IN THE SUPREME COURT OF THE STATE OF NEVADA

DOYLE DOLEN LANCASTER,
Appellant,
vs.
WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER, DON HELLING,
Respondent.

No. 51446

FILED

OCT 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT JUDGMENT OF CONVICTION

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus filed pursuant to the remedy provided in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994). Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On July 2, 2003, the district court convicted appellant, pursuant to a guilty plea, of four counts of lewdness with a child under the age of 14 years and sentenced him to four concurrent terms of life in prison with the possibility of parole after ten years.

On July 1, 2004, appellant filed a timely post-conviction petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel on various grounds. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition on all but one ground, determining that appellant had been deprived of his right to a direct appeal. The district court appointed counsel to assist appellant in filing a petition for a writ of habeas corpus. On November 6,

2007, appellant filed a petition pursuant to Lozada, which the State opposed. On March 7, 2008, the district court denied the petition. This appeal followed.

Appellant argues that the district court abused its discretion in denying his Lozada appeal on two grounds. We review de novo the district court's conclusions. See generally Paige v. State, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000) (recognizing that questions of law are reviewed de novo). We conclude that appellant's claims are without merit.

First, appellant argues that he should have been allowed to withdraw his guilty plea because it was entered into involuntarily and unknowingly, in that trial counsel guaranteed him that he would receive probation. Claims raised in Lozada petitions are treated as direct appeal claims, see Lozada, 110 Nev. at 359, 871 P.2d at 950, and challenges to the validity of a guilty plea are not cognizable on direct appeal, Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), superseded by statute on other grounds as stated in Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000). Moreover, appellant challenged the validity of his guilty plea in his July 1, 2004, post-conviction petition on this ground, and we rejected appellant's claim on appeal. Lancaster v. State, Docket No. 49844 (Order of Affirmance, February 8, 2008). Thus, the law of the case doctrine also bars appellant's challenge on this ground. See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). We therefore conclude that the district court did not err in denying appellant's petition based on a challenge to his guilty plea.

Second, appellant argues that the district court considered impalpable and highly suspect evidence when it sentenced him. More specifically, appellant argues that the district court imposed prison

instead of probation because it relied on the victim's uncorroborated allegation of uncharged acts of oral sex in the presentence investigation report ("PSI Report"), as well as the victim's failure to appear at appellant's sentencing hearing or otherwise provide direct input into appellant's sentencing. While a district court abuses its discretion when "the defendant's sentence is prejudiced from consideration of information or accusations founded on impalpable or highly suspect evidence," Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982), we conclude that the district court did not err in denying appellant's petition based on these claims.

Appellant's PSI Report attributed to the victim a statement that appellant had performed oral sex on her while they lived in California, acts for which appellant was not charged. Appellant did not challenge the information at the sentencing hearing, and trial counsel specifically stated there were no corrections to the PSI Report. Therefore, we review this claim for plain error that affects a defendant's substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Walch v. State, 112 Nev. 25, 33-34, 909 P.2d 1184, 1189 (1996).

We conclude that appellant failed to demonstrate plain error for three reasons. First, a sentencing court may consider reliable facts adduced solely from the victim. Ferris v. State, 100 Nev. 162, 163, 677 P.2d 1066, 1066-67 (1984). Here, the victim alleged years of sexual abuse by appellant (most of which was not charged), and neither during sentencing nor in his appeal has appellant denied the allegations. Nothing in the submissions before us suggests that the allegations were unreliable. Second, although a defendant may not be specifically punished for an uncharged crime, uncharged crimes may justify heavier punishment

for charged offenses. Sheriff v. Morfin, 107 Nev. 557, 561, 816 P.2d 453, 456 (1991). Third, there is no evidence in the record that the district court relied on that piece of information in its sentencing decision. While the prosecutor once mentioned the oral sex allegation during argument, the district court did not. Rather, the district court stated that its primary concern was whether granting appellant probation would depreciate the gravity of the offenses.

Appellant also argues that the district court punished him for the lack of victim input at the sentencing hearing. While we agree that the district court made inappropriate comments regarding the victim's absence,[1] the record does not show that appellant was punished on this basis. Rather, as stated above, the district court was primarily concerned that granting appellant probation would depreciate the gravity of the offenses. Given the reasons stated by the district court, we cannot conclude that it erred in denying appellant's petition.

While we conclude that the district court did not abuse its discretion in denying appellant's Lozada petition, we note that the judgment of conviction states that appellant was convicted pursuant to a jury verdict when, in fact, he was convicted pursuant to a guilty plea.

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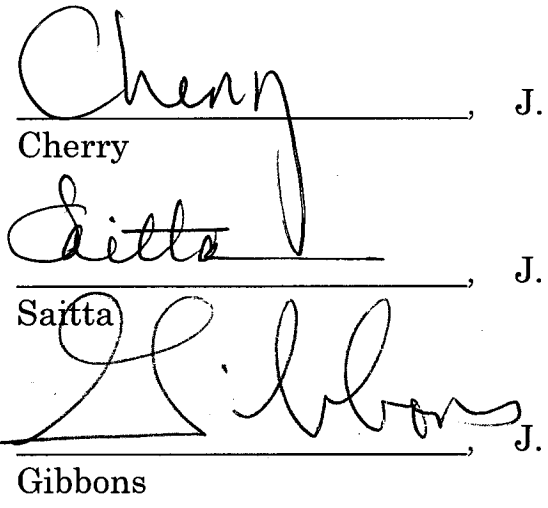
[1]The district court interrupted trial counsel's argument at the sentencing hearing to note the victim's absence and to opine that the family of the appellant and victim was "taking a guilt trip and laying it on the girl for being a victim. . . . That's wrong. That's totally wrong." There is no evidence in the record to support the district court's supposition about the reason for the victim's absence. See Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998) (acknowledging "the importance of not only doing justice, but also insuring that justice 'satisfies the appearance of justice'") (quoting United States v. Edwardo-Franco, 885 F.2d 1002, 1005 (2d Cir. 1989) (internal punctuation omitted)).

Therefore, we remand this matter to the district court for correction of the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND for the limited purpose of correcting the judgment of conviction.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk