IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 69049

RESPONDENT'S ANSWERING BRIEF

CHARLES JOSEPH MAKI #42820
Warm Springs Correctional Center
P.O. Box 7007
Carson City, Nevada 89702

APPELLANT, PRO-PER

CHRISTOPHER J. HICKS
District Attorney

TERRENCE P. McCARTHY
Chief Appellate Deputy
P.O. Box 11130
Reno, Nevada 89520

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI, No. 69049

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

A review of the procedural history is made a bit difficult due to Appellant Maki's tendency to file pleadings that are not known to the law. Still, the State will give it a shot.

Maki was convicted of multiple crimes in 1994. Record on Appeal, Volume 3 (3 ROA) at 372-373. Unfortunately, when the judgment was reduced to writing, it was unduly lenient. The oral pronouncement of sentence called for each sentence to be consecutive to each other sentence, but when it was reduced to writing, each sentence was consecutive to count III, but not to each other sentence. At the oral pronouncement of sentence, the judge made it clear that the aggregate parole eligibility would be 80 years. *See* 3 ROA 432. The written judgment is more lenient, probably due to a

scrivener's error. 3 AA 372.

Maki launched a series of attacks on his conviction. Those, in turn, resulted in a series of appeals. *See* various notices of appeal at 3 ROA 435; 4 ROA 684; 6 ROA 1024; 6 ROA 1127; 7 ROA 105[1]; 7 ROA 107; 7 ROA 112.

The instant appeal involves a motion captioned as "Defendant's Motion to Amend Judgment of 5/17/1994 to Comport With NRS 176.105." 6 ROA 1094. In that motion, Maki sought various forms of relief, including being relieved of the obligation to pay restitution. The district court denied the motion. The Order denying the motion makes it clear that the court is frustrated by Maki's inability to make sense. The Order recites that "to the extent" he is challenging his conviction, the petition is denied. 6 ROA 112. It goes on to say that "to the extent" that he wishes to modify his sentence, the motion is denied. *Id.* Maki now appeals, arguing that his motion meant something else entirely, although he still has the part about changing the restitution.

II. STATEMENT OF THE FACTS

The underlying facts of this case involve the defendant's sexual abuse of two neighbor children. The trial transcript can be found at 4 ROA 461 through 663.

---

[1]The State has no explanation for the page numbering provided by the clerk, or for the order in which documents are presented in the Record on Appeal.

III. ARGUMENT

Appellant's argument now seems to be that the court misconstrued his motion, and that he was really just trying to get clarification of the judgment, to include some things required by NRS 176.105 [2]. The statute requires that various details be included in a judgment of conviction and this Court has enforced those requirements by remand on direct appeal. *See e.g. Ledbetter v. State*, 122 Nev. 252, 265, 129 P.3d 671 (2006). What is at issue now is whether that statute gives a private right, and, if so, whether that private right can be enforced by the instant motion, and, if so, whether the court has an obligation to decipher the motion to determine what the defendant is seeking.

The State acknowledges that the provision requiring that the judgment recite whether the conviction was by plea or by trial could probably be enforced by a motion to correct a clerical error, as described in NRS 176.565. That was not what Maki sought.

The Ninth Circuit has weighed in on the effect of Criminal Rule 32, which is very similar to NRS 176.105. The court held that the rules " prescribe a recital in the judgment of the several steps taken by the court during the progress of a case from the entry of a plea to the pronouncement of sentence.

---

[2]Related issues, like whether the time for appeal or post-conviction relief would be re-started, are not directly at issue in this appeal but they might be a consideration for the Court.

Such a recital in the judgment would be *prima facie* evidence that the steps set forth therein actually took place, but it does not follow that a failure to make such a recital in the written judgment nullifies steps which did in fact occur." *Sanders v. Johnston*, 165 F.2d 736, 737 (9th Cir. 1948). *Accord Revuelta v. State*, 86 Nev. 224, 467 P.2d 105 (1970). That is, the failure to recite whether the conviction was by plea or by trial does not invalidate the judgment. Instead, if it becomes significant, the law allows that "recourse to all the records of the court may be had and where all legal essentials are thereby made to appear habeas corpus will not lie." *Sanders*, 165 F.2d at 737. So, to the extent that we are to take Maki literally, and assume that all he wants is to amend the judgment to recite that his convictions were by trial and not by plea, it appears that the law provides no such remedy to him.

If he was trying to get the district court to explain the various sentences in the written judgment, the failure to specify a minimum term (where only one sentence is allowable) does not render the sentence illegal nor does it implicate the jurisdiction of the district court. Therefore, Maki's claim fell outside the narrow scope of claims permissible in a motion to modify or correct an illegal sentence. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

If the claim is that the department of corrections is not construing his judgment correctly, that claim should be presented in the county where he is

confined. *See, e.g., Johnson v. Director, Dept. Of Prisons*, 105 Nev. 314, 774 P.2d 1047 (1989). If the claim is that the Court should modify the judgment in some way, that is beyond the scope of what is allowed by *Edwards, supra*. If the prisoner disagrees with the construction placed on the judgment by the warden, then a habeas petition, naming the confining officer, and filed in the county of confinement, would be the appropriate remedy.

The State notes that the only sentence at the time of the crime, for the crime of sexual assault upon a child (with no finding of harm) would be a sentence of life imprisonment with parole eligibility in ten years. If Maki is insisting that he must have the various consecutive terms specified by the district court in its oral pronouncement, the State does not object. If he is insisting on something else, he has used the wrong procedural vehicle in the wrong county.

The State notes that in general an appellant is required to present cogent arguments supporting his position. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Even if that duty does not apply equally in the district court, this Court need not undertake the burden of pleading for Maki. Instead, the Court should simply affirm the judgment for lack of a cogent argument demonstrating that Maki is entitled to some form of relief. It does not seem overly burdensome to require the appellant to explain what he wants and how he is prejudiced by not getting it. Indeed, other courts have

recognized that a trial court need not consider a pleading that is "confused, ambiguous, vague, or otherwise unintelligible." *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir.1988). Here, except for the part where Maki complains that the judgment does not mention whether the conviction was by plea or by trial, the motion makes little sense. As there is no explanation of how Maki is aggrieved, and was no such explanation in the district court, the appeal should be dismissed.

IV. CONCLUSION

Whatever the defendant was seeking in his motion, it was denied.

DATED: January 14, 2016.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

DATED: January 14, 2016.

By: TERRENCE P. McCARTHY
Chief Appellate Deputy
Nevada Bar No. 2745
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on January 14, 2016, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Charles Maki #42820
Warm Springs Correctional Center
P.O. Box 7007
Carson City, NV 89702

Destinee Allen
Washoe County District Attorney's Office