

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES H. PORTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48122

**FILED**

APR 06 2007

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

ORDER OF AFFIRMANCE AND DIRECTING CORRECTION OF  
JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a motion to correct or vacate an illegal sentence. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On July 14, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count each of first-degree kidnapping and sexual assault. Pursuant to NRS 207.010(2)<sup>1</sup> the district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole for kidnapping, and a concurrent term of life without the possibility of parole for sexual assault.<sup>2</sup> This court affirmed

---

<sup>1</sup>See 1985 Nev. Stat., ch. 544, § 1, at 1643-44 (NRS 207.010(2)).

<sup>2</sup>On July 22, 1997, the district court amended the judgment of conviction to indicate that appellant was adjudicated as a habitual criminal pursuant to NRS 207.010(2). The original and first amended judgment of conviction indicated that the sentence for kidnapping was a term of life with the possibility of parole after five years. On November 20, 1997, the district court entered a second amended judgment of conviction that corrected a clerical error and set the term for kidnapping at life with the possibility of parole after ten years.

the judgment of conviction and sentence on direct appeal.<sup>3</sup> The remittitur issued on October 20, 1999.

On August 4, 2006, appellant filed a proper person motion to correct or vacate an illegal sentence in the district court. The State opposed the motion. Appellant filed a reply to the opposition and a motion to supplement his motion. The State filed a reply to appellant's motion to supplement. On September 20, 2006, the district court entered orders denying appellant's motions. This appeal followed.<sup>4</sup>

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.<sup>5</sup> "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.'"<sup>6</sup>

In his motion, appellant first claimed that his adjudication as a large habitual criminal was improper and his sentence therefore exceeded the statutory maximum. Specifically, appellant argued that he was ineligible for large habitual criminal treatment because the

---

<sup>3</sup>Porter v. State, Docket No. 30680 (Order Dismissing Appeal, September 24, 1999).

<sup>4</sup>To the extent that appellant appeals from the denial of his motion to supplement, we conclude that the district court did not err in denying this motion.

<sup>5</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

<sup>6</sup>Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

presentence investigation report (PSI) only alleged and the State only demonstrated two, rather than three, prior felony convictions. Appellant further noted that the second amended judgment of conviction indicated that the district court relied only upon two certified felony convictions when adjudicating him as a habitual criminal.

Appellant failed to demonstrate that the district court lacked jurisdiction or his sentence exceeded the statutory maximum. Although the PSI and supplemental PSI only listed two prior felonies for appellant, in the notice seeking habitual criminal status that was attached to the amended information, the State clearly identified three prior felony convictions that the State was relying upon. Additionally, although the judgment of conviction states that the district court "certified two felony convictions as acceptable to support an adjudication of habitual criminality," this statement was an error and is belied by the record. The record on appeal reveals that, because there was initially a question about whether the State had provided certified copies for all three prior convictions, the district court continued the sentencing hearing several times. Eventually, the State presented and filed, and the district court considered, three prior judgments for felony convictions for appellant that corresponded to the prior convictions alleged in the notice of intent to seek habitual criminal status. Further, the judgment of conviction stated that appellant was sentenced as a habitual criminal pursuant to NRS 207.010(2), which addressed sentencing for habitual criminals who had three prior felony convictions. Appellant's adjudication as a large habitual criminal was proper because the State presented certified copies of three prior judgments for felony convictions, appellant did not deny his prior convictions and appellant was on notice that the State would be relying

upon those convictions when seeking habitual criminal adjudication.<sup>7</sup> Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that entry of the amended judgment of conviction and the second amended judgment of conviction was improper. Appellant asserted that entry of the amended judgment of conviction was improper because it was done without notice to him and without any motion pending. Appellant asserted that entry of the second amended judgment of conviction was improper because it increased the sentence for the kidnapping by changing the minimum term from five to ten years, and was amended without notice to him. Appellant alleged that the district court lacked jurisdiction to enter the amended judgments of conviction and his sentence for kidnapping as stated in the second amended judgment of conviction exceeded the statutory maximum.

Appellant failed to demonstrate that the district court was without jurisdiction to enter the amended judgments of conviction or his sentence exceeded the statutory maximum. The first judgment of conviction failed to include a reference to the habitual criminal statute as required.<sup>8</sup> The amended judgment of conviction was entered to correct this clerical error. Although the amended judgment of conviction corrected one clerical error, an additional clerical error remained. Both the judgment of conviction and the amended judgment of conviction improperly stated that the minimum term to be served before parole eligibility was five years. The record on appeal reveals that the district

---

<sup>7</sup>See 1985 Nev. Stat., ch. 544, § 1, at 1643-44 (NRS 207.010(2), (6)).

<sup>8</sup>See 1993 Nev. Stat., ch. 46, § 1, at 78-79 (NRS 176.105(1)(b)(3)).

court adjudicated and sentenced appellant as a habitual criminal for both the kidnapping and sexual assault convictions. After adjudicating appellant as a habitual criminal, the district court sentenced appellant to serve a term of life with the possibility of parole for the kidnapping count. Although the district court did not specifically state the minimum term to be served before parole eligibility, pursuant to the habitual criminal statute, a term of life with the possibility of parole required parole eligibility to begin after a minimum term of ten years had been served.<sup>9</sup> The second amended judgment of conviction corrected the clerical error regarding the minimum term to be served and changed the minimum term from five years to ten years in compliance with the statutory requirements and the sentence imposed by the district court. Because the amended judgments of conviction were entered in order to correct clerical mistakes, we conclude that the amended judgments of conviction were properly entered and no notice prior to the entry of the amended judgments was required.<sup>10</sup> Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his sentence was illegal and entered in violation of Apprendi<sup>11</sup> because the jury did not find the facts supporting his habitual criminal adjudication. Appellant argued that he was entitled to a jury determination regarding his three prior convictions and his adjudication as a habitual criminal. This claim fell outside the scope of claims permissible in a motion to correct an illegal sentence.

---

<sup>9</sup>See 1985 Nev. Stat., ch. 544, § 1, at 1643-44 (NRS 207.010(2), (6)).

<sup>10</sup>See NRS 176.565.

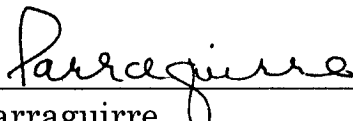
<sup>11</sup>Apprendi v. New Jersey, 530 U.S. 466 (2000).

Accordingly, we conclude the district court did not err in denying this claim.


Finally, we note that a clerical error remains in the judgment of conviction. Specifically, the second amended judgment of conviction states that the court "certified two felony convictions as acceptable to support an adjudication of habitual criminality." This statement is in error and is clearly belied by the record. Because the record reveals that the district court considered three prior felony convictions when adjudicating appellant as a habitual criminal, the district court shall amend the judgment of conviction to correct this error.<sup>12</sup>

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.<sup>13</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

---

<sup>12</sup>See NRS 176.565.

<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Donald M. Mosley, District Judge  
Charles H. Porter  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk