

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LEE TOWE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48924

FILED

MAY 31 2007

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 appellant's motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; James A. Brennan, Judge.

On July 5, 2005, the district court convicted appellant, pursuant to a guilty plea, of attempted lewdness with a child under the age of 14. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. Appellant did not file a direct appeal.

On August 31, 2005, appellant filed a motion to modify sentence in which he sought 47 days' credit for time served. On January 19, 2006, the district court amended the judgment to credit appellant 46 days for time served.

On March 23, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Appellant filed a supplemental petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant; however, the district court conducted a limited evidentiary hearing on two issues. On August 15, 2006, the district court denied the

petition. Appellant appealed and this court affirmed the order of the district court.¹

On January 11, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On March 6, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that his sentence was illegal because he was actually innocent of the crime for which he was convicted. He asserted that a motion to vacate sentence was the appropriate remedy under United States v. Barron.²

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 of sentence.'"⁴

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's claim of innocence fell outside the very narrow scope of claims permissible in a

¹Towe v. State, Docket No. 47791 (Order of Affirmance, March 8, 2007).

²172 F.3d 1153 (9th Cir. 1999).

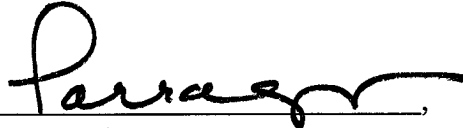
³Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

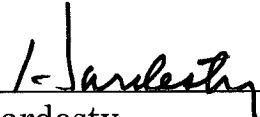
⁴Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).


motion to correct an illegal sentence.⁵ Moreover, appellant's reliance on Barron is misplaced because that case addressed the scope of 18 U.S.C. § 2255, not NRS 176.555.⁶ Appellant failed to demonstrate that his sentence was facially illegal or that the district court was without jurisdiction to sentence him in the instant case.⁷ 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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

⁵A claim that a fundamental miscarriage of justice resulted in the conviction on one who is actually innocent may be appropriately raised in a petition for writ of habeas corpus, and further, may also overcome procedural bars to filing a petition. Mitchell v. State, 122 Nev. ___, ___, 149 P.3d 33, 36 (2006).

⁶See Barron, 172 F.3d at 1157-61.

⁷See NRS 193.330(a)(1); NRS 201.230(2).

⁸See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Chief Judge, Eighth Judicial District Court
Hon. James A. Brennan, Senior Judge
Michael Lee Towe
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk