IN THE SUPREME COURT OF THE STATE OF NEVADA

GLEEN DOOLIN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 80223

Electronically Filed
Feb 27 2020 10:25 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Alexander Chen
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2750

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: N/A

5. Procedural history.

On September 17, 2012, Glenn Doolin (hereinafter, "Appellant") was charged by way of Information with GRAND LARCENY AUTO (Category C Felony – NRS 205.228.2) for actions on or about June 15, 2012. Appellant's Appendix ("AA") at

1-3. Contained within the Information was a Notice that the State would seek habitual criminal treatment under NRS 207.010. Id. at 2-3.

On November 6, 2012, an Amended Information was filed, adding a count for POSSESSION OF BURGLARY TOOLS (Gross Misdemeanor – NRS 205.080). AA at 4-7. Appellant entered a guilty plea, by which he pled guilty to both counts, without negotiations, on January 7, 2013. Id. at 8-14. In executing the guilty plea, Appellant acknowledge that he "under[stood] that if more than one sentence of imprisonment is imposed…the sentencing judge [had] the discretion to order the sentences served concurrently or consecutively." Id. at 10.

On April 10, 2013, Appellant was sentenced as a "small habitual criminal" to a minimum of sixty (60) and a maximum of one hundred fifty (150) months in the Nevada Department of Corrections for Grand Larceny Auto, and to twelve (12) months in the Clark County Detention Center for Possession of Burglary Tools, consecutive to the Grand Larceny Auto. AA at 35-36. The Judgment of Conviction was filed on April 26, 2013. Id. at 38-39.

On October 10, 2019, Appellant filed a Motion to Modify Sentence, basing his argument on a research article regarding imprisonment. AA at 40-49. The State filed its Response on October 14, 2019. Id. at 50-53. Appellant thereafter filed an Addendum to Motion to Modify Sentence on October 23, 2019. Id. at 61-64. The district court conducted a hearing on November 6, 2019, at which the district court

concluded it lacked jurisdiction to modify Appellant's sentence, as Appellant had already started serving it. Id. at 72-81. The Order Denying Motion to Modify was filed on November 18, 2019. Id. at 82-83.

On December 9, 2019, Appellant Noticed his appeal of the Order Denying Motion to Modify. AA at 84-85.

On January 23, 2020, Appellant filed a Motion to Correct Order, claiming that the Order Denying Motion to Modify did not properly include the district court's reasoning. AA at 86-89. The State responded to Appellant's Motion to Correct on January 29, 2020. Id. at 112-13. The district court granted Appellant's Motion to Correct; the Order reflecting the district court's decision was entered on February 6, 2020. Id. at 116-19.

On February 6, 2020, Appellant filed a Supplemental Notice of Appeal. AA at 120-21. Appellant filed his Fast Track Statement in the instant appeal on February 10, 2020.

6. Statement of Facts.

Appellant was adjudicated guilty, due to his own guilty plea without negotiations, of Grand Larceny Auto and Possession of Burglary Tools on April 10, 2013. AA at 27-36, 38-39. Appellant was thereafter sentenced to prison time for his felony, and to consecutive jail time for his gross misdemeanor. Id. The Judgment of

Conviction reflected both convictions, and announced the sentences together. Id. at 38-39.

Appellant began serving his sentence under the Judgment of Conviction on April 10, 2013. AA at 35-36, 38-39. Thereafter, on October 10, 2019, Appellant filed his Motion to Modify, seeking to sever the sentence as pronounced in the singular Judgment of Conviction, so that Appellant could argue that his good behavior while serving time for his felony conviction warranted probation rather than finishing his sentence for his gross misdemeanor. Id. at 40-43. The district court explained in detail that, while it would consider Appellant's other arguments persuasive, the court was unable to reach those arguments because Appellant had already begun serving his sentence under the Judgment of Conviction. Id. at 75-80, 118-19.

7. Issue(s) on appeal.

Whether the district court properly held that it lacked jurisdiction to modify Appellant's sentence.

8. Legal Argument, including authorities:

I. THE DISTRICT COURT PROPERLY CONCLUDED IT LACKED JURISDICTION TO MODIFY APPELLANT'S SENTENCE

The Nevada Supreme Court has concluded that, "[g]enerally, a district court lacks jurisdiction to suspend or modify a sentence after the defendant has begun to serve it." Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1374 (1992) (overturned on other grounds by Harris v. State, 130 Nev. 435, 329 P.3d 619 (2014)).

However, a district court has inherent authority to correct, vacate, or modify a sentence *that violates due process* where the defendant can demonstrate the sentence is based on a materially untrue assumption or on a mistake of fact about the defendant's criminal record that has worked to the *extreme detriment* of the defendant. Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996) (emphasis added); see also Passanisi, 108 Nev. at 322-23, 831 P.2d at 1373-74 (concluding that a district court has jurisdiction to modify a sentence "only if (1) the district court actually sentenced appellant based on a materially false assumption of fact that worked to appellant's extreme detriment, *and* (2) the particular mistake at issue was of the type that *would rise to the level of a violation of due process*." (Emphasis added).). Not every mistake or error during sentencing gives rise to a due process violation. State v. Eighth Judicial Dist. Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984).

A. Appellant has begun serving his sentence under the Judgment of Conviction

Appellant's argument here hinges on the assertion that Appellant's sentence is somehow bifurcated between his felony and gross misdemeanor convictions. Appellant's Fast Track Statement ("App.") at 10. However, Appellant fails to specifically cite to any legal authority that multiple sentences within a single Judgment of Conviction may be bifurcated. Id. In fact, Nevada case law regarding motions to modify sentence would seem to belie Appellant's claim.

In Passanisi, the appellant was sentenced to two consecutive fifteen (15) year terms of imprisonment. 108 Nev. at 319, 831 P.2d at 1371. In that case, the appellant filed his motion to modify sentence four and a half (4 ½) years into his sentence. Id. Therefore, by Appellant's logic, the Passanisi appellant could not have possibly begun serving the sentence for his second conviction. Contrary to Appellant's logic, however, the Passanisi Court referenced the various individual terms of imprisonments in that appellant's judgment of conviction with the singular term "sentence." 108 Nev. at 323, 831 P.2d 1374 (concluding that the district court "properly found that it lacked jurisdiction to modify appellant's *sentence* after he began to serve *it*." (Emphasis added).).

In Edwards, the appellant was sentenced to five (5) consecutive terms of fifteen (15) years of imprisonment. 112 Nev. at 704, 918 P.2d at 322. Again, the Nevada Supreme Court referred to that appellant's various terms of imprisonment with the singular term "sentence." Id. at 709, 918 P.2d at 325.

Appellant cites to Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979) to support his position that his terms of imprisonment amount to two separate sentences. App. at 10. However, that case is easily distinguishable from the instant case. In that case, at the time the district court took action, "*no judgment had been signed by the judge nor entered by the clerk*." Id. at 929, 604 P.2d at 118 (emphasis added). Here, the Judgment of Conviction was signed on April 24, 2013. AA at 39.

The Judgment of Conviction was entered by the clerk on April 26, 2013. Id. at 38. The Miller Court based its decision on the fact that the judgment had not been signed or entered for its determination that the district court maintained its jurisdiction to modify that defendant's sentence. 95 Nev. at 929, 604 P.2d at 118. Therefore, it does not provide legal support for Appellant's assertion.

Pursuant to NRAP Rule 3C(e)(1)(B)(vi), Appellant had the duty to provide the authorities to support his argument. Appellant's failure to sufficiently do so undermines, if not dooms, Appellant's argument from the outset.

B. The district court lacked jurisdiction under Passanisi

Appellant concedes that he has begun serving the sentence as set forth in his Judgment of Conviction. App. at 10. Therefore, Appellant has the burden, pursuant to Passanisi, of showing that his case falls into the exception to the general rule. 108 Nev. at 322-23, 831 P.2d at 1373-74. The Passanisi Court was specific in detailing which cases thus qualify as exceptions to the general rule, setting forth a two-factor analysis, as set forth *supra*. Id. Appellant fails to do so; thus, the district court did not abuse its discretion in concluding that it lacked jurisdiction.

In order to demonstrate his case is an exception to the rule, Appellant would first need to demonstrate that the district court's sentencing decision was *based* on a "materially false assumption of fact." Id. Appellant makes no such showing. Instead, Appellant's underlying argument seemed to rely on an article that discusses the

potential impact of prison sentences. See, AA at 42 n.1 (alleging "[t]he materially untrue assumption in [Appellant's] sentencing that give [sic] rise to the request for a sentencing modification is the substantial body of evidence that long prison sentences for low level offenses such as the property crime committed here are counterproductive to fighting crime or rehabilitating the convicted.") Appellant's underlying argument does not actually allege any facts that were materially false, upon which the district court based its sentencing decision. Rather, Appellant makes a public policy argument that he entreats the district court to consider. Appellant doesn't even allege any specific representation that the district court relied on information that was contrary to Appellant's proposed article. Appellant simply fails to raise any argument as to the information on which the district court relied. See generally, AA at 40-43; see also App. at 10-11. The State respectfully submits that Appellant therefore fails to demonstrate that his case falls into the exception to the general rule set forth in Passanisi. 108 Nev. at 322-23, 831 P.2d at 1373-74.

Furthermore, Appellant, if he could show that the district court had relied on some materially false fact, would still have to show that such a mistake violated due process. Appellant failed to even address this issue in his underlying Motion, and fails again to discuss it on appeal. See AA at 40-43; see also App. at 10-11. Therefore, even if Appellant somehow were to meet his burden for the first Passanisi

factor, Appellant would still fall short, as the two factors are conjunctive, and Appellant cannot make a showing as to the second.

Because Appellant has begun serving his sentence as set forth in the Judgment of Conviction, and because Appellant fails to demonstrate that the circumstances of his sentence fall within the exception to the general rule, the district court did not abuse its discretion by concluding that it lacked jurisdiction to modify Appellant's sentence. As such, the district court's decision should be AFFIRMED.

9. Preservation of the Issue.

Appellant filed a timely Notice of Appeal.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, contains 1,799 words and 9 pages.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 27th day of February, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
P O Box 552212
Las Vegas, NV 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 27th day of February, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JONELL THOMAS
W. JEREMY STORMS
Chief Deputy Special Public Defender

ALEXANDER CHEN
Chief Deputy District Attorney

BY */s/ J. Garcia*
Employee,
Clark County District Attorney's Office

AC/Joshua Judd/jg