

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMIE NUNN,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 80121

**MOTION TO STRIKE PORTIONS OF
APPELLANT'S OPENING BRIEF**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, JOHN NIMAN, and submits this Motion to Strike Portions of Appellant's Opening Brief. This Motion is filed pursuant to NRAP Rule 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 7th day of July, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ John Niman
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

The first argument of Appellant's Opening Brief ("AOB") is not properly before this Court, as Appellant failed to properly notice that he was appealing the district court's denial of his Petition for Writ of Habeas Corpus (Post-Conviction) (his "Motion to Withdraw Guilty Plea"). This Court should therefore strike argument "I" of AOB, and all subsections therein, as well as all references to the same in argument "III" of AOB.¹

"[A]n appeal...may be taken only by filing a notice of appeal with the district court clerk[.]" NRAP 4(a)(1). A notice of appeal "*shall*...designate the judgment, order or part thereof being appealed[.]" NRAP 3(c)(1)(B) (emphasis added). "[A] judgment or order which is not included in the notice of appeal will not be considered on appeal." Collins v. Union Fed. Sav. & Loan Ass'n, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981); see also, Abdullah v. State, 129 Nev. 86, 294 P.3d 419 (2013) (notice of appeal citing post-conviction petition for writ of habeas corpus could not be construed as a challenge to the judgment of conviction).

¹ The State would note that Argument III asks this Court to find cumulative error based on two issues: the allegedly wrongful denial of Appellant's effort to withdraw his guilty plea, and the allegedly wrongful revocation of probation. AOB at 18. Therefore, if this Court deems appropriate to strike Appellant's plea withdrawal claims, the grounds for a "cumulative error" argument would be insufficient, as only one alleged error would remain. See, McKenna v. State, 114 Nev. 1044, 1060, 968 P.2d 739, 749 (1998) ("[A] sole error...does not, by itself, constitute cumulative error.").

Argument I of AOB complains “THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED *DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA*.” (Emphasis added). AOB at 11. Likewise, Argument III of AOB makes reference of Appellant’s “attempt to withdraw his invalid plea.” *Id.* at 18, 19 (alleging “The denial of the Motion to Withdraw the Guilty Plea led to the revocation”). Appellant admits that the decision on his withdrawal motion was made on November 5, 2019, making it a separate decision and order from that referenced in Appellant’s Notice of Appeal. AOB at 11; Appellant’s Appendix (“AA”) at 078-79 (Order for Revocation of Probation and Amended Judgment of Conviction, resulting from proceedings on November 14, 2019). Appellant does not acknowledge this procedural default, much less attempt to justify his inclusion of this improper argument in his Opening Brief. See generally, AOB at 11-16. Appellant’s Notice of Appeal is specific – he is appealing the district court’s decision on November 14, 2019. AA at 086-87. Therefore, any issues not implicated in that decision must not be considered in the instant proceedings. Collins, 97 Nev. at 89-90, 624 P.2d at 497; see, AA at 077 (Court Minutes dated November 14, 2019, including no reference to Appellant’s Motion to Withdraw Guilty Plea).

Admittedly, Appellant’s Docketing Statement, filed in the instant case on March 5, 2020, includes a reference to the denial of Appellant’s “Motion to

Withdraw Guilty Plea.” At 4. However, in the event Appellant seeks to argue that this statement provides grounds for consideration of his unnoticed claims, Appellant is mistaken. NRAP 14, which governs docketing statements in appeals, explains that the purpose of such statements is “to assist the Supreme Court in...identifying issues on appeal,” but that “such statement is not binding on the court” NRAP 14(a)(3), (4). Nothing in NRAP 14 excuses an appellant from his duty to specifically “designate the judgment, order or part thereof being appealed” in the Notice of Appeal. NRAP 3(c)(1)(B). Therefore, the inclusion of Appellant’s contentions against the denial of his “Motion to Withdraw Guilty Plea” as potential issues on appeal cannot cure the deficient Notice of Appeal that does not reference, much less specify, the district court’s Findings of Fact, Conclusions of Law and Order denying Appellant’s habeas efforts in that regard.

CONCLUSION

Because Appellant did not notice any appeal from the district court’s denial of his “Motion to Withdraw Guilty Plea”, the State respectfully requests that this Court strike Argument I on pages 11-16 of AOB and any reference to the same in Argument III on pages 18-20 of AOB.

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Dated this 7th day of July, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
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BY */s/ John Niman*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 7, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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BY /s/ E. Davis

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JN/Joshua Judd/ed