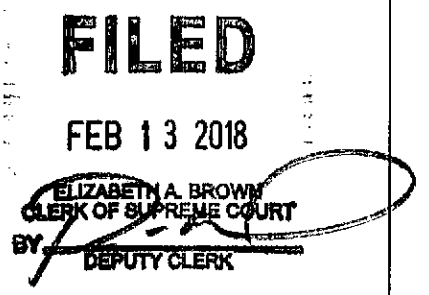
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARDELL MAURICE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72318



ORDER OF AFFIRMANCE

Mardell Maurice Johnson appeals from a judgment of conviction entered pursuant to a guilty plea of one count of trafficking in a controlled substance greater than 14 grams but less than 28 grams and three counts of trafficking in a controlled substance 28 grams or more. First Judicial District Court, Carson City; James E. Wilson, Judge.

First, Johnson argues the district court erred in denying a motion to withdraw as counsel. Johnson asserts the attorney-client relationship had deteriorated and his counsel could not effectively advocate on his behalf. This court reviews a district court's denial of a defendant's request to substitute counsel for an abuse of discretion. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). In conducting our review, we consider the extent of any conflict, the adequacy of the district court's inquiry, and the timeliness of a defendant's motion. *Id.* at 968-69, 102 P.3d at 576.

The district court conducted a hearing and heard Johnson's concerns. The district court found the issues between Johnson and counsel stemmed from a difference of opinion regarding their respective views on the probability of success at trial and the likely resulting sentence. The

district court noted both Johnson and counsel asserted they would work together. The district court concluded Johnson and counsel's level of conflict did not amount to an irreconcilable difference and denied the motion. Based upon the record before this court, we conclude the district court did not abuse its discretion in this regard and Johnson is not entitled to relief for this claim.

Second, Johnson argues the district court abused its discretion by accepting his guilty plea because he was confused regarding the status of a plea offer and he did not have sufficient time to consider the ramifications of his guilty plea. "A district judge may, in his or her discretion, refuse to accept guilty pleas." *Sandy v. Fifth Judicial Dist. Court*, 113 Nev. 435, 439, 935 P.2d 1148, 1150 (1997); *see also* NRS 174.035(1). Here, the district court questioned Johnson regarding the lack of a plea bargain and provided Johnson time to discuss entry of a guilty plea with his counsel. Johnson then informed the district court of his desire to enter a guilty plea and the district court conducted a plea colloquy with Johnson. The district court then accepted Johnson's guilty plea, finding Johnson understood the charges against him, the possible sentences, and his rights. The district court subsequently concluded Johnson waived his rights. Given the circumstances in this matter, Johnson fails to demonstrate the district court abused its discretion by accepting his guilty plea. *See* NRS 174.035(2). Therefore, Johnson is not entitled to relief for this claim.[1]

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[1]To the extent Johnson challenges the validity of his guilty plea, such challenges must generally be raised in the district court in the first instance by either filing a presentence motion to withdraw the plea or commencing

Third, Johnson argues the State committed prosecutorial misconduct by declining to negotiate a plea bargain with him. Johnson asserts the State improperly failed to put the expiration date of the offer in writing and improperly declined to negotiate with Johnson the day after indicating it would consider a plea deal.

We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). A prosecutor can withdraw a plea bargain offer any time before a defendant pleads guilty, so long as the defendant has not detrimentally relied on the offer. *State v. Crockett*, 110 Nev. 838, 845, 877 P.2d 1077, 1081 (1994).

The record reveals the morning trial was scheduled to begin, Johnson informed the district court he wished to enter a guilty plea and had desired to accept a prior plea offer made by the State, but learned that morning it had since been withdrawn. The parties informed the district court they had discussed a plea deal the week prior, but the offer had expired without Johnson accepting it. They further explained the night before trial, Johnson's counsel attempted to renew a plea bargain and the State indicated it was not inclined to accept Johnson's latest plea offer, but that it would consider the renewed offer overnight. The parties explained the State had since decided not to accept Johnson's plea offer and to proceed

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a postconviction proceeding pursuant to NRS chapter 34. *See Bryant v. State*, 102 Nev. 268, 272, 721 P.24 364, 367-68 (1986), *limited by Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994); *see also O'Guinn v. State*, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002). Johnson did not file a presentence motion to withdraw his guilty plea. We therefore conclude these claims are not appropriate for review on direct appeal and we decline to address them. *See O'Guinn*, 118 Nev. at 851-52, 59 P.3d at 489-90.

to trial. After discussion with his counsel, Johnson acknowledged he understood the parties did not have a plea bargain, but he still wished to enter a guilty plea. The record before this court demonstrates the State appropriately withdrew its plea offer and Johnson fails to demonstrate the State was required to place the expiration of the offer in writing, or renew plea negotiations, or that he relied on the State's plea offer to his detriment. Therefore, Johnson does not demonstrate the State committed prosecutorial misconduct.

Fourth, Johnson argues the district court abused its discretion by failing to require a written guilty plea agreement. A written guilty plea agreement was not required in this case because Johnson's guilty plea was not entered pursuant to a plea bargain. *See* NRS 174.035(2). Therefore, we conclude Johnson is not entitled to relief for this claim.

Fifth, Johnson argues the district court abused its discretion in failing to sua sponte continue the plea canvass hearing to allow Johnson to further discuss and consider the ramifications arising from his guilty plea. Johnson did not request a continuance, and accordingly, he is not entitled to relief absent a demonstration of plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted). "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.*

A review of the record demonstrates the district court permitted Johnson and his counsel to go to a separate room to discuss Johnson's wish to enter a guilty plea. When they returned, counsel informed the district

court they had discussed entry of a guilty plea and Johnson wished to plead guilty. Johnson reiterated his desire to enter a guilty plea, the district court canvassed Johnson regarding entry of the plea and then accepted the guilty plea. Given the circumstances of this case, Johnson failed to demonstrate the district court committed error by failing to sua sponte continue the plea canvass in this matter. Therefore, we conclude Johnson is not entitled to relief for this claim.

Sixth, Johnson argues the district court should have refused to accept the guilty plea because his counsel's errors regarding the plea negotiations violated *Lafler v. Cooper*, 566 U.S. 156 (2012) and *Missouri v. Frye*, 566 U.S. 134 (2012). This claim involves an assertion of the ineffective assistance of counsel and such claims are not appropriate on direct appeal from the judgment of conviction "unless there has already been an evidentiary hearing" regarding such claims. *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). There was not an evidentiary hearing regarding ineffective assistance of counsel claims, and therefore, we decline to address this claim in this appeal.

Seventh, Johnson argues the district court abused its discretion at the sentencing hearing. Johnson asserts he should have received a more lenient sentence because he had no prior convictions involving drugs, he was not the target of the drug task force, he had only sold marijuana to the informant prior to the incidents in this matter, and the sentence he received was greater than recommended in the PSI. Johnson also argues the district court improperly focused on the quantity of drugs sold.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). It is within the district court's discretion to impose consecutive sentences. *See*

NRS 176.035(1); *Pitmon v. State*, 131 Nev. ___, ___, 352 P.3d 655, 659 (Ct. App. 2015). The district court is not required to follow the sentencing recommendation of the Division of Parole and Probation. *See Collins v. State*, 88 Nev. 168, 171, 494 P.2d 956, 957 (1972). We will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

A review of the record reveals the district court did not base its sentencing decision on impalpable or highly suspect evidence. At the sentencing hearing, the district court heard the arguments of the parties. The district court noted with cases involving large quantities of drugs, the defendant did not know who the drugs will negatively affect and what problems the drugs will cause to the community. The district court concluded an aggregate sentence of life with the possibility of parole in 20 years was the appropriate sentence, which was within the parameters of the relevant statutes. *See* NRS 176.035(1); NRS 453.3385(1)(b), (c). Given the record in this case, we conclude the district court did not abuse its discretion when imposing sentence.

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

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. James E. Wilson, District Judge
Mary Lou Wilson
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk