

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN RAUL MARISCAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40588

FILED

NOV 05 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of nonsupport of minor children for a period exceeding one year.¹ The district court sentenced appellant Allen Raul Mariscal to serve a prison term of 12-30 months, and gave him credit for 129 days time served. The district court suspended the sentence and placed Mariscal on probation for an indeterminate period not to exceed 60 months. Mariscal was further ordered to pay \$53,026.26 in restitution.

Mariscal contends that the district court erred in including interest on the principal owed as part of the restitution award. Specifically, Mariscal argues that the inclusion of interest was not contemplated by the negotiated plea agreement and should instead be sought in a civil action. As part of the plea agreement, Mariscal would be allowed to withdraw his guilty plea to the felony and reenter a guilty plea to a gross misdemeanor if he satisfied his restitution obligations during his probationary period; accordingly, he contends that he is losing a substantial benefit of the plea bargain by having to pay the interest as well as the principal. We conclude that Mariscal's contention contains a fatal flaw and is therefore without merit.

¹See NRS 201.020 (a category C felony).

Our review of the record on appeal reveals that the district court ordered the restitution award as a term of probation pursuant to NRS 176A.400, rather than as part of the sentence pursuant to NRS 176.033 as argued by Mariscal.² At Mariscal's arraignment, the terms of the negotiated plea agreement, as understood by the parties and as stated by the district court, were that the State "will be requesting an underlying sentence of thirty months with a minimum of twelve months to be served and that [Mariscal] will sign a civil Confession of Judgment. And, so long as you are making your best efforts to pay the restitution obligations, [the State] will not seek probation revocation." Also, the guilty plea memorandum read, signed, and understood by Mariscal indicated that "[t]he State will not seek probation revocation so long as I am making my best efforts to pay my restitution obligations." And finally, in sentencing Mariscal, the district court made the following statement:

I will suspend the execution of that sentence, place you on probation for an indeterminate period not to exceed sixty months under the following special conditions: I will impose the obligation for payment in the amount of \$53,026.26. And you will work out a plan with the Division for paying that amount within the sixty months.

...

You will submit . . . to search by any Probation Officer or police officer for alcohol and weapons. So you are going to have a twofold obligation here. No use, possession or control of alcohol. You will sign a civil Confession of Judgment for \$53,026.26.

²See Igbinovia v. State, 111 Nev. 699, 895 P.2d 1304 (1995) (distinguishing between restitution as probationary term and as part of the sentence).

And you will be required to maintain full-time employment during the course of this probation so that this restitution amount can be realized.

(Emphasis added.) Therefore, based on the above, it is clear that the district court intended to impose restitution obligations on Mariscal as a condition of probation.

We conclude that the district court did not err in its determination of the restitution amount. NRS 176A.100(1)(c), as it applies in the instant case, states that the district court “may suspend the execution of the sentence imposed and grant probation as the court deems advisable.” NRS 176A.430(1) authorizes restitution as a condition of probation “in appropriate circumstances.”³ This court has held that the district court has broad discretionary powers, which are liberally construed, to impose restitution as a condition of probation.⁴ Moreover, this court has held that the awarding of restitution is a sentencing determination that will not be disturbed on appeal provided it does not rest upon impalpable or highly suspect evidence.⁵

We also conclude that the district court acted appropriately and within its broad discretion in imposing \$53,026.26 in restitution as a condition of probation. As discussed above, the district court intended the restitution obligation to be a condition of probation. Mariscal does not

³NRS 176A.400(1)(a) states that “[i]n issuing an order granting probation, the court may fix the terms and conditions thereof, including, without limitation . . . [a] requirement for restitution.”


⁴Igbinovia, 111 Nev. at 710, 895 P.2d at 1311; Korby v. State, 93 Nev. 326, 565 P.2d 1006 (1977).


⁵See generally Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999).

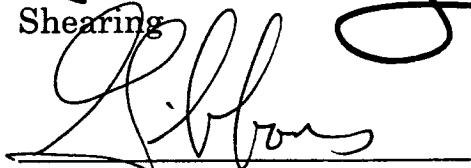
allege that the determination was based on impalpable or suspect evidence. Furthermore, at no point in the proceedings did Mariscal challenge the amount awarded as not being an accurate calculation of the principal and interest owed for the nonsupport of his two minor children over a ten-year period. Finally, to the extent that Mariscal is indirectly claiming that his guilty plea was not entered knowingly and intelligently because he was not aware that the interest could be included along with the principal owed in the restitution award, his claim is not appropriate for review on direct appeal from the judgment of conviction.⁶ This court has held that challenges to the validity of a guilty plea must be raised in the district court in the first instance by either filing a motion to withdraw the guilty plea or commencing a post-conviction proceeding pursuant to NRS chapter 34.⁷

Accordingly, having considered Mariscal's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

⁶Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

⁷Id.

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk