

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEE ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47072

FILED

JUL 28 2006

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

ORDER OF AFFIRMANCE

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; Jackie Glass, Judge.

On April 13, 1989, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit robbery and one count of robbery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve concurrent terms of life in the Nevada State Prison with the possibility of parole. This court affirmed appellant's conviction on direct appeal.¹ The remittitur issued on December 18, 1990. Appellant unsuccessfully sought post-conviction relief from his judgment of conviction.²

On February 8, 2006, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On March 28, 2006, the district court denied appellant's motion. This appeal followed.

¹Gaitor v. State, 106 Nev. 785, 801 P.2d 1372 (1990) (consolidated direct appeals of appellant and his co-defendant Jamie Gaitor).

²Allen v. State, Docket No. 24690 (Order Dismissing Appeal, October 11, 1994).

In his motion, appellant claimed that his habitual criminal adjudication violated Apprendi v. New Jersey³ because the issue of whether he should be adjudicated a habitual criminal was not presented to the jury. Appellant further claimed that the State did not present a sufficient number of prior convictions for large habitual criminal treatment and that there were errors in the presentence investigation report.

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 A motion to correct an illegal sentence may not be used to correct alleged errors occurring at sentencing.⁶

Our review of the record on appeal reveals 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's sentence was facially legal, and there is no indication that the district court was without jurisdiction in this matter.⁷ A claim that the district court allegedly exceeded its authority at

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)).

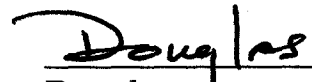
⁶Id.


⁷See 1985 Nev. Stat., ch. 544, § 1, at 1643-44.

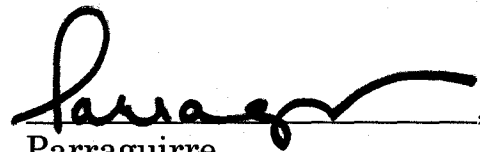
sentencing, or violated appellant's due process rights, is not appropriately raised in a motion to correct an illegal sentence. Finally, we note that appellant's reliance upon Apprendi is misplaced as it would not apply retroactively to appellant's conviction.⁸ Therefore, we affirm the order of the district court.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

⁸See Colwell v. State, 118 Nev. 807, 816-22, 59 P.3d 463, 469-73 (2002) (discussing retroactive application of new rules of criminal procedure and determining that where new rule required fact-finding by a jury the new rule did not suggest the accuracy of the proceedings was diminished where a three-judge panel determined the facts, but rather the new rule emphasized the right to a jury trial); United States v. Sanchez-Cervantes, 282 F.3d 664, 669-71 (9th Cir. 2002) (holding that the new rule of criminal procedure announced in Apprendi does not apply retroactively).

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Honorable Jackie Glass, District Judge
Donald Lee Allen
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk