

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAMERON WAYNE KONOLD,

No. 36521

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JAN 23 2002

JANEYTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On December 31, 1997, the district court convicted Konold, pursuant to a guilty plea, of battery with the use of a deadly weapon committed on school property (count I) and discharge of a firearm out of a motor vehicle (count II). The district court originally sentenced Konold to serve two consecutive prison terms of 40 to 100 months for count I and a consecutive prison term of 42 to 156 months for count II. Konold filed a

direct appeal. Thereafter, Konold filed a motion to withdraw his appeal voluntarily. Konold's motion was granted, and this court dismissed his appeal.¹

On September 14, 1998, Konold filed a post-conviction petition for a writ of habeas corpus, arguing that his guilty plea was involuntary and that his counsel was ineffective. After conducting a hearing, on October 13, 1998, the district court denied the petition in part and granted it in part, finding that Konold's plea was knowing, but that a new sentencing hearing was warranted. The district court did not, however, enter a written order resolving the petition.

On February 3, 1999, the district court modified Konold's sentence, ordering that he serve two consecutive prison terms of 36 to 100 months for count I and a consecutive prison term of 30 to 156 months for count II. Konold filed a notice of appeal on March 20, 1999. This court dismissed Konold's direct appeal because it was untimely filed.²

¹Konold v. State, Docket No. 32132 (Order Dismissing Appeal, July 20, 1998).

²Konold v. State, Docket No. 33925 (Order Dismissing Appeal, May 4, 1999).

On October 11, 1999, Konold filed a motion to clarify his sentence, requesting that the district court enter a second amended judgment of conviction because of the State's failure to follow an earlier order of the district court. The district court granted Konold's motion and, on October 29, 1999, entered a second amended judgment of conviction. Konold filed a notice of appeal on November 23, 1999. Upon the filing of the fast track documents, it became apparent that Konold was actually challenging the district court's denial of his post-conviction petition. Because no written order had been entered denying his petition and notice of entry had not been served by the district court, the notice of appeal filed on November 23, 1999, was timely as to the district court's denial of the post-conviction petition.³ Accordingly, this court treated the appeal as an appeal from the district court order denying the post-conviction petition. This court affirmed the order of the district court.⁴

On April 21, 2000, Konold filed a second post-conviction petition for a writ of habeas corpus, arguing that his counsel was ineffective for failing to file a direct appeal and that his due process rights

³See NRS 34.575(1); NRAP 4(b)(1).

⁴Konold v. State, Docket No. 35199 (Order of Affirmance, October 12, 2000).

were violated because he was denied his right to a direct appeal. The State opposed the petition. Without conducting a hearing, the district court denied the petition, finding that the petition was untimely and successive. Konold filed the instant appeal, contending that the district court erred in denying his petition. We disagree.

Konold's petition was untimely because it was filed more than one year after the entry of the judgment of conviction.⁵ Further, Konold's petition was successive because he had previously filed a petition on September 14, 1998.⁶ Therefore, Konold's petition was procedurally barred absent a demonstration of good cause and actual prejudice.⁷

Konold argues that his procedural defect should be excused because his due process rights were violated and his trial counsel was ineffective in failing to appeal the original judgment of conviction, contrary to Konold's request. While acknowledging that his petition is

⁵See NRS 34.726(1); Dickerson v State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (holding that one-year period runs from issuance of a remittitur from a timely direct appeal or from entry of judgment of conviction if no direct appeal is filed).

⁶See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁷See NRS 34.810(1)(b); NRS 34.810(3).

successive, Konold argues that he has established good cause to overcome his procedural default because he “was informed and led to believe that his direct appeal from judgment of conviction was in fact filed and still pending” before this court. We disagree.

The district court did not err in finding that Konold failed to establish good cause and prejudice to excuse his procedural default. Konold’s claim that he was he was deprived of his right to a direct appeal of the original judgment of conviction is belied by the record. In particular, Konold’s trial counsel, on April 6, 1998, actually filed a direct appeal of the judgment of conviction in this court. Thereafter, Konold voluntarily withdrew that appeal, thereby waiving any issues that were or could have been brought in that appeal.⁸

Moreover, we note that, in pleading guilty, Konold waived most challenges to the judgment of conviction.⁹ By pleading guilty, Konold waived his right to appeal many of the issues he claims he is now entitled

⁸See Konold v. State, Docket No. 32132 (Order Dismissing Appeal, July 20, 1998).

⁹See 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.”) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

to raise, including that: (1) the indictment was unsupported by probable cause; (2) there was an unauthorized person in the grand jury room; (3) he did not commit a crime on "school property" within the purview of NRS 193.161; and (4) there was insufficient evidence to indict him for felony discharging of a firearm. Accordingly, Konold has not been deprived of his right to appeal issues that he waived by pleading guilty.

Assuming that he waived the right to appeal certain issues by pleading guilty, Konold maintains that he may still challenge the facial illegality of his sentence. In particular, Konold argues that the district court illegally sentenced him to a "double enhancement" in convicting him of "battery with the a deadly weapon on school property."


We conclude that Konold's claim that he received multiple sentencing enhancements is belied by the record. In fact, Konold did not receive a sentencing enhancement for the use of a deadly weapon pursuant to NRS 193.165. Rather, Konold was convicted of battery with the use of a deadly weapon in violation of NRS 200.481(3)(e), in which the use of a deadly weapon is an element of the offense. It is generally recognized that the deadly weapon enhancement is inapplicable where the

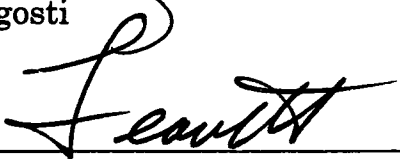
use of a deadly weapon is an essential element of the crime.¹⁰ Accordingly, Konold's claim that he was subject to multiple sentencing enhancements is belied by the record because Konold's sentence was only enhanced once.

Having considered Konold's contentions and concluded that the district court did not err in denying his petition,¹¹ we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

¹⁰NRS 193.165(3); Zgombic v. State, 106 Nev. 571, 576, 798 P.2d 548, 551 (1990) ("NRS 193.165(3) provides that the deadly weapon enhancement does not apply where use of the weapon is an element of the underlying crime."), superseded by statute on other grounds as stated in Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998).

¹¹We have considered all proper person documents filed or received in this matter, and we conclude that no further relief is warranted.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Kenneth J. McKenna
Clark County Clerk