

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN RAMOS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 33072

**FILED**

JAN 12 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Roberts*  
CHIEF DEPUTY CLERK

JUAN RAMOS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 33519

JUAN RAMOS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 34475

JUAN RAMOS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 34840

ORDER OF AFFIRMANCE

Docket No. 33072 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 33519 is a proper person appeal from an order denying appellant's motion to withdraw a guilty plea. Docket No. 34840 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Docket No. 34475 is a proper person appeal from an order of the district court denying appellant's motion to amend the judgment of conviction to include

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jail time credits. We elect to consolidate these appeals for disposition. See NRAP 3(b).

On March 25, 1997, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted robbery. The district court sentenced appellant to serve a term of 22 to 96 months in the Nevada State Prison to run concurrently to the sentence imposed in another district court case. This court dismissed appellant's direct appeal. *Ramos v. State*, Docket No. 30305 (Order Dismissing Appeal, March 5, 1998).

Docket No. 33072

On April 16, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On September 21, 1998, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first raised a claim of prosecutorial misconduct for vindictive and discriminatory prosecution, which he argued violated equal protection. Specifically, appellant claimed that no facts existed to support the elements of attempted robbery, however, the prosecutor charged him with attempted robbery because he is a "Mexican American Drug Addict." This claim falls outside the narrow scope of claims allowed in a post-conviction petition for a writ of habeas corpus challenging a conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

Next, appellant contended that the district court abused its discretion in accepting appellant's guilty plea because appellant did not commit the crime of attempted robbery. Appellant also claimed that the plea canvass was inadequate because the court failed to inform appellant of the possible ranges of sentences, the rights that he was waiving by pleading guilty, and that he had to pay attorney fees to the public

defender's office. A guilty plea is presumptively valid, and the defendant has the burden of establishing that the plea was not entered knowingly and intelligently. See *Bryant v. State*, 102 Nev. 268, 721 P.2d 364 (1986). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. See *id.* at 272, 721 P.2d at 368. We conclude, considering the totality of the circumstances, that the district court did not err in denying this claim. Appellant admitted the crime and confirmed that his plea was freely and voluntarily given and that it was not a product of undue influence. In addition, appellant signed a guilty plea agreement and told the court that he read, discussed, and understood the terms of the agreement which included the possible ranges of sentences and the rights appellant was waiving by pleading guilty. Moreover, the district court conducted an adequate plea canvass. Therefore, appellant did not demonstrate that his plea was involuntary or that the district court abused its discretion in accepting his plea.

Last, appellant contended that his counsel was ineffective prior to and during sentencing and on direct appeal. Specifically, appellant contended that his counsel was ineffective for: (1) failing to challenge the amended information; (2) failing to argue that appellant should have been charged with petit larceny instead of attempted robbery; (3) failing to challenge the vindictive acts of the prosecutor; (4) failing to file a motion to withdraw his guilty plea; (5) waiving appellant's preliminary hearing; and (6) failing to raise meritorious claims on direct appeal.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. An appellant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. See *Kirksey v. State*, 112

Nev. 980, 923 P.2d 1102 (1996); Hill v. Lockhart, 474 U.S. 52 (1985). Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances. See Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). Further, appellate counsel does not have a constitutional duty to raise every non-frivolous issue on appeal, even when the appellant requests that a particular issue be raised. See Jones v. Barnes, 463 U.S. 745 (1983). Appellate counsel will be most effective when every conceivable issue is not raised on appeal. See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989). Based upon our review of the record, we conclude that appellant has failed to demonstrate that his counsel's performance, before and during sentencing and on direct appeal, was unreasonable or that he was prejudiced by the performance of counsel.

We conclude that the district court did not err in denying appellant's petition.

Docket No. 33519

Docket No. 33519 is proper person appeal from an order of the district court denying appellant's post-conviction motion to withdraw his guilty plea.

On November 3, 1998, appellant filed a proper person post-conviction motion to withdraw his guilty plea in the district court. The State opposed the motion. On November 25, 1998, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that his plea was involuntary because he did not commit the crime of attempted robbery; he pleaded guilty with the understanding that he would not be sentenced to more than 60 months; his plea canvass was inadequate; and his sentence should be modified.

A guilty plea is presumptively valid, and the defendant has the burden of establishing that the plea was not entered knowingly and intelligently. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). Further, this court will not reverse a district court's determination concerning the validity

of a plea absent a clear abuse of discretion. See id. Appellant has not carried his burden of establishing that his plea was invalid. Moreover, appellant previously raised this claim in his post-conviction petition for a writ of habeas corpus which was denied by the district court; this court has also affirmed the district court's decision in Docket No. 33072. We conclude that the district court did not err in denying appellant's motion.

Appellant also contended in his motion, that his counsel was ineffective for failing to advise him of his right to appeal. We conclude that this claim is not properly raised in a motion to withdraw a guilty plea because it does not challenge the validity of the plea. Moreover, appellant did have a direct appeal which this court dismissed.

We conclude that the district court did not err in denying appellant's motion.

Docket No. 34475

Docket No. 34475 is a proper person appeal from an order of the district court denying appellant's motion for an amended judgment of conviction to include jail time credits.

On June 3, 1999, appellant filed a proper person motion for an amended judgment of conviction to include jail time credits. The State opposed the motion on the grounds that appellant was on probation for another offense at the time that he was arrested for attempted robbery. On June 23, 1999, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that he was entitled to 190 days of jail time credit for time spent in custody from September 1996 to March 1997.

NRS 176.055(2)(b) provides that a defendant convicted of a subsequent offense which was committed while he was "on probation . . . from a Nevada conviction is not eligible for any credit on the sentence for the subsequent offense for the time he has spent in confinement which is within the period of the prior sentence, regardless of whether any probation or parole has been formally revoked."

Our review of the record on appeal reveals that appellant did not demonstrate that he was entitled to jail time credit. Therefore, the district court did not err in denying appellant's motion. See Pangallo v. State, 112 Nev. 1533, 930 P.2d 100 (1996); see also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Docket No. 34840

Docket No. 34840 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence.

On August 16, 1999, appellant filed a motion to correct an illegal sentence in the district court. The State opposed the motion and appellant filed a reply. On September 30, 1999, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that his sentence was illegal because he was sentenced to 22 to 96 months and he should have been sentenced to 1 to 5 years pursuant to "the penalties for felonies under the Nevada Revised Statutes, Senate Bill 416, 1995 Legislative session (effective July 1, 1995)." Appellant also contended that his sentence was implemented without the effective assistance of counsel.

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 that 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)).

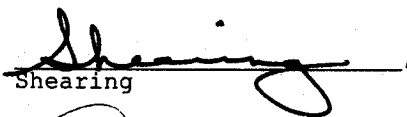
Our review of the record on appeal reveals that the district court had jurisdiction to sentence appellant and appellant's sentence was not in excess of the statutory maximum.

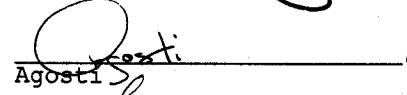
In fact, the district court sentenced appellant to a maximum sentence of 8 years which is two years less than the statutory maximum for attempted robbery. See NRS 193.330(1)(a)(2); NRS 200.380. Therefore, the district court did not err in denying appellant's motion.

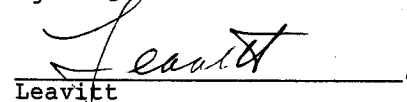
Conclusion

Having reviewed the records 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), cert. denied, 423 U.S. 1077 (1976). Accordingly, we affirm these orders of the district court.

It is so ORDERED.<sup>1</sup>

  
Shearing, J.

  
Agosti, J.

  
Leavitt, J.

cc: Hon. John S. McGroarty, District Judge  
Attorney General  
Clark County District Attorney  
Juan Ramos  
Clark County Clerk

<sup>1</sup>We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.