

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS GUY KIRSCH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40518

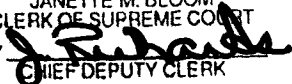
THOMAS GUY KIRSCH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40519

**FILED**

JAN 12 2004

ORDER OF AFFIRMANCE

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

These are consolidated appeals from judgments of conviction, pursuant to guilty pleas, of two counts of burglary. The district court adjudicated appellant Thomas Guy Kirsch a habitual criminal and sentenced him to serve two concurrent life prison terms with parole eligibility in 10 years.

Kirsch first contends that his trial counsel was ineffective in failing to negotiate a plea agreement with the State and in failing to object to the fact that the presentence investigation reports (PSI) were received by the defense during the course of the sentencing proceeding. We decline to consider Kirsch's contentions. Claims of ineffective assistance of counsel may not be raised on direct appeal, unless the claims have already been the subject of an evidentiary hearing.<sup>1</sup> In this case, no such hearing has been conducted. Accordingly, Kirsch must raise his claims of

<sup>1</sup>Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

ineffective assistance of counsel in the district court in the first instance by initiating a post-conviction proceeding.

Kirsch next contends that he should be allowed to withdraw his guilty pleas to correct a manifest injustice. Kirsch notes that he entered his guilty pleas without any promised benefit from the State.<sup>2</sup> Again, we decline to consider this issue. Generally, this court will not consider a challenge to the validity of the guilty plea on direct appeal from the judgment of conviction, unless the defendant filed a presentence motion to withdraw the guilty plea in the district court.<sup>3</sup> Because Kirsch did not file a motion to withdraw his guilty pleas prior to sentencing, we conclude that Kirsch must bring his challenge to the validity of his guilty pleas in the district court in the first instance.<sup>4</sup>

Finally, Kirsch contends that his right to due process was violated at the sentencing proceeding because he did not receive the PSI prior to the sentencing proceeding. We conclude that Kirsch's contention lacks merit.

In this case, at the beginning of the sentencing proceeding, defense counsel objected to the fact that he had not received a copy of the PSI and requested a continuance so that he would have time to review the PSI with Kirsch. The district court granted the continuance, but after an off-the-record discussion, the district court ultimately conducted the

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<sup>2</sup>Prior to pleading guilty, Kirsch rejected the State's plea offer that he plead guilty to two counts of burglary and agree to be sentenced under NRS 207.010(1)(a), the small habitual criminal enhancement.

<sup>3</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also NRS 177.045; Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225 n.3 (1984).

<sup>4</sup>See Bryant, 102 Nev. at 272, 721 P.2d at 368.

sentencing proceeding on the originally scheduled day. Prior to resuming the sentencing proceeding, however, the district court recessed to allow defense counsel time to review the PSI with Kirsch.<sup>5</sup> Notably, defense counsel has never alleged, either at the sentencing proceeding below or in the appellate briefs on appeal, that there were any inaccuracies in the PSI or that Kirsch was prejudiced by the delay in receiving the report.<sup>6</sup> Accordingly, we conclude that Kirsch's right to due process was not violated.

Having considered Kirsch's contentions and concluded that they are either inappropriate for direct appeal or lack merit, we

ORDER the judgments of conviction AFFIRMED.

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

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<sup>5</sup>In his appellate briefs, defense counsel states that Kirsch chose to go forward with the sentencing proceeding rather than continue the proceeding to a later date, despite counsel's concerns.

<sup>6</sup>See generally McKenna v. State, 114 Nev. 1049-50, 968 P.2d 739, 742-43 (1998) (to warrant a new sentencing hearing based on alleged due process violation, a defendant must show actual prejudice).

cc: Hon. Steven R. Kosach, District Judge  
Robert Bruce Lindsay  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk