

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ROBERT HAIRE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53020

**FILED**

MAY 15 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, entered pursuant to a guilty plea, of one count of an offense involving a stolen vehicle and one count of tampering with a stolen vehicle. Fifth Judicial District Court, Nye County; John P. Davis, Judge. The district court sentenced appellant James Robert Haire to serve a prison term of four to ten years for the offense involving the stolen vehicle and a concurrent jail term of one year for tampering with the stolen vehicle. The district court also ordered Haire to pay \$10,000 in restitution.

In the Fast Track Statement, appellate counsel states, "Appellant demanded an appeal by filing his pro per notice of appeal and then by subsequently advising counsel in writing that he wanted to raise a claim of ineffective assistance and a claim that his guilty pleas were invalid because no written plea agreement was prepared and filed pursuant to NRS 174.035." Counsel then presents the following issues for our review.

First, Haire "challenges the validity of his guilty pleas." Counsel does not indicate why the guilty pleas are invalid; instead, he

argues that this claim is not appropriate for review on direct appeal. “Generally, we will not review a plea-validity challenge that is raised for the first time on appeal. There are exceptions to this rule in cases where: (1) the error clearly appears from the record; or (2) the challenge rests on legal rather than factual allegations.” O’Guinn v. State, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002) (footnotes omitted). As counsel has not alleged that either of these exceptions applies, we decline to consider this contention on direct appeal.

Second, Haire “alleges that counsel was ineffective.” Appellate counsel does not indicate why defense counsel was ineffective; instead, he argues that that this claim must be raised in a petition for a writ of habeas corpus. “This court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless.” Archanian v. State, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). As counsel has not alleged that either of these exceptions applies, we decline to consider this contention on direct appeal.

Third, Haire “alleges that his guilty plea was in violation of NRS 174.035(7).” Counsel notes that NRS 174.035(7) provides

A defendant may not enter a plea of guilty . . . pursuant to a plea bargain for an offense punishable as a felony for which:

- (a) Probation is not allowed; or
- (b) The maximum prison sentence is more than 10 years, unless the plea bargain is set forth in writing and signed by the defendant, the defendant’s attorney, if he is represented by counsel, and the prosecuting attorney.

(Emphasis added.) Counsel affirms that there was no written plea agreement and observes that Haire's felony carries a maximum prison sentence of ten years. See NRS 205.273(4). And counsel concedes, "It appears that NRS 174.035 was not applicable to Haire's guilty pleas in the district court." We agree and conclude that Haire's guilty plea does not violate NRS 174.035(7).

Fourth, Haire alleges that "[t]he lower court erred in determining the amount of restitution." Counsel notes that "Haire was present in court during his sentencing and conferred with his counsel before stipulating to the \$10,000 restitution amount." Counsel observes that Haire did not object to the restitution amount. And counsel asserts that Haire's "failure to object to the amount at the time of sentencing amounts to a waiver of this issue on appeal" pursuant to Martinez v. State, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999). Counsel does not argue that the district court's restitution determination should be reviewed for plain error. See NRS 178.602. However, we have reviewed the record on appeal and conclude that the district court did not err.

We remind counsel that "[a]ttorneys must argue for their clients without conceding an appeal is without merit. An action is not frivolous even though the lawyer believes that the client's position will ultimately not prevail." Ramos v. State, 113 Nev. 1081, 1084-85, 944 P.2d 856, 858 (1997). "[C]ounsel should file a brief that includes all arguable issues and argues defendant's appeal as well as possible." Id. at 1084, 944 P.2d at 857. We note that Franklin v. State provides an illustrative list of claims that may be raised on a direct appeal from a judgment of conviction entered pursuant to a guilty plea. 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), disapproved of on other grounds by Thomas v. State, 115 Nev.

148, 979 P.2d 222 (1999). And we conclude that the claims raised in Haire's appeal are either not appropriate for direct appeal or are without merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. John P. Davis, District Judge  
Gibson & Kuehn  
Nye County Public Defender  
Attorney General Catherine Cortez Masto/Carson City  
Nye County District Attorney/Pahrump  
Nye County District Attorney/Tonopah  
Nye County Clerk