IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN FLOYD VOSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81472-COA

ORDER OF AFFIRMANCE

Steven Floyd Voss appeals from a judgment of conviction, pursuant to a jury verdict, of burglary, two counts of uttering a forged instrument, two counts of forgery, and attempted theft. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

In June 1996, Voss took two checks belonging to Beverly Baxter.[1] He endorsed one check that was already payable to Baxter in the amount of $5,000 in Baxter's name. On the other check, he inserted his name into the payee line, making the check payable to himself. He took the first check to a nearby bank and deposited the funds into Baxter's account. Two days after depositing the first check, Voss went to a bank and attempted draw $5,000 on Baxter's account by presenting the second check. Around this time, Baxter went missing. Based on these actions, Voss was charged with six Category D felonies: Burglary, Uttering a Forged Instrument (two counts), Forgery (two counts), and Attempted Theft. He was not formally connected to or charged with Baxter's disappearance at this time. A jury found Voss guilty of the six property crimes. The district court sentenced Voss to an aggregate maximum term of incarceration of 360 months with parole eligibility after 128 months.

[1]We recount the facts only as necessary to our disposition.

Voss pursued a direct appeal in 1997, arguing that the evidence against him was insufficient and that he could not be convicted of duplicative charges.[2] The Nevada Supreme Court dismissed his appeal and denied Voss's subsequent attempts to recall remittitur.[3] In 2000, Voss was convicted of murder and first-degree kidnapping in a separate case. In 2001, in the case at issue here, he filed a postconviction petition for a writ of habeas corpus. A district court reviewing his habeas petition agreed with Voss on a sentencing issue. When Voss was originally sentenced on the six property crimes, the sentencing judge considered Baxter's disappearance and seemed to infer Voss was involved with it. According to the district court conducting Voss's collateral review, the sentencing court had issued a sentence that fell "clearly outside the heartland of sentences" imposed in similar cases. Accordingly, the court ordered Voss resentenced.

Voss's case largely stayed in this procedural posture for nearly twenty years. In 2018, however, he filed a petition for a writ of mandamus with this court, seeking an order directing the district court to conduct the resentencing ordered in 2001. This court granted the petition and issued an order directing the district court to resentence Voss. Eventually, Voss's resentencing was set for July 7, 2020. The district court issued an Order to Produce Prisoner, dated June 8, 2020, which notified Voss of the July 7, 2020, resentencing date. Weeks later, in a notice dated June 24, 2020, the

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[2]Voss argued that one of the forged instrument charges and attempted theft were duplicative because one was a lesser included offense of the other.

[3]*Voss v. State*, Docket No. 29783 (Order Dismissing Appeal, March 11, 1999).

court informed Voss that the resentencing would be conducted via audio-visual technology and conveyed the relevant online meeting information.

Voss virtually appeared before the district court on July 7, 2020, with six pending motions. The district court resolved all six motions and proceeded to resentencing. The district court heard argument from both Voss, representing himself, and the State. First, Voss raised numerous alleged issues with his Presentence Investigation Report (PSI). Second, Voss objected to being resentenced via audio-visual technology.

Regarding Voss's challenges to his PSI, the district court made clear it would give him the benefit of the doubt on all points he contested in his PSI. The district court rejected the State's invitation to consider Voss's murder and kidnapping convictions from 2000, noting that this court's order directed the district court to step into the shoes of the court that sentenced Voss in 1996.

As to Voss's objection to resentencing via audio-visual technology, the district court leaned on the relevant COVID-19 administrative orders that prohibited in-person sentencing hearings. The district court also noted that the hearing went smoothly, and that the audio-visual technology enabled clear audio and visual connections between Voss and the court. The district court was not persuaded that the virtual setting prevented Voss from presenting mitigating evidence.

Having resolved all the parties' objections and requests, the court resentenced Voss. The district court imposed an aggregate maximum term of incarceration of 144 months with parole eligibility after 48 months. Consistent with this court's 2018 order, the district court then awarded Voss credit for his time served between 2001 and the 2020 resentencing. His credit totaled over 7,200 days, whereas his maximum sentence totaled

approximately 4,320 days. As a result, the district court sentenced Voss to credit for time served and issued a new judgment of conviction.

Voss brought this pro se appeal and filed a handwritten opening brief. The Nevada Supreme Court remanded for the limited purpose of appointing appellate counsel. Appellate counsel for Voss filed an additional opening brief that refined Voss's points. The State answered. Afterward, Voss filed a motion for leave to amend his brief, and the supreme court granted that motion. Accordingly, Voss filed a supplemental brief, and the State filed a supplemental answer. With those filings, the case moved to this court for review.

Preliminarily, this appeal is unique in that it is Voss's second attempt to file a direct appeal. Therefore, it implicates the doctrine that appellate claims "appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (differentiating between matters appropriate for direct appeal versus collateral review), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Similarly, "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969), *vacated in part on other grounds by Walker v. Nevada*, 408 U.S. 935 (1972).

In Voss's direct appeal in 1997, he raised two issues. Here, he has raised six. Some of these issues are based on the same facts that existed when he appealed in 1997. For example, he argues now that the Justice of the Peace that bound him over for trial on some of the underlying charges did so without sufficient cause. This challenge could have been raised in his original direct appeal because all the facts necessary to such a

determination existed at the time and probable cause determinations are reviewable on direct appeal. *See, e.g., Bolden v. State*, 137 Nev., Adv. Op. 28, 491 P.3d 19, 25 (2021) (approving probable cause finding). Accordingly, because Voss did not raise the issue when he lodged his first direct appeal, he waived the issue. Similarly, Voss waived his arguments concerning technical differences between the criminal complaint and the information[4] and duplicative punishment[5] because he could have raised those arguments in his original direct appeal, but he failed to do so.

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[4]The facts of this issue were the same after his original trial because the same charging documents are still operative here. Any problem with the information and the complaint existed when he filed his first direct appeal.

[5]Voss's duplicative punishment argument under *Blockburger v. United States*, 284 U.S. 299 (1932) was also waived. Voss argued two of his charges were duplicative on his original appeal, although that argument focused on different charges and a slightly different theory. Nevertheless, Voss's convictions today are the same as his convictions when he filed his first direct appeal. Only his sentences are different. Accordingly, he could have argued the same theory in his first direct appeal and his failure to do so waives the same here. Even if considered, Voss's Double Jeopardy argument fails because he was not punished more than once for a single criminal act. He created two checks, endorsing one for Baxter and making another out in his own name. For forging the information on the two checks, he was charged and punished once for each check under the forgery statute. Likewise, he was charged and punished once for each check after passing, or attempting to pass, each check as true. This distinction is made clearer by the fact that he offered the checks to the bank on different days. The acts of forging the two checks and then offering each forged check are separate and distinct; thus, they may each be punished separately. *See Blockburger*, 284 U.S. at 304 (differentiating between continuous acts that may be punished only once and distinct criminal acts that may be punished individually).

Next, making an argument similar to the one that secured him relief in 2001, Voss argues that during resentencing the district court improperly considered evidence of his murder conviction. The State, citing the resentencing transcript, argues the district court did not consider Voss's murder conviction.

We review the district court's sentencing decisions for an abuse of discretion. *Parrish v. State*, 116 Nev. 982, 988-89, 12 P.3d 953, 957 (2000). Moreover, we "refrain from interfering with the sentence imposed" absent a showing of "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).

Here, the district court made it explicitly clear that it would not be considering Voss's murder conviction pursuant to this court's 2018 order. Further, Voss received a credit for time served sentence, and his new sentence amounted to less than half of his original sentence. This reduction in sentence paired with the district court's explicit refusal to consider the murder conviction does not suggest Voss was prejudiced. Without a showing of prejudice based on impalpable evidence, we will not interfere with the district court's broad discretion over sentencing.

Voss next contends that the audio-visual format of his resentencing, paired with insufficient notice, prevented his presentation of mitigating evidence. The State stresses that Voss knew of his sentencing date far in advance and that Voss was unable to articulate with specificity what evidence he wanted to present or to what mitigating witnesses would testify.

To begin, we appreciate the difficulties the COVID-19 pandemic has placed on the judiciary, including the Second Judicial District Court.

Due to the pandemic, Administrative Order 20-02(C) reasonably compelled sentencing hearings to be conducted by video conference or other remote means and, under the circumstances, a fair and just hearing was not thwarted by Voss's absence from the courtroom. Accordingly, to the extent Voss challenges the audio-visual hearing itself, no relief is warranted. *Chaparro v. State*, 137 Nev., Adv. Op. 68, 497 P.3d 1187, 1192 (2021) (rejecting a due process challenge to a sentencing hearing held over Zoom due to the COVID-19 pandemic and the related administrative order limiting the availability of in-person hearings).

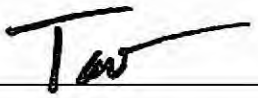
By statute, the sentencing court shall invite the defendant to "present any information in mitigation of punishment." NRS 176.015. This does not, however, give a defendant the right to present any evidence he desires; it is limited by general concepts of relevancy. *See, e.g., Kaczmarek v. State*, 120 Nev. 314, 336, 91 P.3d 16, 31 (2004) (affirming a district court's rejection of mitigating testimony offered by the daughter of a murder victim in the defendant's capital sentencing hearing). Stated another way, a defendant does not have a right to "present every piece of evidence he wishes." *Id.* (quoting *Brown v. State*, 107 Nev. 164, 167, 807 P.2d 1379, 1381 (1991)).

The district court gave Voss an opportunity to present mitigation evidence, but he failed to seize it. Voss was on notice of the time and virtual nature of his hearing well in advance. He did enter the sentencing hearing with a pending emergency motion to delay his resentencing because of his other unresolved motions; however, the district court resolved those pending motions on the day of sentencing, mooting Voss's request for a delay. Although Voss contends he had insufficient time to prepare, he was unable to describe any evidence he hoped to present. In

other words, he failed to demonstrate that his ability to present any mitigation evidence was prejudiced. Therefore, we

ORDER the judgment of conviction AFFIRMED.[6]

_____, C.J.
Gibbons



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cc: Hon. Kathleen M. Drakulich, District Judge
Tracie Lindeman
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[6]To the extent Voss raised other arguments on appeal, including those raised in his pro se brief, we have considered the same and conclude they are either procedurally precluded or that they do not warrant relief.