

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIJAH BOYKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45597

FILED

OCT 25 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. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On August 13, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of grand larceny (auto). The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of five to twenty years in the Nevada State Prison. No direct appeal was taken.

On June 15, 2005, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On July 7, 2005, the district court denied the motion. This appeal followed.

In his motion, appellant contended that his sentence was illegal because the issue of whether or not to adjudicate appellant a habitual criminal was not presented to a jury. Appellant claimed that the jury should have decided the facts considered by the district court in

determining that it was just and proper to adjudicate appellant a habitual criminal.¹

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.² "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"³

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's sentence was facially legal, and there is no indication that the district court was without jurisdiction to sentence appellant in this case.⁴ Appellant was informed in the written guilty plea agreement that he waived his right to a jury trial and that the district court determined the sentence within the limits prescribed by statute. This court has specifically held that the right to a jury trial does not extend to a habitual criminal proceeding.⁵ Rather, the decision of whether to adjudicate a defendant a habitual criminal is left to

¹Appellant argued that these facts included: (1) appellant had eight prior convictions, and in eighteen years, appellant was only in the community for approximately one year; (2) appellant's juvenile record; (3) appellant's drug usage; and (4) the presentence investigation report.

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

³Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

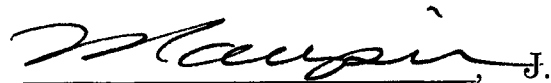
⁴See NRS 207.010(1)(a) (providing for a term of not less than five years nor more than twenty years for small habitual criminal treatment).

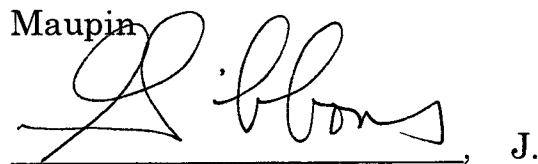
⁵See Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967).

the discretion of the district court and all that is required is that the district court actually exercise its discretion.⁶ In the instant case, the record as a whole reveals that the district court exercised its discretion to adjudicate appellant a habitual criminal. Apprendi v. New Jersey expressly excludes the fact of a prior conviction from its holding, and there is nothing in Apprendi suggesting that a jury is required to participate in any facet of the habitual criminal decision.⁷

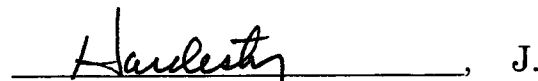
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin
 J.

Gibbons

 J.

Hardesty

⁶See NRS 207.010; Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000); compare to Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995).

⁷See 530 U.S. 466, 490 (2000). In fact, appellant's argument to the contrary is patently absurd because it would require the jury to make a decision of habitual criminality without being presented with the prior convictions. Notably, NRS 207.010 does not specify as predicate facts any facts in addition to the required number of convictions for habitual criminal adjudication.

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michael A. Cherry, District Judge
Elijah Boykins
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk