

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. MANNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49963

FILED

AUG 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

MICHAEL A. MANNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50378

MICHAEL A. MANNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50995

ORDER OF AFFIRMANCE

Docket No. 49963 is a proper person appeal from an order of the district court denying appellant's motion for sentence modification and post-conviction petition for a writ of habeas corpus. Docket No. 50378 is a proper person appeal from an order of the district court denying appellant's petition for a writ of mandamus. Docket No. 50995 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District

Court, Clark County; Michael Villani, Judge. We elect to consolidate these appeals for disposition.¹

On November 7, 2003, the district court convicted appellant, pursuant to a guilty plea, of attempted murder. The district court sentenced appellant to serve a term of 60 to 180 months in the Nevada State Prison.² No direct appeal was taken.

On November 16, 2005, appellant filed a motion to compel specific performance in the district court. On November 22, 2005, appellant filed a proper person petition for a writ of habeas corpus. On January 26, 2006, the district court dismissed appellant's petition. On April 3, 2006, the district court denied the motion, which it construed as a motion for sentence modification. This court affirmed the district court's orders on appeal.³

On July 24, 2006, appellant filed a motion to correct and amend the presentence investigation report (PSI). On August 14, 2006, the district court granted appellant's motion and ordered the Department of Parole and Probation to amend appellant's PSI.

¹NRAP 3(b).

²On September 8, 2005, the district court amended the judgment of conviction to include 100 days credit for time served.

³Manning v. State, Docket Nos. 46575 and 46852 (Order of Affirmance, July 6, 2006).

Docket No. 49963

On May 24, 2007, appellant filed a “motion to vacate judgment of conviction sentence and/or motion for new sentencing hearing with corrected presentence investigation report and/or in the alternative petition for habeas corpus relief pursuant to N.R.S. 34 et seq.” The State opposed the motion. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 17, 2007, the district court denied appellant’s motion. This appeal followed.

In his motion, appellant claimed that the presentence investigation report contained inaccurate information regarding a threatening letter, aliases appellant had allegedly used, and a prior California felony conviction. Appellant also asserted that factual claims regarding the victim’s medical bills were not substantiated. In addition, appellant claimed that these errors call into doubt the remainder of the information provided by the victim in the PSI.

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

⁴Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

⁵Id. at 708-09 n.2, 918 P.2d at 325 n.2.

Based on our review of the record, we conclude that the district court did not err in denying appellant's motion. In affirming the district court's order denying appellant's motion to compel, which the district court construed as a motion for sentence modification and which included those errors mentioned in the instant motion, this court recognized that appellant's "sentence was based upon 'the heinousness of the crime and the injury [appellant] caused to a human being.'" This court further held that appellant failed to demonstrate that the "district court relied upon a mistake about [appellant's] criminal record that worked to his extreme detriment." The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument.⁶ Therefore, the district court did not err in denying the motion.

To the extent that appellant's document may also be construed as a petition for a writ of habeas corpus, appellant filed his motion more than 4 years after entry of the judgment of conviction. Thus, appellant's motion was untimely filed.⁷ Moreover, appellant's motion was an abuse of the writ because he raised new claims not raised and litigated in his prior post-conviction petitions for a writ of habeas corpus.⁸ Appellant's motion was procedurally barred absent a demonstration of good cause and

⁶Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

⁷See NRS 34.726(1).

⁸See NRS 34.810(2).

prejudice.⁹ A defendant seeking habeas corpus relief may be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice,¹⁰ *i.e.*, when a constitutional violation “has probably resulted in the conviction of someone who is actually innocent.”¹¹ This requires the defendant to show that “it is more likely than not that no reasonable juror would have convicted him.”¹² “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”¹³

In an apparent attempt to excuse his procedural defects, appellant claimed that the errors in his PSI rose to the level of a miscarriage of justice. Appellant failed to demonstrate a fundamental miscarriage of justice because he failed to demonstrate that he was actually innocent of the charge for which he was convicted and of all of the charges foregone by the State in the plea bargaining process.¹⁴ Therefore,

⁹See NRS 34.726(1); NRS 34.810(1)(b).

¹⁰Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹¹See Bousley v. United States, 523 U.S. 614, 623 (1998) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)); Mazzan, 112 Nev. at 842, 921 P.2d at 922 (quoting Murray, *id.*).

¹²Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

¹³Bousley, 523 U.S. at 623-24 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

¹⁴See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley, 523 U.S. at 624 (recognizing that actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of

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we conclude that the district court did not err in determining that appellant's motion was procedurally barred.

Docket No. 50378

On July 30, 2007, appellant filed a proper person petition for a writ of mandamus. The State opposed the petition. On October 19, 2007, the district court denied the petition.

In his petition, appellant claimed that the Department of Probation and Parole failed to comply with the district court's order granting appellant's motion to correct and amend his PSI.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.¹⁵ A writ of mandamus may issue only where there is no plain, speedy, and adequate remedy at law.¹⁶ Further, mandamus is an extraordinary remedy, and it is within the discretion of the court whether a petition will be entertained.¹⁷

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more serious charges foregone by the State in the course of plea bargaining).

¹⁵NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

¹⁶NRS 34.170.

¹⁷See Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); see also State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

Our review of the record reveals that the district court did not abuse its discretion in denying appellant's petition. The record reveals that the Department of Parole and Probation amended the PSI to delete the factual assertions of which appellant complained in his motion to correct the PSI. Moreover, appellant had a plain, speedy, and adequate remedy at law. Claims regarding inaccurate information contained in a PSI may be raised in a motion for sentence modification. Therefore, we affirm the order of the district court.

Docket No. 50995

On October 11, 2007, appellant filed a proper person petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 13, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the Department of Corrections misapplied NRS 209.4465 and the recent amendments set forth in Assembly Bill 510 in crediting time served to his sentence. He asserted that the NDOC only applied the amendments partially to his sentence as a whole.

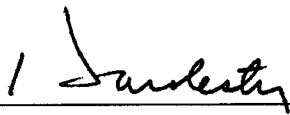
Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition. Appellant failed to provide any specific facts or argument demonstrating that the

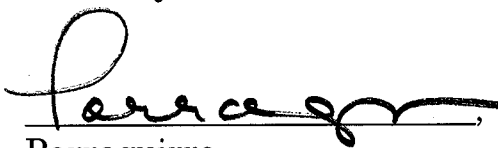
Department incorrectly calculated his credit in the instant case.¹⁸ Therefore, the district court did not err in denying the petition.

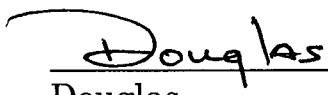
Conclusion

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.¹⁹ Accordingly, we

ORDER the judgments of the district court AFFIRMED.²⁰


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹⁸See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹⁹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰Appellant's notice of withdrawal of appeal regarding his appeal in Docket No. 50995, was not properly filed in the district court. Accordingly, we deny appellant's proper person "motion to withdraw notice to withdraw notice of appeal as filed with the Eighth Judicial District Court for the County of Clark, State of Nevada in case No: C194534," as moot.

cc: Hon. Michael Villani, District Judge
Michael A. Manning
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk