IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY GEORGE MURROW, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 51623
GREGORY GEORGE MURROW, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 51624
GREGORY GEORGE MURROW, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 51625
GREGORY GEORGE MURROW, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 51626

FILED

OCT 01 2008

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a single district court order entered in four district court cases that denied and summarily dismissed a post-conviction petition for a writ of habeas corpus and a supplemental petition. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

In district court case number CR03-0153, the district court convicted appellant Gregory Murrow, pursuant to a guilty plea, of

08-25404

possession of stolen property and sentenced him to a prison term of 48 to 120 months. In district court case number CR03-0582, the district court convicted Murrow, pursuant to a guilty plea, of possession of stolen property and sentenced him to a prison term of 24 to 60 months to be served concurrently with the term imposed in CR03-0153. In district court case number CR03-2027, the district court convicted Murrow, pursuant to a guilty plea, of burglary and sentenced him to a prison term of 48 to 120 months, to be served concurrently with the terms imposed in CR03-0153 and CR03-0582. In district court case number CR04-1814, the district court convicted Murrow, pursuant to a guilty plea, of burglary and sentenced him to a prison term of 48 to 120 months to be served consecutively to the term imposed in CR03-0153 and concurrently with the terms imposed in CR03-0582 and CR03-2027. This court affirmed the judgments of conviction and sentences on direct appeal.[1]

On December 4, 2006, Murrow filed in the district court a proper person post-conviction petition for a writ of habeas corpus and a memorandum of points and authorities in support of the petition. On December 20, 2007, counsel filed a supplemental petition. The State filed an answer to the petition and supplemental petition. On April 24, 2008, the district court denied the petition and supplemental petition without conducting an evidentiary hearing. This appeal followed.

In the supplemental petition, Murrow claimed that his sentencing counsel, Jenny Hubach, was ineffective for failing to (1) consult with plea counsel to find out about the sentencing agreement underlying

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[1]Murrow v. State, Docket Nos. 45348, 45352, 45353, and 45354 (Order of Affirmance, May 10, 2006).

the pleas, (2) argue for the imposition of concurrent sentences as was agreed to by the parties, and (3) raise a Kluttz[2] violation argument at sentencing and on direct appeal. On appeal, Murrow claims that the district court erred by denying these claims without conducting an evidentiary hearing. The State argues that counsel was not ineffective with respect to district court case numbers CR03-0153, CR03-0582 and CR03-2027 and the district court did not err by summarily denying these claims. However, the State concedes that an evidentiary hearing was necessary in district court case number CR04-1814. We agree.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different result in the proceedings.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4] A petitioner is entitled to an evidentiary hearing if he raises claims that are not belied by the record and, if true, would entitle him to relief.[5]

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[2]Kluttz v. Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983) (holding that "the prosecution is held to the most meticulous standards of both promise and performance" when fulfilling its part of the plea bargain and violation of the spirit of the plea bargain will constitute a breach of the plea bargain).

[3]See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[4]Strickland v. Washington, 466 U.S. 668, 697 (1984).

[5]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Murrow was represented in district court case numbers CR03-0153, CR03-0582 and CR03-2027, through the entry of the pleas, by Jack Alian. Murrow was represented in district court case number CR04-1814, through entry of the plea, by Kevin Van Ry. The district court conducted a single sentencing hearing and sentenced Murrow in all four cases on the same date. At sentencing, Murrow was represented by Hubach, and neither Alian nor Van Ry were present.

At sentencing, Hubach requested the district court to continue the sentencing for a short period of time to allow Murrow to obtain a bed at the Westcare Facility. Alternatively, Hubach recommended that the district court place Murrow on probation in all cases, to be imposed consecutively, with a maximum sentence underlying each case, also to run consecutively. The prosecutor expressed his frustration with dealing with Murrow; outlined the terms of the initial plea agreements in district court case numbers CR03-0153, CR03-0582 and CR03-2027; gave a brief overview of the facts surrounding Murrow's subsequent rearrest in district court case number CR04-1814; and opined that Murrow was not going to Westcare and really needed to go to prison. The prosecution then submitted the matter, stating to the court: "I know you'll do the right thing."

Our review of the record indicates that Hubach's recommendation at sentencing corresponded to the terms set forth in the written plea agreements in district court case numbers CR03-0153, CR03-0582 and CR03-2027. Murrow failed to demonstrate that consultation with Alian regarding the terms of the plea agreements in these cases would have revealed a different sentencing agreement. Further, the prosecution's argument did not violate the terms or the spirit of the plea

agreements in district court case numbers CR03-0153, CR03-0582 and CR03-2027. Therefore, we conclude that an evidentiary hearing was not warranted and the district court did not err by denying Murrow's claims of ineffective assistance of counsel as they pertained to district court case numbers CR03-0153, CR03-0582 and CR03-2027. Accordingly, we affirm the district court in Docket Nos. 51623, 51624 and 51625.

However, we conclude that Hubach's representation of Murrow in CR04-1814 fell below an objective standard of reasonableness. The written plea agreement in district court case number CR04-1814 provided that Murrow's counsel and the prosecution would recommend that the sentence be imposed to run concurrently with the sentences in district court case numbers CR03-0153, CR03-0582 and CR03-2027. Hubach's argument at sentencing expressly violated the terms of the written plea agreement. Additionally, because the prosecution did not recommend the imposition of a concurrent sentence, the prosecution violated the terms of the plea agreement. Therefore, we conclude that Hubach was deficient for failing to recommend a concurrent sentence and for failing to claim that the prosecution's argument violated Kluttz. However, we further conclude that an evidentiary hearing was necessary to determine whether Murrow was prejudiced by Hubach's deficient performance. Specifically, it is unclear whether the district court would have imposed a concurrent sentence if Hubach and the prosecution had recommended a concurrent sentence as provided in the guilty plea agreement. Therefore, we reverse the denial of Murrow's claims of ineffective assistance of counsel as they pertain to district court case number CR04-1814, and we remand the appeal in Docket No. 51626 for an

evidentiary hearing to determine whether Murrow was prejudiced by counsel's deficient performance.

On appeal, Murrow also claims that his guilty plea in CR04-1814 was not knowingly, voluntarily and intelligently entered because the plea was based on a promise that the sentence in that case would be imposed to run concurrently with his sentences in district court case numbers CR03-0153, CR03-0582 and CR03-2027. In his supplemental petition, Murrow asserted that before entering his guilty plea he participated in a meeting with Alian, Van Ry, the prosecutor Roger Whomes, and Judge Kosach, at which all involved agreed that if Murrow pleaded guilty in CR04-1814 the sentence for that case would be imposed to run concurrently with the sentences for Murrow's other three cases. The supplemental petition also asserted that Murrow's counsel had discussed the case with Van Ry and Van Ry confirmed that a meeting took place at which concurrent time was agreed upon. The State informs this court that it does not appear that the district court specifically ruled on this claim when denying Murrow's petition,[6] but concedes that an evidentiary hearing is warranted to consider the validity of the plea in CR04-1814. We agree.

The record indicates that before Murrow entered his guilty plea in CR04-1814 a short recess was taken. Upon reconvening, Murrow pleaded guilty and Van Ry informed the court that the negotiations

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[6]Although the district court order did not specifically address this claim, the district court order concluded by denying all claims raised in the post-conviction petition for a writ of habeas corpus and supplemental petition.

included a recommendation that the sentence be run concurrent with the sentences in district court case numbers CR03-0153, CR03-0582 and CR03-2027. Because Murrow's claim that a meeting took place is not belied by the record, and Murrow would be entitled to relief if the district court participated in the plea negotiations or the district court indicated that it was inclined to follow the sentencing recommendation,[7] we conclude that an evidentiary hearing is necessary to determine the validity of the plea in CR04-1814. Because it appears that Judge Kosach will be required to testify regarding his participation, if any, at the alleged meeting, upon remand, this case shall be assigned to a different district court judge.

Finally, our review of the sentence imposed in CR04-1814 indicates that it is legally impossible to serve the sentence as structured. The sentence in CR04-1814 was imposed to run consecutively to the term imposed in CR03-0153 and concurrent with the terms imposed in CR03-0582 and CR03-2027. However, because the terms for district court case numbers CR03-0153, CR03-0582 and CR03-2027 were all imposed to run concurrent to each other, it is impossible for Murrow to serve the term in CR04-1814 as imposed. Accordingly, if on remand the district court determines that Murrow is not entitled to withdraw his guilty plea, the

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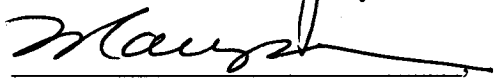
[7]See Cripps v. State, 122 Nev. 764, 770-71, 137 P.3d 1187, 1191-92 (2006) (holding that, if a judge expresses an inclination to follow a sentencing recommendation and later reconsiders and imposes a harsher sentence, a defendant must be given an opportunity to withdraw the plea); see also Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999) (holding that when a plea rests to a significant degree on a promise by the State, such a promise can be considered part of the inducement for the plea, and such a promise must be fulfilled).

district court shall conduct a new sentencing hearing to correct the sentence imposed in CR04-1814.

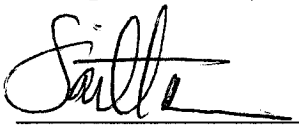
Having reviewed Murrow's claims, we conclude that the district court did not err by denying the claims of ineffective assistance of counsel as they pertained to district court case numbers CR03-0153, CR03-0582 and CR03-202, and we affirm the district court in Docket Nos. 51623, 51624, and 51625. We further conclude that an evidentiary hearing was necessary to resolve Murrow's claims in CR04-1814 that his counsel was ineffective and the guilty plea was invalid. Therefore, we reverse and remand the appeal in Docket No. 51626 for an evidentiary hearing in front of a different district court judge. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Cherry



_____, J.
Maupin



_____, J.
Saitta

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk