

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIO HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47585

FILED

OCT 23 2006

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 modify an illegal sentence and motion for a new trial. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On July 23, 1984, the district court convicted appellant, pursuant to a jury trial, of one count each of first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms of life without the possibility of parole in the Nevada State Prison for first-degree kidnapping with the use of a deadly weapon and first-degree murder with the use of a deadly weapon, plus two consecutive terms of fifteen years for robbery with the use of a deadly weapon. This court dismissed appellant's direct appeal.¹ The remittitur issued on January 13, 1987.

¹Castellon v. State, Docket No. 16103 (Order Dismissing Appeal, December 23, 1986) (appellant appealed with his co-defendant Hector Castellon).

On April 18, 2006, appellant filed a proper person motion to modify an illegal sentence and motion for new trial in the district court. The State opposed the motions. On June 6, 2006, the district court denied appellant's motions. This appeal followed.

In his motions, appellant claimed (1) insufficient evidence supported the conviction because no scientific or testimonial evidence linked him to the crimes, (2) inconsistent statements made by key witnesses at trial constituted perjury and the State erred by allowing the perjury to be admitted, (3) the district court erred by admitting Domingo Gonzales' testimony because Gonzales was a co-conspirator, (4) his conviction and sentence are invalid because the State failed to disclose Brady² information, (5) his trial counsel was ineffective for failing to move to strike the inconsistent testimony of Daisey Chism and for failing to recall her to impeach her testimony, and (6) his due process rights were violated because Chism was paid for her testimony.

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.³ "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

²Brady v. Maryland, 373 U.S. 83 (1963).

³Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

of sentence."⁴ 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."⁵ A motion to modify a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied.⁶

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion to modify an illegal sentence. To the extent that appellant's motion can be construed as a motion to correct an illegal sentence, appellant's sentence was facially legal,⁷ and the record does not support an argument that the district court was without jurisdiction in the instant case. To the extent that appellant's motion can be construed as a motion for sentence modification, his claims fell outside the narrow scope of claims permissible in a motion to modify a sentence. Appellant did not argue that the district court relied on any mistaken assumptions about his criminal record when sentencing him.

A motion for a new trial based on newly discovered evidence must be made within two years after the verdict or finding of guilt.⁸ "A

⁴Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

⁵Id.

⁶Id. at 708-09 n.2, 918 P.2d at 325 n.2.

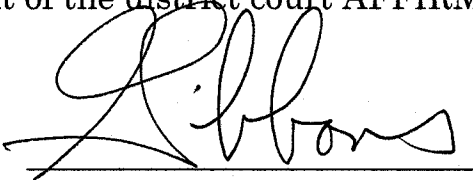
⁷See 1973 Nev. Stat., ch. 798, § 6, at 1804-05 (NRS 200.320); 1967 Nev. Stat., ch. 211, § 59, at 470-71 (NRS 200.380); 1977 Nev. Stat., ch. 598, § 5, at 1627 (NRS 200.030); 1981 Nev. Stat., ch. 780, § 1, at 2050 (NRS 193.165).

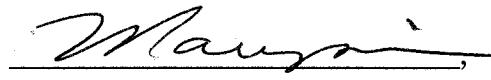
⁸NRS 176.515(3).

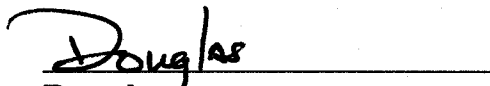
motion for a new trial based on any other grounds must be made within [seven] days after the verdict or finding of guilt."⁹ Because appellant filed his motion for a new trial more than twenty-one years after the entry of the judgment of conviction, the motion was untimely. Accordingly, we conclude the district court did not err in denying the motion for new trial.

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Nancy M. Saitta, District Judge
Julio Herrera
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁹NRS 176.515(4).

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).