

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARSHALL BURGESS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42469

FILED

JUN 14 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of possession or control of a dangerous weapon by an incarcerated person. In exchange for appellant Marshall Burgess' guilty plea, the State agreed not to pursue habitual criminal adjudication. The district court sentenced Burgess to serve a prison term of 19-48 months to run consecutively to the sentence he is currently serving.¹

Burgess contends that this case should be remanded to the district court for an evidentiary hearing on a motion that he never actually filed below. Burgess claims that the State, by prosecuting him in the instant case, violated an agreement that he had with prison officials. The alleged agreement was that prison officials "promised not to turn the case over to the Attorney General for prosecution" if he pleaded guilty in the prison disciplinary proceedings initiated as a result of the same conduct.² We disagree with Burgess' contention.

¹On May 24, 2001, Burgess was convicted of one count each of robbery with the use of a firearm and trafficking in a controlled substance. This court rejected Burgess' direct appeal. See Burgess v. State, Docket No. 38050 (Order of Affirmance, August 24, 2001).

²As a result of the prison disciplinary proceedings, Burgess was housed in administrative segregation, "the hole," for 270 days.

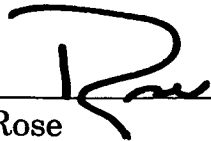
At Burgess' change of plea hearing held on August 28, 2003, he agreed to plead guilty and eventually did enter a guilty plea, but with the understanding that prior to sentencing, he would file a motion regarding the alleged agreement with prison officials. Essentially, the proposed motion would amount to a motion to withdraw his guilty plea. The State agreed to the procedure, but denied that any agreement with prison officials existed, and also noted that the State would file an opposition to any motion and present the testimony of prison officials in support at an evidentiary hearing. The district court thoroughly canvassed Burgess, and scheduled the sentencing hearing for November 18, 2003, in order to allow Burgess ample opportunity to file his intended motion. During the time period between the entry of Burgess' guilty plea and sentencing, Burgess never did, in fact, file any motion. At the sentencing hearing, no mention was made of the filing of a motion, and both defense counsel, Rayner Kjeldsen, and Burgess argued for a minimum sentence, partly because of the fact that Burgess believed he had an agreement with prison officials.

This court has stated that "[w]here a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."³ In the instant case, the State was never afforded the opportunity, or given the need, to file an opposition to any motion, and the district court never had reason to consider its merit and fashion a ruling. Accordingly, we conclude that because Burgess never filed a motion of any sort in the district court with regard to his


³See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

alleged agreement with prison officials, he has effectively waived the issue and not preserved it for review on appeal.

Therefore, having considered Burgess' contention and concluded that it has not been properly preserved for review on appeal, we ORDER the judgment of conviction AFFIRMED.

 _____ J.
Rose

 _____ J.
Maupin

 _____ J.
Douglas

cc: Hon. John M. Iroz, District Judge
State Public Defender/Carson City
State Public Defender/Winnemucca
Attorney General Brian Sandoval/Carson City
Pershing County District Attorney
State Public Defender/Carson City
Pershing County Clerk