

IN THE SUPREME COURT OF THE STATE OF NEVADA

DORIAN M. GIVENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52838

DORIAN M. GIVENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52880

FILED

OCT 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 52838 is a proper person appeal from an order of the district court denying a motion for specific performance of plea agreement. Docket No. 52880 is a proper person appeal from an order of the district court denying a motion to correct or modify sentence. We elect to consolidate these appeals for disposition. NRAP3(b). Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On May 15, 2008, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted battery constituting domestic violence and one count of coercion. The district court sentenced appellant to consecutive terms of 19 to 48 months and 28 to 72 months in the Nevada State Prison. No direct appeal was taken.

Docket No. 52838: Motion for Specific Performance of Plea Agreement

On October 15, 2008, appellant filed a proper person motion for specific performance of plea agreement in the district court. The State

opposed the motion. On November 25, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant appeared to challenge whether his plea was intelligently and voluntarily entered. Appellant claimed that he believed that he would receive a term of 12 to 48 months for attempted battery and a term of 12 to 72 months for coercion, the terms to be served concurrently, suspended and probationary terms imposed. Instead, the district court sentenced appellant to serve consecutive terms of 19 to 48 months and 28 to 72 months for the attempted battery and coercion counts.

Because of the nature of the relief sought, we construe appellant's motion to be a motion to withdraw a guilty plea as there is no statutory authority recognizing a motion for specific performance of plea agreement. A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

Appellant failed to carry his burden of demonstrating his plea was invalid in this respect. No such promise is contained in the written plea agreement. Rather, in exchange for his guilty plea to attempted battery constituting domestic violence and coercion, the State conditionally agreed not to oppose concurrent terms and to dismiss two additional criminal cases. The additional conditions imposed were

appellant was not permitted to contact the victim or commit a new criminal offense. Appellant was informed in the written guilty plea agreement and during the plea canvass of the potential terms and that sentencing decisions were left within the district court's discretion. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing. Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975). Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that the State and the district court breached the plea agreement. In exchange for his guilty plea to one count of attempted battery constituting domestic violence and one count of coercion, the State agreed to not oppose concurrent sentences. However, at the sentencing hearing, the State argued for consecutive sentences, and the district court imposed consecutive sentences. We note that this claim was waived as it should have been raised on direct appeal, and this reason alone provides a sufficient basis to deny the claim. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Moreover, as a separate and independent ground to deny relief, appellant failed to demonstrate a breach of the plea agreement. Appellant was informed in the written guilty plea agreement that as a condition of his plea, appellant "must not have any contact in any way by any means whatsoever with the victim." Appellant was further informed in the written guilty plea agreement that if he committed a new criminal offense prior to sentencing, the State would regain the full right to argue for any lawful sentence. Appellant entered his guilty plea on February 14, 2008, and a police report was filed on March 12, 2008, detailing another

domestic violence incident involving appellant and the victim on March 9, 2008.¹ In arguing for consecutive sentences, the State specifically relied upon the March 9, 2008 incident. The March 9, 2008 incident constituted a breach of the conditions of the plea agreement by appellant, which permitted the State to regain the right to argue for any lawful sentence. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that he was never charged with or arraigned on the charge of coercion. This claim does not implicate the voluntary or knowing nature of the guilty plea, and thus, we conclude that this claim was not cognizable in this action. See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000). Moreover, as a separate and independent ground to deny relief, we note that the claim is belied by the record on appeal. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Therefore, we conclude that the district court did not err in denying the motion for specific performance of plea agreement.

Docket No. 52880: Motion to Correct or Modify Sentence

On November 17, 2008, appellant filed a proper person motion to modify or correct a sentence in the district court. The State opposed the motion. On January 8, 2009, the district court denied the motion. This appeal followed.

¹The police report indicates that appellant came to the victim's place of employment after being released from jail and asked if he could stay in her apartment. The victim allowed appellant to stay the night. The next morning a fight ensued in which appellant allegedly grabbed the victim's arms, pushed the victim, hit the victim, and strangled the victim. The police report noted an abrasion on the victim's neck.

In his motion, appellant claimed that the State misled the district court that he had committed a new offense because the new offense occurred prior to his plea being entered, thus it was not new, and because charges were not filed on the new offense until after he was sentenced in this case.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'" Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)). A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment." Id. A motion to correct or modify a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied. Id. at 708-09 n.2, 918 P.2d at 325 n.2.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying the motion. The sentences imposed were facially legal, and appellant failed to demonstrate that the district court was not a competent court of jurisdiction. NRS 200.481(2)(c); NRS 193.330(1)(4); NRS 207.190. Appellant further failed to demonstrate that the district court relied upon material mistakes of fact about his criminal record in sentencing appellant. As discussed earlier, the police report referred to by the State during the sentencing hearing detailed a new offense occurring after entry of the guilty plea in this case.

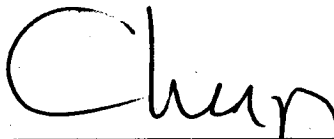
Consideration of the new offense did not depend upon the filing of formal charges.

Therefore, we conclude that the district court did not err in denying the motion to correct or modify sentence.

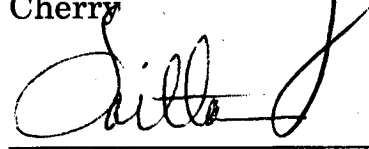
Conclusion

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

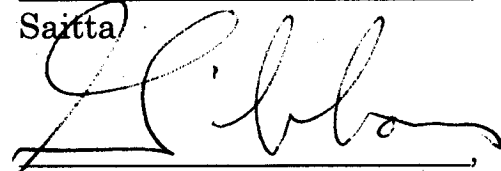
ORDER the judgments of the district court AFFIRMED.²

 _____, J.

Cherry

 _____, J.

Saitta

 _____, J.

Gibbons

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. David B. Barker, District Judge
Dorian M. Givens
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk