IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD G. SHINGLETON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37218

FILED

OCT 31 2001

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

ORDER OF REMAND

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus and alternative motions to withdraw his guilty plea or modify his sentence.

On August 26, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of second-degree kidnapping and sentenced appellant to serve 5 to 15 years in prison. Appellant filed a timely notice of appeal from the judgment of conviction, but he later moved to voluntarily withdraw the appeal. This court granted that request and dismissed the appeal.[1]

On January 21, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus. Appellant's family retained counsel to assist appellant; counsel filed a supplement to the petition and alternative motions to withdraw the guilty plea or modify the sentence. The post-conviction petition and motions raised the same two arguments: (1) the State breached the plea agreement; and (2) appellant should be permitted to withdraw his guilty plea because the district court did not impose the sentence set forth in the plea agreement. The State opposed

[1]Shingleton v. State, Docket No. 34780 (Order Dismissing Appeal, September 21, 2000).

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the petition and the motions. On December 26, 2000, the district court denied the petition and the motions.

Appellant contends that the district court erred in denying the petition and the motions. In particular, appellant argues that the district court erred in rejecting his claim that the State breached the plea agreement by implicitly arguing for a harsher sentence than it had agreed to recommend.[2]

As presented to the district court, the breach issue was not properly raised in the post-conviction petition or the motion to modify the sentence. NRS 34.810(1)(a) provides that a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea may only raise allegations that "the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." The claim raised by appellant falls outside the limited scope of claims that may be raised pursuant to NRS 34.810(1)(a). Similarly, the breach issue falls outside the narrow scope of a motion to modify a sentence, which is "limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."[3] Additionally, appellant waived the breach issue by failing to raise it on direct appeal.[4]

This case, however, presents us with a rather complicated problem. Appellant filed his proper person post-conviction petition in the district court while his direct appeal was pending in this court. When this court remanded the direct appeal for the limited purpose of obtaining

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[2]On appeal, appellant has not asserted the other issue raised below — that he is entitled to withdraw his guilty plea because the district court did not follow the plea negotiations. Therefore, we need not address it.

[3]Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

[4]See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (noting that all claims that are appropriate for direct appeal must be raised on direct appeal or they are waived and that claim that State breached plea agreement at sentencing is such a claim), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

counsel to represent appellant on direct appeal,[5] the district court appointed post-conviction counsel to represent appellant in the pending direct appeal. Shortly after the district court appointed counsel, but before counsel had made an appearance in this court, appellant filed a proper person motion to dismiss the direct appeal without prejudice. Once this court received the district court minutes indicating that it had appointed counsel, this court ordered counsel to supplement the motion to dismiss with an affidavit. Counsel did so. This court then dismissed the direct appeal.

The problem is that in supporting appellant's decision to voluntarily dismiss the direct appeal, counsel effectively waived appellant's claim that the State breached the plea agreement. It is clear that this claim was crucial to appellant and that he mistakenly believed that it could be adequately addressed in the pending post-conviction proceedings, making the direct appeal unnecessary. As noted above, this was incorrect; appellant's failure to raise the issue on direct appeal waived the issue. Moreover, at that point, the only way the issue could be properly raised in the post-conviction proceedings was through a claim that appellant received ineffective assistance of appellate counsel. But post-conviction counsel was also appellate counsel and clearly did not appreciate the significance of dismissing the direct appeal or the procedural problems with the manner in which the claim was raised in the post-conviction petition and motions.

As a general rule, ineffective assistance of counsel claims must be raised in the district court in the first instance.[6] Similarly, we generally will not consider post-conviction issues that were not presented in a petition and considered by the district court.[7] Nonetheless, we have

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[5]Appellant's trial counsel, who was also responsible for filing the notice of appeal and fast track statement pursuant to NRAP 3C, had been suspended from the practice of law while the direct appeal was pending.

[6]Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[7]Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

entertained ineffective-assistance claims in the first instance where an evidentiary hearing is unnecessary because no good reason for counsel's actions could exist.[8] We conclude that this is such a case. Given the record in this case, we can conceive of no good reason to voluntarily dismiss the direct appeal and, thereby, waive the breach claim. Moreover, based on our review of the record, we conclude that appellant suffered prejudice as a result of counsel's deficient performance because the breach claim would have been successful on appeal.[9]

When the State enters a plea agreement, it is held to "'the most meticulous standards of both promise and performance'" in fulfillment of both the terms and the spirit of the plea bargain.[10] Due process requires that the bargain be kept when the guilty plea is entered.[11] When a prosecutor expressly recommends only the sentence agreed upon, but by his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit.[12]

Based on our review of the record, we conclude that the prosecutor breached the spirit of the plea agreement. Although the prosecutor indicated that the State had agreed not to recommend more than 72 months in prison, he subsequently indicated that the agreement

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[8]See Jones v. State, 110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994).

[9]See Strickland v. Washington, 466 U.S. 668 (1984) (establishing two-prong test for ineffective assistance claims that requires defendant to establish that counsel's performance was deficient and that defendant was prejudiced by counsel's deficient performance); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (explaining that prejudice prong for claim of ineffective assistance of appellate counsel requires showing that "omitted issue would have a reasonable probability of success on appeal").

[10]Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v. Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

[11]Id.

[12]See Wolf v. State, 106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990); Kluttz, 99 Nev. at 683-84, 669 P.2d at 245-46; see also Sullivan v. State, 115 Nev. 383, 389-90, 990 P.2d 1258, 1262 (1999).

was based on a misunderstanding of appellant's record and that "with the increasing pattern of violence we have a slightly different treatment." While the prosecutor did not directly repudiate the plea agreement, his comments undercut the recommendation that he agreed to make. Appellant's trial counsel noted as much, objecting to the prosecutor's comments. We conclude that the prosecutor's comments breached the spirit of the plea agreement. That breach "requires reversal."[13] Accordingly, we conclude that this claim would have been successful on direct appeal.

We acknowledge that this ineffective assistance claim could be raised in a successive post-conviction petition for a writ of habeas corpus. Moreover, given the circumstances of this case, a meritorious claim of ineffective assistance of appellate counsel would constitute good cause to excuse the filing of an untimely and successive petition. But in this case, it is clear that the district court would summarily reject any such petition as it has already rejected the breach claim on the merits. Because it is clear that appellate counsel's performance was deficient and we disagree with the district court's decision regarding the merits of the breach claim, we conclude that requiring appellant to file a successive petition in this case would be a waste of judicial resources.

For the reasons stated above, we remand this matter to the district court with instructions to vacate appellant's sentence and to hold a new sentencing hearing before a different district court judge.[14] We

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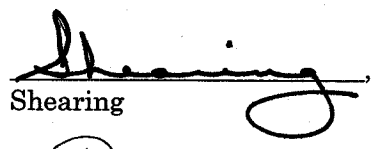
[13]Statz v. State, 113 Nev. 987, 992, 944 P.2d 813, 816 (1997), overruled on other grounds by Sullivan v. State, 115 Nev. 383, 990 P.2d 1258 (1999).

[14]See Santobello v. New York, 404 U.S. 257, 262-63 (1971) (remand is appropriate regardless of whether sentencing judge was influenced by breach); Riley v. Warden, 89 Nev. 510, 512-13, 515 P.2d 1269, 1270 (1973) (although district judge declared he would not be affected by prosecutor's breach, this court could "accord such a statement no more effect than the U.S. Supreme Court did in Santobello. To do so would . . . merely force the public defender to waste public funds redressing appellant's grievance in the federal court system") (footnote and citations omitted).

further order the Clark County District Attorney to specifically perform the plea agreement.[15] Upon remand, if the sentencing judge pronounces a sentence that exceeds the sentence imposed by Judge Mosley, said sentence shall be automatically reduced to conform with Judge Mosley's lesser sentence.[16] Accordingly, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order. [17]



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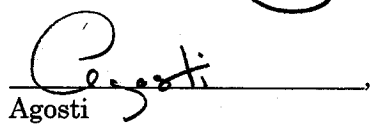

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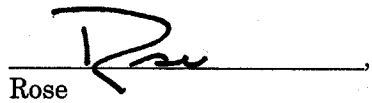

_____, J.
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cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Robert M. Draskovich, Chtd.
Clark County Clerk

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[15]See Citti v. State, 107 Nev. 89, 807 P.2d 724 (1991).

[16]See id. at 94, 807 P.2d at 727.

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

This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.