

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52385

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Tracie K. Lindeman
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

PROCEDURAL HISTORY

On August 31, 2005, the district court convicted appellant, pursuant to a guilty plea, of attempted murder with the use of a deadly weapon (count 1), robbery with the use of a deadly weapon (count 2), first-degree kidnapping with substantial bodily harm (count 3), and first-degree kidnapping with the use of a deadly weapon (count 4). The district court sentenced appellant to serve in the Nevada State Prison: (1) for count 1, two consecutive terms of 90 to 240 months; (2) for count 2, two consecutive terms of 72 to 180 months; (3) for count 3, life with the possibility of parole after 15 years; and (4) for count 4, two consecutive terms of life with the possibility of parole after 5 years. The district court imposed the terms between counts to run concurrently. No direct appeal was taken.

On August 7, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Among other things, appellant claimed that his guilty plea was not voluntarily entered because he was promised and led to believe that he would be

eligible for parole/release to the streets after serving a minimum of 15 years. The State opposed the petition. On January 29, 2007, the district court denied the petition. This court affirmed the denial of several of the claims raised in the petition, but reversed the denial of appellant's claim regarding the voluntariness of his plea and remanded the matter for an evidentiary hearing and directed that the Attorney General file a response to the underlying sentence structure/parole eligibility claim. Slaughter, Jr. v. State, Docket No. 48742 (Order Affirming in Part, Vacating in Part and Remanding, July 24, 2007).

Upon remand, the district court appointed post-conviction counsel to assist appellant, however, appellant later elected to proceed in proper person. The Attorney General filed a response regarding the underlying sentence structure/parole eligibility claim. Appellant filed a brief in the district court seeking to withdraw his guilty plea. The State opposed withdrawal of the guilty plea, but stated that in the spirit of the plea negotiations, the deadly weapon enhancements should be removed. Appellant filed a reply. After conducting an evidentiary hearing, the district court denied appellant's claim that his guilty plea was involuntarily entered, but ordered the Department of Corrections to parole appellant from sentences for the deadly weapon enhancements for counts 1, 2, and 4 at the same time as the sentences for the primary offenses for counts 1, 2, and 4 and the sentence imposed in count 3. This appeal followed.

FACTS AND DISCUSSION

In his petition, appellant claimed that his guilty plea was involuntary because he was not correctly informed about the minimum sentence he would be required to serve before parole eligibility to the streets. Confusion regarding the minimum sentence largely relates to the

structuring of appellant's sentences for parole purposes. Based upon our review of the record on appeal, we conclude that the district court erred in determining that the Department erred in structuring the sentences and erred in determining that the guilty plea was voluntarily entered. We further conclude that the only remedy available is for appellant to have an opportunity to withdraw the guilty plea.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

Appellant claimed that his guilty plea was involuntary because he was promised and led to believe that he would be eligible for parole/release to the streets after serving 15 years. Pursuant to plea negotiations, notably in which appellant represented himself, appellant agreed to enter a guilty plea to the four counts set forth above, the parties: (1) agreed to argue for a minimum sentence of 15 years on count 3; (2) the defendant retained the right to argue for a maximum term of 40 years on count 3 while the State retained the right to argue for a maximum sentence of life imprisonment on count 3; and (3) the State agreed to concurrent time between counts. While acknowledging that he was not promised release on parole, appellant claimed that he was led to believe that the plea agreement was represented as providing a minimum term of

15 years collectively before being eligible for consideration for parole/release to the streets.

At the evidentiary hearing, appellant's standby counsel testified that he understood the plea negotiations to include an absolute minimum sentence of 15 years no matter how the other sentences were imposed. Susan Krisko, one of the State's attorneys at the time of the plea, testified that she believed the spirit of the negotiations contemplated appellant's being eligible for parole after 15 years, although she never discussed NRS 213.1213 or promised appellant that he would be released after 15 years. Marc DiGiacomo, another of the State's attorneys at the time of the plea, testified that they never discussed the sentence structure or provided legal advice regarding the sentence structure and disagreed that the spirit of the negotiations required a minimum term of 15 years before parole eligibility. Mr. DiGiacomo testified, however, that he believed the sentences for the counts 1, 2, and 4 ran concurrently with the 15-to-life sentence for count 3. At the conclusion of the evidentiary hearing, the district court determined that the plea was voluntarily entered—appellant bargained for 15 years before eligibility for parole/release to the streets but there was no promise only a subjective belief that he would be eligible for release after 15 years. However, the district court concluded that the Department incorrectly determined that the deadly weapon enhancements did not begin until after appellant was paroled on the 15 to life term for count 3 and directed the Department to consider appellant for parole from the deadly weapon enhancements at the same time as he was considered for parole on the sentences for the primary offenses. The district court reasoned that because the counts were imposed to run concurrently every portion of the count, the primary

offense sentences and deadly weapon enhancement sentences, should run concurrently with count 3.

Sentence Structure

We conclude that the district court erred in determining that the Department incorrectly structured the sentences for purposes of parole eligibility. NRS 213.1213 provides that for purposes of determining parole eligibility between concurrent sentences, "eligibility for parole from any of the concurrent sentences must be based on the sentence which requires the longest period before the prisoner is eligible for parole." In the instant case, this means that the sentence for count 3, life with the possibility of parole after 15 years, is the controlling sentence for purposes of parole eligibility because it represents the longest term for parole eligibility. However, at the time appellant committed his offense, NRS 193.165 provided for an equal and consecutive enhancement sentence when a defendant used a deadly weapon during the commission of his primary offense. 1995 Nev. Stat., ch. 455, § 1, at 1431. Thus, until appellant is paroled from the sentences for the primary offenses for counts 1, 2, and 4, appellant is not eligible for parole on the deadly weapon enhancements. In examining the effect of NRS 193.165, this court has held that the deadly weapon enhancement is to be treated as a separate sentence from the primary sentence for all purposes, including parole eligibility. Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 481, 745 P.2d 697, 699 (1987). This court has further recognized that there is no authority to aggregate a sentence for the purpose of parole eligibility. State v. Kimsey, 109 Nev. 519, 521, 853 P.2d 109, 111 (1993). Thus, the district court erred in determining that the Department was required to treat in the aggregate the sentences of the primary offenses and the deadly weapon enhancements for purposes of parole eligibility on counts 1, 2, and 4;

rather, the sentence structure as imposed requires appellant to serve the term of 15 years to life imprisonment for count 3 and a consecutive term for the controlling deadly weapon enhancement in the second level of the sentence structure.

Voluntariness of the Plea

Based upon our review of the record on appeal, we further conclude that the district court erred in determining that the guilty plea was voluntarily entered. In order to enter a voluntary and knowing guilty plea, the district court must be satisfied that the defendant has an understanding of the consequences of the guilty plea. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The record on appeal establishes that appellant was informed of the nature of the charges and the range of punishments for each offense. Appellant was further informed that the district court's imposition of concurrent or consecutive time between counts was a matter within the district court's discretion. However, pervading the plea negotiations, was a misapprehension regarding the minimum term for parole eligibility to the streets when examining the global effect of the plea negotiations. The testimony from appellant's standby counsel, the testimony from one of the State's attorneys, and the district court's own statements at sentencing and during the post-conviction hearings, indicates that the parties and the district court mistakenly understood that the plea negotiations provided, globally, for a minimum term of 15 years to be served before appellant was eligible for parole to the streets.¹ Although the district court does not

¹As discussed above, this understanding was mistaken pursuant to NRS 213.1213 and NRS 193.165.

have a duty to inform a defendant of the parole consequences of a guilty plea, because those consequences are considered to be collateral consequences, see Palmer v. State, 118 Nev. 823, 830, 59 P.3d 1192, 1196 (2002), if appellant is informed that the plea negotiations contemplate a minimum sentence for parole eligibility that information should be accurate.² See Sierra v. State, 100 Nev. 614, 616, 691 P.2d 431, 433 (1984) (recognizing that a plea may be involuntary where the defendant was misinformed about the mandatory minimum punishment because if the defendant had been correctly informed of the full range of punishments, including the minimum term which was higher than represented, the defendant may not have been willing to enter the plea); Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975) (recognizing that a plea may be invalid where a defendant's belief as to a potential sentence, or hope of leniency, is supported by a promise from the State or indication by the court); see also Mathis v. Warden, 86 Nev. 439, 443, 471 P.2d 233, 236 (1970) (suggesting that the district court's misrepresentation regarding the parole consequences may warrant withdrawal of the plea). Reviewing the entire record on appeal, the "spirit" of the plea negotiations contemplated a term of 15 years to be served before appellant was eligible for parole to the streets. In the instant case, because of a misunderstanding of the effect of the deadly weapon enhancements on the

²This court is not suggesting that the State had a duty to provide legal advice to appellant, who as we noted earlier represented himself, but merely that the State provide accurate information regarding the plea negotiations. In the instant case, the record reveals that the plea negotiations concerned the minimum parole eligible term, and thus, this information was required to be accurate for a voluntary and knowing plea in the instant case.

minimum term to be served for parole eligibility to the streets, the terms of the negotiations were not fairly and accurately set forth. Thus, under the unique facts in this case, appellant demonstrated that his plea was involuntarily entered.

Remedy

In the proceedings below, the State indicated its willingness to have the deadly weapon enhancements stricken from the judgment of conviction in order to effectuate the parties' intentions regarding the guilty plea. Generally, the district court lacks jurisdiction to suspend or modify a defendant's sentence after the defendant begins to serve it. NRS 176A.400(3); Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1373 (1992). An exception to this rule applies when the court has made a mistake in rendering a judgment that worked to the extreme detriment of the defendant; however, this exception only applies if the error concerned the defendant's criminal record. Id. at 322-23, 831 P.2d at 1373-74; see also Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996). This court has specifically recognized that the district court's misapprehension regarding the legal consequences of a sentence does not permit the district court to modify the sentence after the defendant has begun to serve the sentence. State v. Kimsey, 109 Nev. 519, 522, 853 P.2d 109, 111 (1993). Consequently, because appellant's guilty plea was not voluntarily entered, as discussed above, appellant must be permitted an opportunity to withdraw his guilty plea in the instant case. Therefore, we reverse the denial of this claim.

Conclusion

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted

in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Rickie Lamont Slaughter Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

³We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.