IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY MICHAEL COLLARD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34963

FILED

JAN 09 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On September 13, 1994, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a cheating device. The district court sentenced appellant to serve a prison term of 10 years, to run concurrently with a sentence in another case. Appellant did not pursue a direct appeal.

On December 6, 1994, 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 March 6, 1995, the district court denied appellant's petition. Appellant subsequently appealed to this court, and we remanded the case to the district court with instructions to determine whether counsel informed appellant of his right to a direct appeal. See Collard v. State, Docket No. 27355 (Order of Remand, September 3, 1998). On remand, the district court appointed counsel to represent appellant,

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ordered the parties to brief the issues, heard arguments and once again denied appellant's petition. This appeal followed.[1]

We have reviewed the record on appeal, and for the reasons stated in the attached order of the district court, conclude that appellant's contentions lack merit. Moreover, we conclude that appellant has not demonstrated that the district court erred as a matter of law.

Accordingly, we affirm the order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

It is so ORDERED.

Young, J.

Rose, J.

Becker, J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
William J. Taylor
Clark County Clerk

[1]Appellant is represented by counsel on appeal.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GARY COLLARD aka Gary Michael Collard, #474919

Defendant.

Case No.. C119714
Dept. No. XV
Docket L

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 9/21/99
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable Sally Loehrer, District Judge, on the 21st day of September, 1999, the Petitioner not being present, represented by JOHN KELLIHER, Esquire, the Respondent being represented by STEWART L. BELL, District Attorney, by and through CRAIG HENDRICKS, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant, Gary Collard, entered a plea of guilty on May 3, 1994, to one (1) count of Possession of Cheating Device. (See Judgment of Conviction, filed 9/13/94). Defendant was sentenced on August 30, 1994, to a term of imprisonment of ten (10) years. On December 6, 1994, the Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) alleging two assignments of error including: that Defendant was not apprised by defense counsel of the right

DEPUTY CLERK

to appeal his guilty plea conviction and that the district court improperly sentenced Defendant to a maximum term of ten (10) years based on his HIV-positive status.

2. Defendant's Petition for Writ of Habeas Corpus was denied, and on March 6, 1995, the court entered its Findings of Fact; Conclusions of Law; and Order. On July 24, 1996, the Defendant filed a Motion to Reconsider its Order of March 6, 1995, and said motion was denied on August 30, 1996. Defendant subsequently filed a proper person appeal from the order of the district court denying Defendant's Petition for Writ of Habeas Corpus.

3. On September 3, 1998, prior to the decision in Thomas v. State, 115 Nev. Adv. Op. 22, 979 P.2d 222 (1999) (holding that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."), the Supreme Court declined to rule on the issue of sentencing, and remanded this matter to the district court with instructions to determine whether defense counsel informed Defendant of his right to appeal. (See Order of Remand, filed 9/3/98).

4. On May 11, 1999, the District Court appointed counsel for the Defendant. On May 18, 1999, the Defendant was advised in accordance with the Supreme Court's order from September 3, 1998, to raise any issues which the Defendant would have raised in a direct appeal. On July 19, 1999, the Defendant filed the current Supplemental Points and Authorities as a result, which once again alleges that the Defendant was improperly sentenced due to his HIV status. The State filed a response on September 8, 1999. The Defendant filed a reply on September 14, 1999. Argument was heard and the petition was decided on September 21, 1999.

CONCLUSIONS OF LAW

I. THE DEFENDANT'S PETITION WILL BE DENIED BECAUSE HE WAS PROPERLY SENTENCED WITHIN THE STATUTORY GUIDELINES AND THE DEFENDANT'S SENTENCE WAS EXPRESSLY BASED ON HIS SIX (6) FELONY CONVICTIONS, 24 MISDEMEANOR CONVICTIONS, AND 62 ARRESTS

1. The District Court has already determined that the "Defendant's claims that the court unconstitutionally increased his sentence due to the fact that Defendant is HIV positive is rebutted by the record." (See Findings of Fact, filed 3/6/95). The Court went on to explain that the reason for the Defendant's sentence was the fact that the Defendant had "62 arrests, 24

misdemeanor convictions and 5 or 6 felony convictions." (See Reporter's Transcript of Sentencing, August 30, 1994, p. 4). At the plea hearing, the Defendant fully understood that he was subject to being sentenced from one to ten years in the Nevada State Prison, in exchange for the dismissal of two additional cases pending against him. (See RT of Plea, 5/3/94, pp. 3-6). These facts were the basis for the Defendant's sentence which was properly based on the Defendant's criminal record.

2. The Nevada Supreme Court has repeatedly held that a "sentencing judge is accorded wide discretion in imposing a sentence; absent an abuse of discretion, [the Supreme Court] will not disturb the district court's determination on appeal." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Sentences within the statutory limits are consistently upheld provided they do not "shock the conscience and offend fundamental notions of human dignity." DePasquale v. State, 104 Nev. 338, 341, 757 P.2d 367, 369 (1988). The sentencing judge cannot rely on "information or accusations founded on facts supported only by impalpable or highly suspect evidence." Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996).

3. The Defendant pled guilty to, and was sentenced on, one (1) count of Possession of a Cheating Device, which carries a penalty of imprisonment in the state prison for not less than one (1) year nor more than ten (10) years in the Nevada State prison. The Defendant claimed that the Court prejudicially increased Defendant's sentence due to the fact that Defendant is HIV positive. Though interesting in theory, the claim must fail. The Defendant's whole argument is based upon an erroneous premise - that the Court did, in fact, use Defendant's HIV status as an aggravating factor, and sentenced the Defendant based upon that fact.

4. In support of his claim, the Defendant conveniently edited the Court's remarks at sentencing, stringing together everything the Court said regarding drugs and AIDS, but ignoring the real reason for the sentence: the Defendant's extensive criminal history. During sentencing, the State recommended a ten year sentence based on the Defendant's criminal history. (RT 8/30/94, p. 3). After the Court had listened to the Defendant's comments before pronouncing sentence, the Court succinctly stated, "Anywhere you are in five years could be a life sentence. But you also have 62 arrests, 24 misdemeanor convictions and five or six felony convictions.

That's what you're being sentenced for, not for cheating at gambling." (RT 8/30/94, p. 4).

5. The Defendant also overlooked the fact that most of the charges against him were dismissed pursuant to the negotiations. Although the Defendant had two (2) multi-count cases in the system, he was permitted to plead to one (1) count in each, and received concurrent time. Despite the Defendant's claims that he received a harsh sentence due to his disease, it is highly unlikely that, given the Defendant's prior criminal history, he would have received such a lenient negotiation and sentence on the totality of his cases, were it not for his HIV positive status.

6. The Defendant cited Martinez v. State, 114 Nev. 735, ___, 961 P.2d 143, 145-46 (1998), in support if his argument. In Martinez, the Supreme Court considered the defendants' constitutional due process claim, and determined that the sentencing judge improperly considered the defendants' national origin in violation of their due process rights by stating, "There's something that heightens the nature of an offense when people come from foreign lands to do offenses in another land." Id. at 145.

7. While a person's national origin is a suspect class which requires heightened scrutiny under the constitution, the Defendant's claim in the present case is one of "prejudice" and not due process. Since the Defendant is not a member of a protected class, his claim is not a constitutional violation, and deserves nothing more than a rational basis analysis. See United States v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989) (reviewing constitutional prohibition on unequal treatment due to national origin). Under the lesser standard of a mere rational basis, it is clear that pursuant to the Martinez decision, there was no due process violation in discussing the Defendant's HIV status during sentencing, and justice was satisfied by the Court basing its sentence on the Defendant's criminal history.

8. The Defendant also cited Norwood v. State, 112 Nev. 438, 915 P.2d 277 (1996), in support of his argument. In Norwood, the Supreme Court held that the sentencing judge's comments about the defendant's affiliation with gang members "appeared to have affected the sentence" and remanded the case for a new sentencing hearing before a different district court judge. Id. at 441, 915 P.2d at 279. Justice Springer and Chief Justice Steffen dissented from that decision since the record actually provided a basis for the judge's comments during

sentencing. Id. In the case at bar, the Judge's comments were based on the record and thereby not unduly prejudicial to the Defendant. The sentencing court is entitled to draw reasonable inferences from the evidence presented, and the Court's reference to the transfer of the Defendant's disease is a well documented and reasonable conclusion to be drawn based on the Defendant's drug use and criminal history. See Lucas v. State, 96 Nev. 428, 610 P.2d 727 (1980) ("The trial judge's remarks reflect inferences which reasonably could be drawn from evidence presented at trial and the presentencing report." Id. at 433, 610 P.2d at 731).

9. The Defendant claimed that the Judge's personal opinions and prejudice led to the ten year sentence. The record conclusively shows otherwise. The Defendant's own admissions to the Court included the fact that he had been HIV positive since 1987, and that he was in a cycle of cheating gambling machines to be able to buy cocaine. (See Defendant's Handwritten Statement dated 8/16/94, attached to PSI report of 8/18/94). During sentencing, the Defendant stated, "You have to understand, I'm going out there and going right into drugs." (RT Sentencing, 8/30/94, p. 4). The Defendant also stated, "When you're on the drug you're not thinking about getting help, you're thinking about doing more drugs." Id. at p. 6. These statements were made in connection with the Defendant's request to be put into a drug treatment program to avoid prison, and the Court's responses cited by the Defendant were based on the Defendant's questions. The Court even stated, "Let me ask you. Forget about your life threatening illness for a second." Id. at p. 6. These statements show that the Defendant's sentence was actually based on his lengthy criminal history and not his disease.

10. The Defendant also claimed that the Court was actually giving him a life sentence. While that may eventually prove to be true, it is something which the Defendant should have considered before he committed the crimes with which he was charged, and he was fully aware at the plea hearing that he could be sentenced up to ten years on this case. The Defendant cannot highlight his medical status in a plea for leniency and then use the fact that the Judge mentioned his medical status as a basis for a claim that the sentence was somehow illegal. Therefore, even if this issue was properly before the Court, it is without merit because the Defendant's sentence was properly based on his criminal record, and no new sentencing hearing is required.

II. SINCE THE DEFENDANT'S SENTENCE WAS PROPER, THERE WAS NO APPEALABLE ISSUE, AND BASED ON THE RECENT DECISION IN THOMAS V. STATE,[1] THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING HIS LIMITED RIGHT TO APPEAL

11. The Defendant's attempt to relitigate an issue which was previously raised in the Defendant's first Petition for Writ of Habeas Corpus, filed December 6, 1994, is improper. Said petition was denied on the merits by this Court in its Findings of Fact and Conclusions of Law and Order filed on March 6, 1995. The Defendant appealed the denial of his 1994 petition raising the sentencing issue, and claiming that he was never informed of his right to appeal. The Supreme Court declined to address the sentencing issue because it was a direct appeal claim, and stated as follows:

> Accordingly, we decline to decide the claim at this time because appellant may have waived it if he did not object to counsel's failure to file a direct appeal. [Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059]. If appellant demonstrates that he was not informed of his right to a direct appeal in this case, post-conviction counsel may reassert this claim in the district court in a post-conviction petition for a writ of habeas corpus.

(See Order of Remand, filed 9/3/98).

12. The Defendant is now raising issues which would have been brought on direct appeal. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Pursuant to the Thomas decision, there was no appealable issue of merit, so the Defendant was not improperly denied his right to a direct appeal. Under current Nevada law, Defendant's trial counsel was effective regarding his right to appeal based on the decision in Thomas v. State, 115 Nev. Adv. Op. 22, 979 P.2d 222 (1999) (holding that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."). In Thomas, the Court enumerated circumstances where the trial counsel would have an obligation to advise Defendant of the right to appeal, namely (1) when the defendant inquires about an appeal or (2) when the situation indicates a reasonable likelihood of success. Thomas v. State, 115 Nev. Adv. Op. 22, 979 P.2d 222 (1999). Furthermore, this Court disapproved any implication being drawn from

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[1] Thomas v. State, 115 Nev. Adv. Op. 22, 979 P.2d 222 (1999) (holding that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal.")

the holding in Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), that counsel has an absolute duty to advise a Defendant who pleads guilty of his right to appeal.

13. The issues raised in the present proceedings were waived by the Defendant since his attorney was not required to inform him of his right to appeal pursuant to Thomas. Such claims have already been decided in his first petition, and are now law of the case. See Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993) (holding that prior ruling on same issues had become law of the case and "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 959, 860 P.2d at 715) (citing Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975)).

III. THE ISSUE HAD NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW AND THEREBY COULD NOT BE RAISED IN THESE PROCEEDINGS

14. The defense argued that the Court sentenced the Defendant based on his HIV positive status. The record of the sentencing hearing reveals that the Defendant's attorney did not object to such alleged misstatements and thereby waived appellate review. As stated above, the Defendant cannot highlight his medical status in a plea for leniency and then use the fact that the Judge mentioned his medical status as a basis for a claim that the sentence was somehow illegal. The Defendant's colloquy with the Court regarding his HIV status did not preserve the issue for review.

15. In Todd v. State, 113 Nev. 18, 931 P.2d 721 (1997), the Supreme Court stated, "where evidence of guilt is substantial, the alleged errors are unlikely to have affected the verdict, and the failure to object is unexcused, we conclude that these competing interests are best served by **adhering to the general rule that errors not properly objected to at trial are waived.**" Id. at 723 (emphasis added); see also Lucero v. State, 725 P.2d 266, 269 (N.M. 1986) (holding that "Not only must the objection be raised below, but the objection must be sufficiently timely and specific to apprise the trial court of the nature of the claimed error and to invoke an intelligent ruling by the court.). The general rule regarding the failure to object at trial is also true with regard to the failure to object to alleged errors or misstatements at sentencing. The Defendant's failure to make a timely objection regarding the Court's discussion

of sentencing with the Defendant failed to preserve the issue for appellate review and is therefore precluded.

16. Additionally, the errors complained of are not patently prejudicial. See Todd v. State, 113 Nev. 18, 931 P.2d 721 (1997); Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986) (stating that as a general rule, a failure to object at trial precludes appellate review, but where errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply); State v. Eighth Judicial District Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048-49 (1984) ("[N]ot every mistake or error which occurs during sentencing gives rise to a due process violation."). In this case the alleged errors were not patently prejudicial and the Court will not review improperly preserved assignments of error.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 25th day of October, 1999.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
CRAIG HENDRICKS
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