IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD JEROME FULLER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 51774
RICHARD JEROME FULLER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 51775

FILED

MAY 22 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from two separate judgments of conviction. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Pursuant to plea agreements in two different cases, the district court convicted appellant Richard Jerome Fuller of three counts of burglary and one count of conspiracy to commit uttering a forged instrument. The district court sentenced Fuller to serve various consecutive and concurrent terms of imprisonment, totaling 38 to 96 months. Fuller presents three issues for our review.

Ineffective Assistance of Counsel

Fuller contends that defense counsel was ineffective for failing to file a motion for civil commitment pursuant to NRS 458.290 through NRS 458.350, inclusive. As a general rule, we will not consider claims of ineffective assistance of counsel on direct appeal. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). However, such a claim

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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, Fuller claims that it is undisputed that he is a drug addict, amenable to treatment, and meets the eligibility criteria for treatment set forth in NRS 458.300. Fuller argues that "a motion for civil commitment of necessity would have been granted" and "[t]here can be no reasonable strategy in failing to file a meritorious motion which, if granted, would make the case unprovable or the State unable to proceed." However, the record on appeal indicates that defense counsel informed the district court that Fuller was eligible for a diversion program based on his alcohol and drug addiction, stated that Fuller could be rehabilitated with an opportunity from the court, and asked for a continuance so that Fuller could attend a 30-day residential treatment program. When sentencing resumed, defense counsel informed the district court that Fuller had successfully completed the program and asked the district court to grant Fuller probation or consider him for the drug court program. The district court sentenced Fuller to prison instead. As the alleged error is not apparent from the record on appeal, we decline to depart from the general rule in this case.

Breach of Plea Agreement

Fuller contends that the State breached the plea agreements by presenting evidence of uncharged misconduct at sentencing. Both guilty plea memoranda contain the following clauses:

> 7. In exchange for my plea of guilty, the State, my counsel and I have agreed to recommend the following: The State will be free to argue for an appropriate sentence. The State will not file additional criminal charges resulting from the arrest in this case.
>
> 8. I understand that, even though the State and I have reached this plea agreement, the State is reserving the right to present arguments, facts, and/or witnesses at sentencing in support of the plea agreement.

Fuller claims that a reasonable interpretation of these clauses "is that no other charges would be brought for the incidences of September 8, 2007, September 10, 2007, and December 9, 2007," and "that the State reserved the right to explain more thoroughly – particularly in the form of victim impact statements – what exactly happened on [those dates]." Fuller argues that the plea agreements cannot "reasonably be construed to allow the State to bring in evidence of uncharged misconduct as aggravating circumstances" or "allow uncharged victims to give impact statements recommending a sentence, as they did here."

"A plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea." Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). Here, in addition to the clauses quoted above, both guilty plea memoranda contain the following clause:

> 11. I understand and agree that pursuant to the terms of the plea agreement stated herein, any counts which are to be dismissed or not pursued by the State, may be considered by the court at the time of my sentencing.

During the plea canvass, Fuller acknowledged that he read, understood, and signed both guilty plea memoranda. We have reviewed the guilty plea

memoranda and the plea canvass transcript, and we conclude that the plea agreement cannot reasonably be construed to limit the use of uncharged misconduct or the manner in which the State may argue for an appropriate sentence and that the State did not breach the plea agreements.

Use of Uncharged Misconduct

Fuller contends that the district court abused its discretion at sentencing by allowing the State to present evidence of uncharged misconduct that was not proven "even by a preponderance of the evidence," giving "ultimate weight to statements of 3 people who are victims of uncharged offenses," and punishing him for the uncharged offenses. Fuller asserts that this "court has yet to declare the test for the admissibility of uncharged misconduct in noncapital sentencing hearings," argues "that uncharged misconduct should be deemed 'dubious or tenuous' if it is evidence that cannot or does not establish probable cause," and claims that the evidence presented at sentencing did not establish probable cause as to the uncharged misconduct and that its erroneous admission was prejudicial.

We have consistently afforded the district court wide discretion in its sentencing decisions. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). "'A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial.'" Todd v. State, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) (quoting Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996)). However, "the district court must refrain from punishing a defendant for prior uncharged crimes. Consideration of those crimes is solely for the purpose of gaining a fuller assessment of the defendant's life, health, habits,

conduct, and mental and moral propensities." Denson v. State, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (internal citations and quotation marks omitted). We "will reverse a sentence if it is supported solely by impalpable and highly suspect evidence." Id. at 492, 915 P.2d at 286.

Our review of the record on appeal reveals that Fuller pleaded guilty to burglarizing two casinos and one residence. At sentencing, the State presented the testimony of two detectives who primarily discussed Fuller's participation in uncharged residential burglaries; the unsworn victim impact statement of Sharon Poland who lived next door to one of the residences that Fuller allegedly burglarized; the written statement of James and Rebecca Miller, whose residence Fuller allegedly burglarized; and the written statement of Mr. Schuck, whose residence Fuller pleaded guilty to burglarizing. Prior to rendering its sentencing decision, the district court stated,

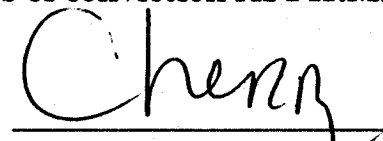
> There are certain things that this Court cannot do. And one of which is to give back to victims of crime a sense of security of their home. They'll never get that back.
>
> When you look at these victims' statements, Mr. Schuck, he says he feels violated. And listen to testimony or review statements in which you get a sense, a true sense of loss that transcends any monetary or proprietary loss. It's a loss of security, a loss of a sense of safety. It's something the Court can never restore. And it's often -- both counsel, who are very good lawyers, understand that it is an obligation of our system of justice to restore to the victims whatever was taken from them, so that they're in the same place that they were before the actions of the defendant intervened in their lives. And in these cases, you can never do that.

> On the other hand, these are serious cases. Maybe not in terms of great financial crimes. Both counsel have had experience with more money, more burglaries, more criminal activity [than] has been presented here. But, nonetheless, these have a significant impact on the quality of life of innocent people who live in Washoe County.

We conclude that Fuller has not demonstrated that the district court erred by admitting evidence of uncharged misconduct during sentencing, the district court's statement reflects its understanding of the impact that burglary – especially residential burglary – has on victims in general, and the district court's statement does not support Fuller's contention that the district court's sentence was improperly intended to punish him for the uncharged offenses.

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

ORDER the judgments of conviction AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk