

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH A. WARREN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35235

FILED

APR 06 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a 1986 judgment of conviction, pursuant to a guilty plea, of eight counts of sexual assault with the use of a deadly weapon and one count each of first degree kidnapping with the use of a deadly weapon, battery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. The district court sentenced appellant Keith A. Warren to imprisonment for eighteen consecutive terms of life without the possibility of parole plus additional terms totaling fifty years.

The judgment of conviction was entered on December 23, 1986. On January 13, 1987, appellant filed a timely proper person notice of appeal in the district court. However, the district court clerk failed to transmit the notice of appeal or the trial court record to this court.

On January 13, 1987, appellant also filed a proper person post-conviction motion to withdraw his guilty plea in the district court. The motion challenged the knowing and voluntary nature of the plea. On February 12, 1987, after

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conducting a hearing, the district court denied the motion to withdraw the guilty plea, noting that the plea canvass demonstrated a valid guilty plea. Appellant did not appeal from the denial of this motion.

In 1990, appellant filed in the district court a proper person petition for post-conviction relief, challenging, inter alia, whether appellant had been competent to enter a guilty plea. The court appointed counsel and scheduled an evidentiary hearing. However, according to district court minutes, appellant's counsel informed the court prior to the hearing that appellant wanted to vacate the hearing date and withdraw his petition. The district court permitted appellant to do so.

On October 17, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Again, appellant challenged whether he was competent during the proceedings leading to his conviction. The court appointed counsel, and counsel filed supplemental documents in support of the petition. In response, the State argued that the petition was procedurally barred as untimely. The State also specifically pleaded laches, asserting that appellant's delay prejudiced the State. The district court heard argument on May 6, 1997, and entered findings of fact and conclusions of law on July 29, 1997. The court concluded that appellant's petition was untimely and barred by laches

and that his claims lacked merit. Appellant timely appealed. That appeal was docketed in this court as Docket No. 30473.

When reviewing the record in the appeal in Docket No. 30473, this court noted that appellant asserted in his 1996 petition that he had filed a timely notice of appeal from the judgment of conviction that was never transmitted to this court. On November 5, 1999, this court remanded the case to the district court for the limited purpose of appointing counsel for the direct appeal, and ordered the district court clerk to transmit the notice of appeal and other documents to this court so that the appeal could be docketed. The direct appeal was ultimately docketed in this court on December 6, 1999. Briefing was completed in January 2001, and on February 23, 2001, the appeal was submitted for decision.

Meanwhile, on December 11, 2000, prior to completion of briefing in this direct appeal, this court entered an order affirming the district court's denial of appellant's 1996 post-conviction petition on the ground that it was procedurally barred by laches. *Warren v. State*, Docket No. 30473 (Order of Affirmance, December 11, 2000).

In this direct appeal, appellant raises numerous claims challenging the district court's order denying the 1987 post-conviction motion to withdraw the guilty plea. However, this appeal is from appellant's judgment of conviction--not from the denial of appellant's post-conviction motion to

withdraw the guilty plea, which was independently appealable.¹ Therefore, claims of error related to the denial of the post-conviction motion, specifically appellant's claims that the district court erred by denying the motion to withdraw the guilty plea because the plea was not knowingly and voluntarily entered, are not properly before this court.² Appellant did not appeal from the district court's denial of his motion. Thus, we conclude that appellant has waived his right to further challenge the district court's rejection of the claims raised in the 1987 motion.³

In this appeal, appellant also presents other claims as challenges to the district court's denial of the 1987 motion to withdraw the guilty plea. However these other claims, which involve whether the district court erred by accepting appellant's waivers of various rights, were not raised in the 1987 motion. Nonetheless, because the claims assert that the district court erred in the proceedings leading up to appellant's conviction, these claims are properly raised and considered in the direct appeal from that

¹See Hargrove v. State, 100 Nev. 498, 501-02, 686 P.2d 222, 224-25 (1984).

²See Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961) (on appeal from judgment of conviction, review is limited to matters preceding the judgment); see also 177.045 ("Upon the appeal, any decision of the court in an intermediate order or proceeding, forming a part of the record, may be reviewed." (emphasis added)).

³We nevertheless note that we perceive no error in the district court's denial of appellant's post-conviction motion to withdraw the guilty plea.

conviction. Therefore, we will consider these claims as direct appeal claims.

Appellant argues that the district court erred in accepting his guilty plea, waiver of counsel and waiver of a presentence investigation report⁴ without first conducting a competency hearing.⁵ We conclude that the district court did not abuse its discretion.

The standards for competency to enter a guilty plea and competency to waive counsel are identical.⁶ "The test to be applied in determining competency 'must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.'"⁷ Whether a hearing to determine the competency of a defendant is required is within

⁴See NRS 176.135 (generally requiring a presentence investigation report prior to sentencing for felonies). Warren does not challenge whether the statutory requirement may be waived. However, we note that the requirement of a presentence investigation report is not a jurisdictional limit on the court's ability to impose sentence. See *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972).

⁵See NRS 178.400-.415 (requiring suspension of proceedings, competency examination and hearing where doubt arises as to the competence of a defendant).

⁶See *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993).

⁷*Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

the discretion of the trial court.⁸ If there is substantial evidence from any source that raises a reasonable doubt as to a defendant's competency, "the failure of the court to order a formal competency hearing is an abuse of discretion and a denial of due process."⁹ The record does not reveal any information or facts raising a reasonable doubt as to appellant's competency. We note, specifically, that appellant appropriately answered all questions during the district court's Faretta¹⁰ canvass and guilty plea canvass. Appellant's counsel also represented to the district court that appellant's competency was not in doubt. No evidence in the record shows that the State's reference during Warren's arraignment to the possibility of a psychological evaluation was any more than a pro forma suggestion that if one was to be done, it be done without delay. Although the record is unclear, even had one of the parties requested a psychological evaluation, such a request is not evidence that in itself creates a reasonable doubt as to competency to proceed. Accordingly, the district court did not err in permitting appellant to represent himself, enter a guilty plea, or waive

⁸See Kelly v. State, 93 Nev. 154, 155, 561 P.2d 449, 449 (1977).

⁹Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113.

¹⁰See Faretta v. California, 422 U.S. 806, 818-19, 835 (1975) (recognizing that an accused has Sixth Amendment right to represent himself but must satisfy the court that waiver of counsel is knowing and voluntary and the record should establish that accused was made aware of dangers and disadvantages of self-representation).

the statutory presentence investigation requirement, without first conducting a competency hearing.

Appellant also argues that the district court erred by permitting appellant to waive counsel and represent himself. He primarily focuses on whether the district court's Faretta canvass was adequate to show a knowing and voluntary waiver of counsel. However, our review of the transcript of the canvass demonstrates that appellant was aware of the dangers and disadvantages of self-representation and that he knowingly and voluntarily waived his right to counsel.¹¹ In sum, we conclude that the district court did not err.

Finally, appellant argues that he is entitled to reversal of his conviction due to the delay in processing the instant appeal. He specifically contends that the delay violates his rights to equal protection and due process. Appellant fails to present any cogent argument in support of his equal protection claim. Therefore, we decline to consider it.¹²

As to the due process claim, both appellant and the State rely on cases analogizing delayed appeal claims to claims involving violation of speedy trial rights and applying

¹¹See Graves v. State, 112 Nev. 118, 123-25, 912 P.2d 234, 237-39 (1996) (rejecting argument that valid waiver requires specific inquiry into matters beyond the general Faretta requirement that the record need show that defendant voluntarily entered waiver of right to counsel with awareness of the dangers and disadvantages of self-representation).

¹²See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

the Barker v. Wingo¹³ factors to determine whether a delay in an appeal interfered with appellant's right to due process. However, this court has rejected the application of the speedy trial analogy and Barker analysis to such claims.¹⁴ Instead, to determine whether a delay in an appeal warrants relief on due process grounds, we consider whether appellant has demonstrated that he is unable to present an adequate appeal because of the delay and whether he will be unable to adequately defend himself should retrial become a reality.¹⁵ Here, appellant does not contend that his ability to present an adequate appeal has been frustrated. Rather he contends that he has suffered anxiety from his incarceration during the delay in processing his appeal. However, such anxiety does not violate due process.¹⁶ Additionally, although appellant argues that he will be unable to adequately prepare a defense in the event of a retrial, we have concluded that his conviction should be affirmed. Accordingly, regardless of any possible prejudice to his defense during a retrial, he is not

¹³407 U.S. 514, 530 (1972) (discussing deprivation of right to speedy trial and setting forth four factors to be balanced: length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant).

¹⁴See Lopez v. State, 105 Nev. 68, 86-87, 769 P.2d 1276, 1288-89 (1989).

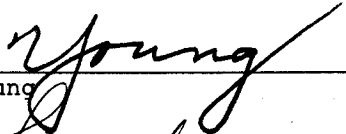
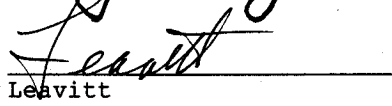
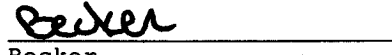
¹⁵See id. at 87, 769 P.2d at 1289.

¹⁶See id.

entitled to relief in this appeal.¹⁷ We therefore conclude that appellant's due process claim lacks merit.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁸

 _____ Young	J.
 _____ Leavitt	J.
 _____ Becker	J.

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
Connolly & Fujii
Keith A. Warren
Clark County Clerk

¹⁷See id. at 87-88, 769 P.2d at 1289.

¹⁸Although appellant has not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered appellant's proper person documents.