

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY GENE TILCOCK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45644

FILED

OCT 17 2005

ORDER OF AFFIRMANCE

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ribade*
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; John S. McGroarty, Judge.

On August 14, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary, one count of possession of a firearm by an ex-felon and one count of stop required on signal of a police officer. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve three concurrent terms of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence.¹ The remittitur issued on November 14, 2000. Appellant unsuccessfully sought post-conviction relief in two post-conviction petitions for writs of habeas corpus and a motion to modify sentence.²

¹Tilcock v. State, Docket No. 32821 (Order Dismissing Appeal, September 8, 2000).

²Tilcock v. State, Docket Nos. 38643, 39678, 40098 (Order of Affirmance, November 22, 2002).

On June 20, 2005, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On August 1, 2005, the district court denied appellant's motion. This appeal followed.

In his motion, appellant argued that pursuant to Apprendi v. New Jersey,³ a jury was required to decide the issue of whether it was just and proper to adjudicate appellant a habitual criminal. Appellant further argued that he should not have been adjudicated because four of the eight prior convictions should only have been counted as one prior conviction.

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.⁴ "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.'"⁵

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's motion. Appellant's claims fell outside the very narrow scope of claims permissible in a motion to correct an illegal sentence. Appellant failed to demonstrate that his sentence was facially illegal or that the district court was without

³530 U.S. 466 (2000).

⁴Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

⁵Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

jurisdiction to sentence him in the instant case.⁶ As a separate and independent ground to deny relief, appellant's claim for relief under Apprendi is without merit. This court has specifically held that the right to a jury trial does not extend to a habitual criminal proceeding.⁷ Rather, the decision of whether to adjudicate a defendant a habitual criminal is left to the discretion of the district court and all that is required is that the district court actually exercise its discretion.⁸ In the instant case, the record as a whole reveals that the district court exercised its discretion to adjudicate appellant a habitual criminal. Apprendi 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.⁹ Appellant failed to demonstrate that the State did not present proof of at least three prior convictions—the number required for large habitual criminal treatment.¹⁰ Finally, this court previously considered and rejected appellant's argument challenging

⁶See NRS 207.010(1)(b).

⁷See Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967).

⁸See 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).

⁹See 530 U.S. at 490. In fact, appellant's argument to the contrary is patently absurd because it would require the jury to make a decision about habitual criminality without actually being presented with the prior convictions. Notably, NRS 207.010 does not specify as a prerequisite any facts in addition to the required number of convictions for habitual criminal adjudication. Thus, a jury was not required to be presented with the presentence investigation report, police reports, or arguments of the State made at sentencing.

¹⁰See NRS 207.010(1)(b).

habitual criminal adjudication based on the number of prior convictions. The doctrine of the law of the case prevents further litigation of this issue.¹¹

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹³

Douglas, J.
Douglas

Rose, J.
Rose

Parraguirre, J.
Parraguirre

¹¹See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We 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.

cc: Hon. John S. McGroarty, District Judge
Larry Gene Tilcock
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk