IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN AUGUSTINE MENDILUCE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48919

FILED

MAY 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Benjamin Augustine Mendiluce's motion to modify his sentence. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

The district court convicted Mendiluce, pursuant to a guilty plea, of burglary (count 2), first-degree kidnapping (count 3), robbery with the use of a deadly weapon (count 4), and attempted robbery with the use of a deadly weapon (count 6). The district court sentenced Mendiluce to serve a prison term of 27 to 72 months for count 2, a prison term of 48 to 120 months for count 3, two equal and consecutive prison terms of 48 to 120 months for count 4, and a prison term 12 to 72 months for count 6. The district court imposed the sentences in counts 2, 3, and 4 to run concurrently and the sentence in count 6 to run consecutively to the sentence for count 4 and concurrently with the sentences for counts 2 and 3. No direct appeal was taken.

Thereafter, Mendiluce filed a proper person pleading entitled a "motion for modification of sentence." The district court appointed counsel to represent Mendiluce, conducted a hearing, and denied the

motion. On appeal, Mendiluce claims that the district court erred by imposing the sentence in count 6 to run consecutively to the sentence in count 4 and concurrently with the sentences in counts 2 and 3.

To the extent that Mendiluce's motion is a motion to modify sentence, we conclude that his claim falls outside the narrow scope of permissible claims.[1] However, to the extent that Mendiluce's motion is a motion to correct an illegal sentence, we conclude his claim is properly raised.[2] A motion to correct an illegal sentence may only challenge the facial legality of the sentence, alleging that either the district court was without jurisdiction to impose a sentence or that the sentence imposed was in excess of the statutory maximum.[3] Here, Mendiluce contends that his sentence is facially illegal because the sentence in count 6 was imposed to run both concurrently and consecutively.

The district court has the discretion to impose sentences to run either concurrently or consecutively.[4] It chose to exercise that discretion by imposing the sentence in count 6 to run consecutively to the sentence in count 4 and concurrently with the sentences in counts 2 and 3. We note that the sentence imposed in count 4 was longer than the sentences imposed in counts 2 and 3, and therefore the sentence in count 6

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

[2]Id.

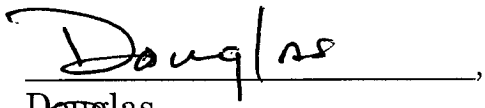
[3]Id.

[4]NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967).

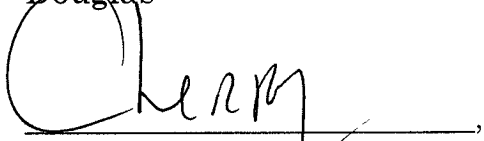
would not begin to run until Mendiluce was paroled on count 4 or the sentence expired.[5] We conclude that the district court did not err in denying Mendiluce's motion, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. J. Michael Memeo, District Judge
Matthew J. Stermitz
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk

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[5]See NRS 213.1213 ("If a prisoner is sentenced pursuant to NRS 176.035 to serve two or more concurrent sentences, whether or not the sentences are identical in length or other characteristics, eligibility for parole from any of the concurrent sentences must be based on the sentence which requires the longest period before the prisoner is eligible for parole.").