IN THE SUPREME COURT OF THE STATE OF NEVADA

IRVIN RICHARD MCGARVA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50791

FILED

APR 22 2008

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

ORDER OF AFFIRMANCE WITH INSTRUCTIONS

This is a proper person appeal from an order of the district court denying a motion to vacate a judgment of conviction to permit withdrawal of the guilty plea. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On January 8, 2003, the district court convicted appellant, pursuant to a guilty plea, of three counts of possession of a visual presentation depicting sexual conduct of a person under the age of 16 and one count of attempted lewdness with a child under the age of 14. The district court sentenced appellant to serve in the Nevada State Prison a term of 24 to 72 months for each of the possession counts and a term of 36 to 240 months for the attempted lewdness count. The four terms were imposed to run consecutively to one another. The district court further imposed the special sentence of lifetime supervision. A corrected judgment of conviction was entered on January 24, 2003, imposing restitution in the amount of $7,815. No direct appeal was taken.

On January 6, 2004, appellant, with the assistance of counsel, filed a motion to withdraw the guilty plea. On that same date, appellant, with the assistance of counsel, filed a post-conviction petition for a writ of

habeas corpus. The State filed an opposition to the motion to withdraw the guilty plea and a motion to dismiss the habeas corpus petition. On April 13, 2004, the district court dismissed appellant's petition. No appeal was taken from that order. It appears that no order was entered formally resolving the motion to withdraw a guilty plea.

On March 1, 2006, appellant filed in proper person a second post-conviction petition for a writ of habeas corpus. On June 13, 2006, the district court dismissed the petition as it was untimely filed. Appellant's subsequent appeal was dismissed because the notice of appeal was untimely filed.[1]

On January 5, 2007, appellant filed a proper person motion to vacate the judgment of conviction to permit withdrawal of the guilty plea in the district court. On November 27, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant claimed that his guilty plea was invalid. A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of

---

[1]McGarva v. State, Docket No. 47750 (Order Dismissing Appeal, November 28, 2006).

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

discretion.[3] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[4]

First, appellant claimed that his guilty plea was not entered voluntarily or knowingly because he was not informed at the change of plea hearing that the term of lifetime supervision would be imposed to follow the terms of imprisonment. Appellant claimed that he believed that lifetime supervision was merely part of his terms of imprisonment.

Appellant failed to carry his burden of demonstrating that his guilty plea was involuntarily or unknowingly entered in this regard. NRS 176.0931 requires that criminal defendants convicted of certain enumerated offenses be sentenced, in addition to any other penalties provided by law, to a special sentence of lifetime supervision.[5] The crime of attempted lewdness with a child under the age of fourteen is one such offense.[6] The special sentence of lifetime supervision "commences after any period of probation or any term of imprisonment and any period of release on parole."[7] Appellant was specifically informed in the written guilty plea agreement, which he acknowledged understanding and signing, that he was subject to lifetime supervision pursuant to NRS 176.0931. Nothing in the written guilty plea agreement indicated that the

---

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

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

[5]NRS 176.0931(1).

[6]NRS 176.0931(5)(c)(1), (2).

[7]NRS 176.0931(2).

special sentence of lifetime supervision would be served concurrently with his terms of imprisonment. Further, the term "lifetime" is not ambiguous in the instant case. Appellant's belief regarding lifetime supervision appears facially illogical as the common meaning of "lifetime" indicates a term that would last the life of the defendant.[8] Nothing in the record on appeal suggested any other meaning to the term lifetime or that lifetime supervision would be served concurrently with the terms of imprisonment. In signing the guilty plea agreement, appellant acknowledged that the consequences of his guilty plea had been explained to him by trial counsel. Finally, appellant received a substantial benefit by entry of his guilty plea in the instant case as he avoided the potential of receiving multiple life sentences under the original lewdness counts.[9] Under these circumstances, appellant failed to demonstrate any manifest injustice in the district court's failure to advise him during the guilty plea canvass that the special sentence of lifetime supervision commenced after the terms of imprisonment. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was not entered voluntarily or knowingly because he only recently discovered that he was innocent of the possession counts. Appellant claimed that the three photographs did not depict sexual conduct, but three girls mooning their mother. Appellant failed to carry his burden of demonstrating that his

---

[8]See Merriam Webster's Collegiate Dictionary 672 (10th ed. 1994) (setting forth first definition of "lifetime" as "the duration of the existence of a living being or thing").

[9]See NRS 1997 Nev. Stat., ch. 455, § 5, at 1722 (NRS 201.230).

guilty plea was involuntarily or unknowingly entered in this regard. By entry of his guilty plea, appellant waived having a jury trial on whether the photographs depicted "sexual conduct" and waived having the charges proved beyond a reasonable doubt. Appellant's claim that children mooning in front of a camera is not sexual conduct falls far short of a demonstration of innocence of the charges in the instant case. Further, as discussed above, appellant received a substantial benefit by entry of his guilty plea. Appellant failed to demonstrate a manifest injustice; therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his guilty plea was not entered voluntarily and knowingly because the district court failed to inform him that he could move to withdraw the guilty plea at sentencing. Appellant appeared to claim that the district court should have known that appellant would want to withdraw the guilty plea because his trial counsel did not argue for probation even though he was evaluated not to be a high risk to reoffend. Appellant failed to carry his burden of demonstrating that his guilty plea was involuntarily or unknowingly entered in this regard. The district court was not obligated to inform appellant that he could withdraw his guilty plea. Further, the guilty plea agreement set forth no stipulation or promise of probation in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Finally, in reviewing the record on appeal, we observed some confusion in the procedural history. As stated earlier, on January 6, 2004, with the assistance of counsel, appellant filed both a motion to withdraw the guilty plea and a post-conviction petition for a writ of habeas corpus. The State filed a motion to dismiss the petition and opposed the motion to

withdraw the guilty plea. Although the district court entered a final written order resolving the post-conviction petition for a writ of habeas corpus, it does not appear that the district court ever entered a formal written order denying the January 6, 2004 motion to withdraw a guilty plea.[10] Thus, we direct the district court to resolve the motion as expeditiously as the court's calendar permits.

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.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED with instructions for the district court to formally resolve the 2004 motion to withdraw a guilty plea.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

---

[10]Because of the confusion relating to the denial of the 2004 motion, we conclude that the district court properly addressed the 2007 motion on the merits, rather than applying the equitable doctrine of laches. See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

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

cc: Hon. Brent T. Adams, District Judge
Irvin Richard McGarva
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk