IN THE SUPREME COURT OF THE STATE OF NEVADA

MAYFIELD ALLEN KIPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49771

FILED

NOV 13 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On May 31, 1996, the district court convicted appellant, pursuant to a jury trial, of one count of burglary and one count of robbery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two consecutive terms of seventy-three to one hundred and eighty-three months in the Nevada State Prison. The sentences were imposed to run consecutive to the sentence imposed in district court case number C101429. This court dismissed appellant's appeal from his judgment of conviction and sentence.[1] The remittitur issued on January 19, 1999.

On October 14, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in district court and a document setting forth good cause. The district court denied the petition,

[1]Kiper v. State, Docket No. 28924 (Order Dismissing Appeal, December 29, 1998).

and this court concluded that the district court properly denied appellant's petition as procedurally time barred.[2]

On May 29, 2007, appellant filed a motion to vacate, modify and correct an illegal sentence. The State opposed the motion. On June 26, 2007, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that the district court erred in adjudicating him a habitual criminal pursuant to NRS 207.010 because the district court judge, rather than a jury, found facts in violation of Blakely v. Washington.[3] Appellant contended that under Nevada case law, a district court must find facts other than prior convictions in order to adjudicate a defendant a habitual criminal and this judicial fact finding violated Blakely.[4] Appellant also contended that he could not be convicted of burglary and robbery because the two crimes merge for purposes of sentencing.

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.[5] A motion to modify a sentence "is limited in

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[2]Kiper v. State, Docket No. 41380 (Order of Affirmance, March 5, 2004).

[3]542 U.S. 296 (2004).

[4]Appellant argued that NRS 207.010 is similar to the Hawaii habitual offender statute which the Ninth Circuit Court of Appeals concluded was unconstitutional in Kaua v. Frank. 436 F.3d 1057, 1062 (2006) cert. denied Frank v. Kaua, 127 S.Ct. 1233 (2007).

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

scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."[6] A motion to modify or correct a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied.[7]

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's sentences were facially legal.[8] Further, there is nothing in the record to indicate that the district court was without jurisdiction to impose the sentences. A claim that the district court allegedly exceeded its authority at sentencing, or violated appellant's due process rights, is not appropriately raised in a motion to correct an illegal sentence. Additionally, the crimes of robbery and burglary do not merge.[9] Finally, appellant's Blakely claim falls outside the narrow scope of claims permitted in a motion for sentence modification. Regardless, this court concluded in O'Neill v. State that NRS 207.010 did not violate Blakely.[10] Therefore we affirm the order of the district court.

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[6]Id.

[7]Id. at 708-09 n.2, 918 P.2d at 325 n.2.

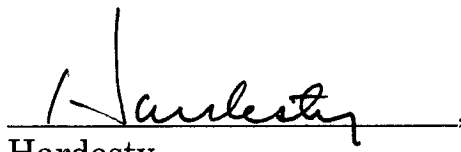
[8]See 1995 Nev. Stat., ch. 444 § 26, at 1358 (NRS 207.010(1)(a)).

[9]See Jones v. State, 95 Nev. 613, 619, 600 P.2d 247, 251 (1979) (holding that burglary and robbery are separate and distinct offenses and prosecution for each crime committed during commission of a burglary, as well as the burglary itself, is specifically authorized by statute). See also NRS 205.070; 1995 Nev. Stat., ch. 443 § 124, at 1215 (NRS 205.060); NRS 200.380.

[10]123 Nev. ___, 153 P.3d 38 (2007).

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.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[12]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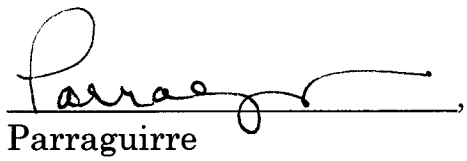
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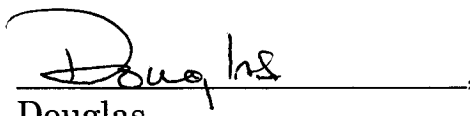
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Douglas

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

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

[12]We have considered appellant's motion for leave to file supplemental pleading and deny the motion.