdiction. On April 24, 2008, Mr. Kuehn filed a response indicating that the appeal should be dismissed as premature. Mr. Kuehn further indicated that he would file a notice of appeal in the district court from the final judgment of conviction. On April 21, 2008, a notice of appeal was filed in the district court, and on April 28, 2008, the appeal was docketed in this court in Docket No. 51053. Because the December 4, 2007 notice of appeal was premature, we

ORDER this appeal DISMISSED.⁴


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

³See NRAP 3C.

⁴We have considered all of the proper person documents submitted in this matter, and we conclude that no relief is warranted.

cc: Hon. John P. Davis, District Judge
Marian Theresa Ausiello
Gibson & Kuehn
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County Clerk