

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN WITHEROW A/K/A JOHN
PHILLIP WITHEROW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45376

FILED

OCT 21 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a motion to correct an illegal sentence. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On August 25, 1989, the district court convicted appellant, pursuant to jury verdict, of one count of attempted robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole.¹ This court dismissed appellant's appeal from his judgment of conviction and sentence.² The

¹Appellant was originally convicted in 1985 of one count of attempted robbery, adjudicated a habitual criminal and sentenced to serve a term of life in the Nevada State Prison without the possibility of parole. This court reversed appellant's conviction on appeal and remanded the matter for a new trial. Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988).

²Witherow v. State, Docket No. 20592 (Order Dismissing Appeal, December 20, 1990).

remittitur issued on January 8, 1991. Appellant unsuccessfully sought post-conviction relief by way of a petition for post-conviction relief.³

On December 14, 2004, appellant filed a proper person motion to correct an illegal sentence and a motion for the appointment of counsel in the district court. On May 11, 2005, the district court denied the motion. This appeal followed.⁴

In his motion, appellant claimed that he was unable to previously respond to the State's presentation of his criminal history, his remorsefulness and his moral character because he was waiting to raise these issues on appeal or in a post-conviction petition. Appellant claimed that he is not a sociopath as alleged by the State, that the district court misunderstood facts relating to his prior convictions, and that his sentence should not have been enhanced. Appellant sought resentencing on the primary offense. Appellant also appeared to claim that he was actually innocent of the offense of attempted robbery because he had a letter from an individual who could demonstrate that a witness during the trial committed perjury.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.⁵ "A motion to correct an illegal sentence

³Witherow v. State, Docket No. 22582 (Order Dismissing Appeal, January 24, 1992).

⁴We conclude that the district court did not abuse its discretion in denying appellant's motion for the appointment of counsel.

⁵Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"6 A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."7 A motion to correct or modify a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied.8

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's motion. Appellant failed to demonstrate that the district court relied on a mistaken assumption about appellant's criminal record that worked to his extreme detriment. Appellant's sentence was facially legal, and there is no indication that the district court was without jurisdiction in this case.9 To the extent that appellant argued that he was actually innocent, this claim was improperly raised in a motion to correct or modify a sentence. Rather, a claim that a defendant is actually innocent should be raised in a post-conviction petition for a writ of habeas corpus.10 Therefore, we affirm the order of the district court.

⁶Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

⁷Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).


⁸Id. at 708-09 n.2, 918 P.2d at 325 n.2.

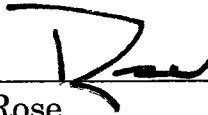
⁹See 1981 Nev. Stat., ch. 682, § 2, at 1647 (NRS 207.010).

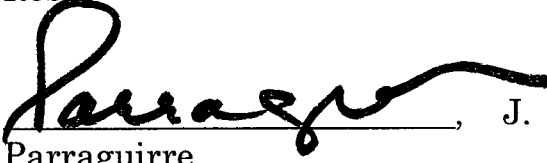
¹⁰We express no opinion as to whether appellant could meet the procedural requirements of NRS chapter 34 or whether appellant could demonstrate a fundamental miscarriage of justice sufficient to overcome application of the procedural bars.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


_____, J.
Douglas


_____, J.
Rose


_____, J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
John Witherow
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.