IN THE SUPREME COURT OF THE STATE OF NEVADA

EVER JOSELIN AREVALO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52267

FILED

MAY 01 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On February 19, 2003, appellant Ever Joselin Arevalo was convicted, pursuant to a guilty plea, of one count each of attempted sexual assault and first-degree kidnapping. The district court sentenced Arevalo to serve two consecutive prison terms of 96-240 months and 60-180 months and ordered him to pay $2,450.87 in restitution. Arevalo did not pursue a direct appeal from the judgment of conviction and sentence.

On January 8, 2004, Arevalo filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court conducted a hearing and, on June 14, 2004, entered an order denying Arevalo's petition. This court dismissed Arevalo's untimely appeal due to a lack of jurisdiction. Arevalo v. State, Docket No. 43858 (Order Dismissing Appeal, September 17, 2004).

Arevalo pursued federal habeas relief and the federal district court granted in part his petition. See Arevalo v. Farwell, No. 3:04cv00568, 2008 WL 820194 (D. Nev. March 25, 2008). Specifically, the federal court found that the state district court erred by rejecting Arevalo's

claim that the State breached his plea agreement by not conducting the required psychosexual evaluation prior to sentencing, which could have made him eligible for probation on one of the two counts to which he pleaded. See id; see also NRS 176.139; NRS 176A.110. As a result, the federal court vacated Arevalo's conviction and directed that he be "resentenced before a different judge with the benefit of the psychosexual evaluation required by the plea agreement." Arevalo, No. 3:04cv00568, 2008 WL 820194, at *14. A psychosexual evaluation was completed and Arevalo was certified as not a high risk to reoffend; therefore, he was eligible for probation on the one count of attempted sexual assault. At the resentencing hearing, the state district court imposed the same sentence originally imposed with credit for 2,928 days time served. An amended judgment of conviction was filed on July 23, 2008. This timely appeal followed.

Claims Not Cognizable

Arevalo makes several arguments not properly raised at this time. Under the circumstances of this case, only issues pertaining to the resentencing proceeding are cognizable in this direct appeal. Nevertheless, Arevalo contends that (1) counsel was ineffective for failing to ensure that the psychosexual evaluation was completed prior to his initial sentencing hearing, (2) counsel was ineffective for failing to move to withdraw his guilty plea, (3) his guilty plea was not entered knowingly and intelligently, and (4) the district court erred by denying his proper person motion to dismiss counsel and appoint alternate counsel prior to the entry of his guilty plea in 2002.

This court has repeatedly stated that, generally, claims of ineffective assistance of counsel will not be considered on direct appeal. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). We conclude that Arevalo has failed to provide this court with any reason

to depart from this policy in his case. See id.; see also Archanian v. State, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). Additionally, Arevalo's challenge to the validity of his guilty plea is not appropriate for review on direct appeal from the amended judgment of conviction, and therefore, we need not address it. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also O'Guinn v. State, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002).

Finally, we note that Arevalo waived any challenge to the district court's denial of his motion to dismiss counsel and appoint alternate counsel. This court has repeatedly stated that, generally, the entry of a guilty plea waives any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). "'[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. . . . [A defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" Id. (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)) (first alteration in original). Moreover, as noted above, Arevalo did not pursue a direct appeal from the initial judgment of conviction and sentence; and, even if he had, there is no indication in the record that Arevalo expressly preserved this issue for review on appeal. See NRS 174.035(3).

Plea Agreement/Abuse of Discretion At Resentencing Hearing

Arevalo contends that the State breached the plea agreement at the resentencing hearing. Specifically, Arevalo claims the following "offensive argument" made by the prosecutor violated the terms of the plea agreement:

> You know. I'm kind of concerned, I guess, would be the word, I'm standing back here in front of the court arguing at sentencing again. When we entered into negotiations, we enter into a contract.

> We assume that when we give something up, we're going to get something in return. What I gave up in this case is multiple consecutive life sentences.
>
> The defendant was charged with sexual assault with a weapon, kidnap with a weapon. I could have asked the court to sentence him to prison for 20 years to life. But instead, I, after long conversations with . . . the victim in this case, I resolved the case this way, and I did it with her blessing. Expecting that he would spend those years in prison and she would not have to re-live this nightmare again.
>
> Then he goes and appeals and says he should have been given a shot at probation. Well, you know what, when you stipulate to a sentence that's what you're supposed to do, stipulate to that sentence. And the only issue should have been, is it concurrent or consecutive.
>
> So now we're standing back here, again, because he didn't want to follow through with the negotiations.

In a related argument, Arevalo contends that the district court abused its discretion by imposing a sentence based on a materially untrue assumption or mistake which worked to his detriment, namely, his eligibility for probation on the count of attempted sexual assault (count I) and alleged lack of remorse. We disagree.

In Van Buskirk v. State, this court explained that when the State enters into a plea agreement, it "is held to 'the most meticulous standards of both promise and performance'" in fulfillment of both the terms and the spirit of the plea bargain, and that due process requires that the bargain be kept when the guilty plea is entered. 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v. Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)). "The violation of either the terms or the spirit of the agreement requires reversal." Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999); see also Echeverria v. State, 119 Nev. 41,

44, 62 P.3d 743, 745 (2003) (recognizing that the State's breach of a plea agreement is not subject to harmless-error analysis).

This court has consistently afforded the district court wide discretion in its sentencing decision. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The district court's discretion, however, is not limitless. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). It is within the district court's discretion to impose consecutive sentences. See NRS 176.035(1); see generally Warden v. Peters, 83 Nev. 298, 302-03, 429 P.2d 549, 552 (1967).

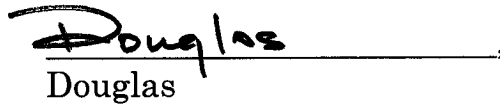
In this case, the written plea agreement memorandum, signed by Arevalo, stated, "The State and Defendant stipulate to a sentence of a minimum of EIGHT (8) years and a maximum of TWENTY (20) years as to Count 1. . . . The State retains the right to argue whether counts run consecutive or concurrent." At his arraignment and plea canvass, Arevalo informed the district court that he understood the terms of the sentence stipulation. At both sentencing hearings, the State asked the district court to impose the stipulated sentence pursuant to negotiations and argued for the prison terms to run consecutively. At the resentencing hearing, the State again detailed the violent nature of the offense to which Arevalo pleaded and noted that he had, among other infractions, two prior domestic violence convictions involving the same victim. Further, at the beginning of the resentencing hearing, defense counsel informed the district court that a psychosexual evaluation had been completed and that Arevalo was found not to be a high risk to reoffend, thus, pursuant to statute, he was eligible for probation on the one count, to which the

district court replied, "Absolutely." Prior to imposing the stipulated sentence and ordering the terms to run consecutively, the district court addressed Arevalo's extensive, violent criminal history and described the instant offense as "[h]einous" and "cruel." Therefore, based on the foregoing, we conclude that the State did not breach the plea agreement and the district court did not abuse its discretion at the resentencing hearing.

Having considered Arevalo's contentions and concluded that they are either not properly raised at this time or without merit, we

ORDER the amended judgment of conviction AFFIRMED.

_____, J.
Parraguirre



_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Jeannie N. Hua, Inc.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk