

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD RAY SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38374

FILED

MAR 05 2002

JANE F. M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND  
REMANDING

This is an appeal from a district court order denying appellant Donald Ray Smith's motion seeking to modify his sentence and withdraw his guilty plea. On February 20, 2001, Smith was convicted, pursuant to a guilty plea, of one count of burglary. The district court sentenced Smith to serve a prison term of 24 to 60 months. Smith did not file a direct appeal.

On April 11, 2001, Smith filed a proper person post-conviction motion to vacate an illegal sentence. The district court appointed counsel, and Smith filed a supplemental motion. The State opposed the motion. Without conducting an evidentiary hearing,<sup>1</sup> the district court denied the motion. Smith filed the instant appeal.

Smith first argues that the district court erred in denying his motion because it sentenced Smith based on materially untrue assumptions about his criminal record, contained in the presentence investigation report, that worked to his extreme detriment. We reject Smith's contention.

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<sup>1</sup>Although the district court did not conduct an evidentiary hearing, it did hear arguments from counsel.

We conclude that Smith has failed to show that his “sentence is the result of the sentencing judge’s misapprehension of [his] criminal record.”<sup>2</sup> Indeed, the record of the sentencing hearing does not support Smith’s claim that the district court relied on mistaken assumptions about Smith’s criminal record in imposing sentence. At allocution, Smith admitted to having six prior felony convictions and to using cocaine since 1983. Additionally, pursuant to the terms of the plea agreement, the State recommended that the district court impose a 60-month prison term. Accordingly, Smith has failed to show that his sentence was imposed based on material, untrue assumptions about his prior criminal history.

Smith next contends that his guilty plea was invalid because he was not informed that he faced a mandatory consecutive sentence.<sup>3</sup> We agree with Smith that a plea is invalid where a defendant pleads guilty without knowing he faces mandatory consecutive sentencing.

This court has recognized that a mandatory consecutive sentence, pursuant to NRS 176.035(2), is an “important and direct consequence” and is “critical information” of which the defendant should

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<sup>2</sup>See Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996) (quoting State v. District Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984)).

<sup>3</sup>Smith also contends that his plea was invalid because he was not advised that he was ineligible for probation. We conclude that Smith’s contention lacks merit because he was eligible for probation since the State failed to proffer evidence of Smith’s prior burglary convictions. See Hudson v. Warden, 117 Nev. \_\_\_, 22 P.3d 1154 (2001) (holding that State has the burden to proffer evidence of a prior conviction when the State seeks to use the prior conviction to enhance a sentence); see also NRS 205.060(2) (provides for enhancement of sentence for a burglary offense, namely, ineligibility for probation, if a defendant “has previously been convicted of burglary or another crime involving the forcible entry or invasion of a dwelling”).

be advised to ensure that his guilty plea is both knowing and voluntary.<sup>4</sup> In considering whether a defendant was advised that he faced mandatory consecutive sentencing prior to entry of his plea, this court examines the totality of the circumstances.<sup>5</sup>

In the instant case, the record reveals that Smith was not advised during the plea canvass or in the written plea agreement that he faced a mandatory consecutive sentence. The advisement in the plea agreement with regard to consecutive sentencing was somewhat ambiguous and provided that:

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences concurrently or consecutively.

Moreover, the record before us is silent with regard to whether Smith's trial counsel or any other individual, for that matter, advised Smith about mandatory consecutive sentencing. We therefore conclude that a remand for an evidentiary hearing is warranted so that the district court can determine whether Smith understood, at the time he pleaded guilty, that he faced a mandatory consecutive sentence.<sup>6</sup> If the district court finds that Smith pleaded guilty without such knowledge, his guilty plea is

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<sup>4</sup>Director, State Prison v. Powell, 101 Nev. 736, 738, 710 P.2d 73, 74 (1985).


<sup>5</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).


<sup>6</sup>See Edwards, 112 Nev. at 707, 918 P.2d at 324 (A motion to modify an illegal sentence may be granted where the sentence is imposed based upon a "materially untrue assumption or mistake of fact that has worked to the extreme detriment of the defendant, but only if the mistaken sentence 'is the result of the sentencing judge's misapprehension of a defendant's criminal record.'") (quoting State v. District Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984)).

invalid, and consequently Smith must be allowed to withdraw his plea. If the district court finds that Smith knew that he faced a mandatory consecutive sentence, then Smith's motion should be denied.

Accordingly, we affirm the district court's order with respect to Smith's motion to modify his illegal sentence. However, we vacate the district court's order with respect to Smith's motion to withdraw his guilty plea and conclude that an evidentiary hearing is necessary to determine whether Smith was advised of the direct consequence of mandatory consecutive sentence. Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART and VACATED IN PART and REMAND this matter to the district court for proceedings consistent with this order.

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Nancy M. Saitta, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Gary E. Gowen  
Clark County Clerk