IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMIE DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46333

FILED

MAY 23 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person motion to vacate enhancement. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On December 20, 1988, the district court convicted appellant, pursuant to a guilty plea, of first-degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. Appellant did not file a direct appeal.

Appellant unsuccessfully sought State relief from his conviction;[1] however, the Ninth Circuit held in an unpublished opinion that appellant's trial counsel was ineffective and remanded the case to the district court to allow appellant to withdraw his plea.[2]

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[1]Davis v. State, Docket No. 31157 (Order Dismissing Appeal, December 4, 1999); Davis v. State, Docket No. 31521 (Order Dismissing Appeal, April 30, 1999); Davis v. State, Docket No. 28400 (Order Dismissing Appeal, April 30, 1999); Davis v. State, Docket No. 23338 (Order Dismissing Appeal, February 21, 1995).

[2]Davis v. Del Papa, No. 02-17090 (9th Cir., 2004).

06-10827

On September 15, 2005, the district court convicted appellant, pursuant to a guilty plea, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of five to twenty years in the Nevada State Prison. Appellant was granted 6,246 days' credit for time served.

On November 1, 2005, appellant filed a proper person motion to vacate enhancement in the district court. The State opposed the petition. On November 21, 2005, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that during his initial conviction, the deadly weapon enhancement was dismissed, and to sentence him to the enhancement now is a violation of double jeopardy.

This court has recognized several motions as incident to the trial proceedings: a motion to modify a sentence, a motion to correct an illegal sentence, and a motion to withdraw a guilty plea.[3] A defendant may file one of these motions to seek relief from the judgment of conviction rather than filing a petition for a writ of habeas corpus.[4] To the extent that appellant's motion is a motion to modify or correct an illegal sentence, we conclude the district court did not err in denying the motion.

A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which

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[3]Hart v. State, 116 Nev. 558, 562-63, 1 P.3d 969, 971-72 (2000).

[4]See NRS 34.724(2).

work to the defendant's extreme detriment."[5] 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.[6] "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.'"[7]

Appellant failed to demonstrate that the district court relied on mistaken assumptions about his criminal record that worked to his extreme detriment. Furthermore, appellant's sentence was facially legal and there is nothing in the record to indicate that the district court was without jurisdiction to impose a sentence.[8] Appellant's challenge to the deadly weapon enhancement fell outside the narrow scope of claims permissible in a motion to correct an illegal sentence because his claim attacked the validity of the judgment of conviction.

To the extent that appellant's motion is a motion to withdraw his guilty plea, it likewise lacked merit. After the imposition of a sentence, the district court will allow the withdrawal of a guilty plea only

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

[6]Id.

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

[8]See 1981 Nev. Stat., ch. 780, § 1, at 2050 (NRS 193.165); 1977 Nev. Stat., ch. 430, §82, at 864-65 (NRS 200.030).

to correct a manifest injustice.[9] A guilty plea is presumptively valid, and appellant carries the burden of establishing that his plea was not entered knowingly and intelligently.[10] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[11] This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[12]

We conclude that the totality of the circumstances indicate that appellant entered his plea knowlingly, voluntarily and intelligently. Appellant entered into a stipulated sentence of two consecutive terms of five to twenty years, specifically, with the knowledge of the deadly weapon enhancement. Appellant specifically vocalized concern to the district court that the district court would exercise its discretion and not sentence appellant as the stipulation recommended, but the district court assured him that it would sentence him according to the stipulation and proceeded to do so.

As a separate and independent reason to deny relief, appellant's double jeopardy claim has no merit. NRS 193.165 does not

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[9]NRS 176.165.

[10]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

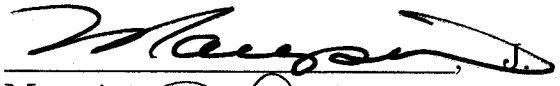
[11]State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[12]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

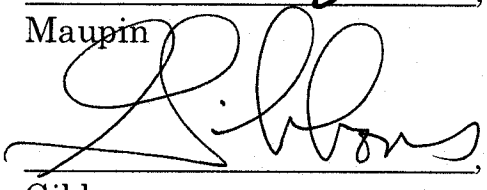
violate double jeopardy.[13] "'It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events.'"[14] Thus, the district court did not err in denying appellant's motion.

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.[15] Accordingly, we

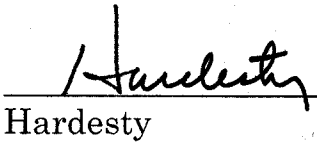
ORDER the judgment of the district court AFFIRMED.



Maupin, J.



Gibbons, J.



Hardesty, J.

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[13]Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975).

[14]Williams v. State, 93 Nev. 405, 407, 566 P.2d 417, 419 (1977) (quoting United States v. Ewell, 383 U.S. 116, 121 (1966)).

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

cc: Hon. Donald M. Mosley, District Judge
Jimmie Davis
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk