IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN EDWARD HORTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51248

FILED

JUN 10 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of two counts of burglary, two counts of possession of stolen property, and two counts of obtaining money under false pretenses. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Dustin Edward Horton to serve various concurrent and consecutive prison terms totaling 48 to 180 months. The district court also ordered Horton to pay $153,280.90 in restitution.

Ineffective Assistance of Counsel

Horton contends that he was denied his Sixth Amendment right to effective assistance of counsel. As a general rule, we will not consider claims of ineffective assistance of counsel on direct appeal; instead, these claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). However, claims of ineffective assistance of counsel may be appropriate for direct appeal if the defendant has demonstrated that the error is undisputed, apparent from the record,

and purely a matter of law, id. at 161, 17 P.3d at 1013, or if the error was "improper per se," such that an evidentiary hearing to establish counsel's strategic or tactical motivations would be unnecessary. Jones v. State, 110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994).

Here, Horton claims that we should consider his ineffective assistance of counsel allegation on direct appeal because an evidentiary hearing is unnecessary: defense counsel admitted during sentencing that (1) he did not realize until after Horton pleaded guilty that the written agreement was not what he negotiated with the State and therefore there was no "meeting of the minds;" (2) if he had known what the plea agreement said, he would not have advised Horton to take the plea; (3) he negotiated the case because he did not believe the State could prove the residential burglaries at trial; and (4) Horton had always maintained that he was innocent of the residential burglary charges. Horton further claims that defense counsel was ineffective for failing to file a presentence motion to withdraw the guilty plea, which the district court had broad discretion to grant, or a post-conviction motion to withdraw the guilty plea, which had a reasonable probability of being granted pursuant to Rubio v. State, 124 Nev. ___, ___, 194 P.3d 1224, 1228 (2008) (observing that "[a] guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel"). And Horton argues that the record undeniably shows that but for defense counsel's failure to read the plea agreement and adequately inform and advise him regarding the nature of the charges and the consequences of the plea, he would not have pleaded guilty to the residential burglaries.

Our review of the record on appeal reveals that the written plea agreement memorialized Horton's agreement to plead guilty to two

counts of burglary and his acknowledgement that he had discussed the charges with counsel; all of the elements, consequences, rights, and waiver of rights were thoroughly explained to him by counsel; and he voluntarily signed the agreement after consultation with counsel. The written plea agreement contained a certificate of counsel, in which defense counsel certified that he "fully explained to [Horton] the allegations contained in the charge(s) to which guilty pleas are being entered." During the plea canvass, the district court specifically informed Horton that he was being charged with

> Count 1, burglary, willfully and unlawfully entering buildings occupied by others on Andante Court and/or Turtle Head Peak and/or Grassy Springs Place and/or Madera Canyon Place and/or San Kristin Avenue, with the intent to commit . . . a felony therein. Count 2, burglary, willfully and unlawfully enter[ed] a building occupied by another on East Sahara and/or West Sahara with the intent to commit a felony therein.

Horton admitted to committing these burglaries and the district court found "that with effective assistance of counsel the Defendant understood the nature of the offense[s] charged and the consequences of his plea thereto and that his plea was freely, voluntarily and knowingly entered." During sentencing, defense counsel stated

> He pled to six felonies. That was the best negotiation we could get. I don't believe the State could have proven the home burglaries at trial. I believe that they probably could have proven everything else that they alleged.
>
> Now, the mistake that was my fault, Judge, is that when the [guilty plea agreement] went in, I didn't catch the fact that the first [burglary] is alleged to be the homes naming the victims, and that's where I believe that I made a mistake not having

> a meeting of the minds with the State. If that had been the case, I would have advised Mr. Horton to take an Alford. I would have asked Ms. Digiacomo for an Alford on that count.

Defense counsel then proceeded to argue for probation. Under these circumstances, we conclude that the alleged ineffective assistance of counsel claim is not apparent from the record on appeal and we decline to depart from the general rule in this case.

Restitution

Horton contends that "[r]eversal of [his] sentence is warranted because the amount of restitution payable to the victims in this case is not supported by sufficient evidence and because [he] was denied due process when the district court ordered restitution without first holding an evidentiary hearing."

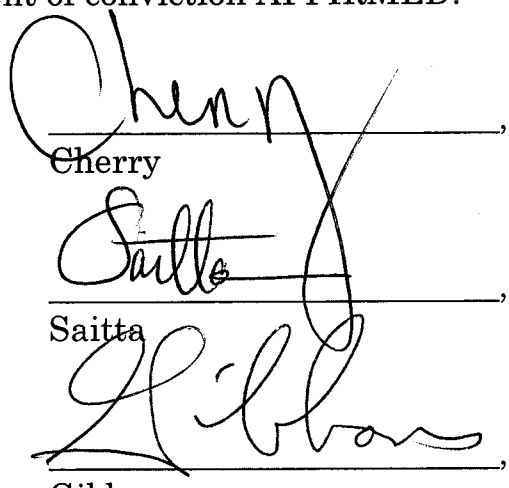
If a sentence of imprisonment is required or permitted by statute and restitution is appropriate, the district court must set an amount of restitution for each victim of the offense. NRS 176.033(1)(c). A district court retains the discretion "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998). However, the district court must rely on reliable and accurate information in calculating restitution. Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999). "A defendant is not entitled to a full evidentiary hearing at sentencing regarding restitution, but he is entitled to challenge restitution sought by the state and may obtain and present evidence to support that challenge." Id.

Here, the district court based its restitution award on the Division of Parole and Probation's presentence investigation report and noted that there was a breakdown of the restitution amount on page nine

of the report. Horton did not challenge the restitution amount at sentencing. Accordingly, we decline to disturb the district court's restitution determination. See id.

Having considered Horton's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Sterling Law, LLC
Mario D. Valencia
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk