

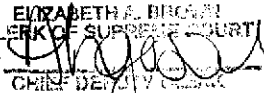
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SCOTT ALLEN DIETER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72467

FILED

FEB 14 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Scott Allen Dieter appeals from a judgment of conviction entered pursuant to a guilty plea of possession of a firearm by a prohibited person. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

First, Dieter claims he did not enter his guilty plea voluntarily because the facts presented during his plea canvass, at his sentencing hearing, and in the presentence investigation report demonstrate he was not in unlawful possession of a firearm as a matter of law. Dieter did not challenge the validity of his plea below, and we decline to consider this claim because it is not properly raised in the first instance on direct appeal. *See Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014) (“[A] post-conviction petition for a writ of habeas corpus provides *the exclusive remedy* for a challenge to the validity of the guilty plea made after sentencing for persons in custody on the conviction being challenged.” (emphasis added)).

Second, Dieter claims the district court engaged in unacceptable judicial misconduct at sentencing by implicitly promising he

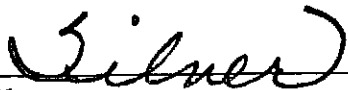
would not be sentenced under the habitual criminal statute if he successfully completed a drug treatment program.¹ However, the existence of such a promise is plainly belied by the record, which demonstrates the district court merely gave Dieter a chance to mitigate his sentence by participating in a drug treatment program before being sentenced in January 2017. We conclude the district court's decision to provide Dieter with a chance to mitigate his sentence fell well within the court's wide sentencing discretion and did not constitute judicial misconduct. See *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Therefore, Dieter is not entitled to relief on this claim.


Third, Dieter claims this court must invoke the doctrine of judicial estoppel to correct an error that occurred when the State assumed inconsistent positions during his first and second sentencing proceedings. However, Dieter's assertion that the State assumed inconsistent positions during his first and second sentencing proceedings is plainly belied by the record, which demonstrates the State's position that Dieter should be sentenced under the lesser habitual criminal statute remained the same during both proceedings. Therefore, we conclude the application of judicial estoppel is unwarranted and Dieter is not entitled to relief on this claim.

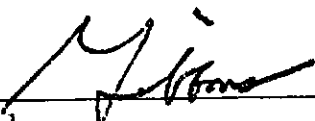
¹We reject Dieter's assertion that his case is indistinguishable from *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986). Unlike in *Van Buskirk*, Dieter's guilty plea was not induced by a promise that he could complete a drug treatment program before being sentenced. Instead, the record demonstrates the parties agreed the State could seek a lesser habitual criminal sentence and Dieter could argue against the enhancement.

See Marcuse v. Del Webb Cmtys., Inc., 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007).

Having concluded Dieter is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk