IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRYL G. STOLTZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40546

FILED

JUN 20 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

Appellant Darryl G. Stoltz originally pleaded guilty to five counts of sexual assault against his two daughters and was sentenced to five terms of life in prison with the possibility of parole, three consecutive and two concurrent. The district court denied Stoltz's first post-conviction habeas petition, and he appealed. This court concluded that the counsel who represented Stoltz when he pleaded guilty failed to provide him with the assistance necessary to perfect a timely appeal. Therefore, pursuant to Lozada v. State,[1] we remanded to allow Stoltz to file a habeas petition raising only the issues that could be raised on direct appeal by a defendant who has pleaded guilty. We otherwise affirmed the district court's order and rejected Stoltz's other claims of ineffective assistance of counsel. Stoltz filed a second habeas petition, and the district court held an evidentiary hearing and denied it.

Stoltz claims that the district court erred in two ways in denying his petition. First, he contends that the State violated the plea

[1]110 Nev. 349, 871 P.2d 944 (1994).

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bargain by introducing evidence of uncharged misconduct at his sentencing hearing. This contention is meritless.

The guilty plea memorandum, signed by Stoltz, his counsel, and the prosecuting attorney, provided in part: "The State is free to argue at the time of sentencing. In addition, the State agrees to dismiss or not pursue all known charges involving sexual misconduct alleged against [Stoltz] as it relates to the following alleged victims: BRANDY S., MONIQUE S., RACHAEL B.[,] SHIRLEEN S., and JAMES S." The State provided notice that at the sentencing it intended to present testimony regarding uncharged sexual misconduct by Stoltz. Defense counsel moved to exclude all such testimony. Counsel later narrowed the motion to oppose testimony by the five alleged victims specifically named in the memorandum. After extensive briefing and argument, the district court ordered the exclusion of testimony by those five persons to implement specific performance of the plea bargain. The State called other witnesses at the sentencing hearing, including two women who testified to sexual misconduct by Stoltz about ten years earlier when they were teenagers babysitting at his home. One testified that Stoltz sexually assaulted her. Defense counsel had conceded that the plea bargain did not preclude these witnesses from testifying and did not object.

Stoltz now claims that this testimony about uncharged misconduct constituted a breach of the plea agreement. We reject this claim and agree with the district court that "nothing in the plea bargain prevented the State from introducing the evidence" and that the State complied with the order preventing discussion of uncharged misconduct against persons named in the plea bargain memorandum. A court enjoys wide discretion in imposing a sentence and may "consider a wide, largely

unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant."[2] The evidence in question did not offend the plea bargain and was properly considered.

Second, despite the exclusion of evidence under the plea bargain of uncharged misconduct at his sentencing, Stoltz contends that the district court was biased by its exposure during earlier proceedings to information about the misconduct. He points to comments by the court at the sentencing, such as "this has proliferated . . . beyond you and your daughters in this case." He asserts that the imposition of three consecutive life terms, when there were but two victims, demonstrates that the court was biased by the information.

This issue also has no merit. The imposition of three prison terms consecutively does not indicate any bias: the district court had discretion to impose all five prison terms consecutively. Nor was the court's knowledge of Stoltz's uncharged misconduct improper or unusual. Generally, what a judge learns in his or her official capacity does not result in disqualification.[3] Moreover, this court has specifically recognized "the practicality of a district judge's involvement in the entry of the guilty plea."[4]

> The district judge who sentences a defendant is usually the same district judge who accepted the guilty plea, and the judge already knows that charges have been dismissed in exchange for the

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[2]Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998).

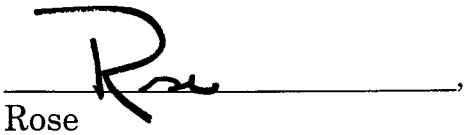
[3]See Kirksey v. State, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996).

[4]Ferris v. State, 100 Nev. 162, 163, 677 P.2d 1066, 1067 (1984).

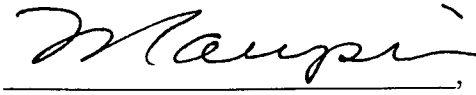
> plea. Furthermore, because of allegations contained in the charging document, the judge is also already aware of the nature of the dismissed charges.
>
> In addition, a presentence report may include information pertaining to criminal offenses which have not been charged.[5]

Stoltz has not shown that the district court was biased. Accordingly, we

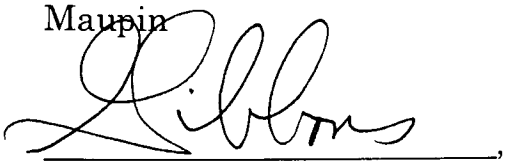
ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Peter I. Breen, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[5]Id. at 163-64, 677 P.2d at 1067.