

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN KENNEDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50913

FILED

AUG 12 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a motion for modification or correction of sentence. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On November 10, 2003, the district court convicted appellant Kevin Kennedy, pursuant to a jury verdict, of one count of attempted burglary. Pursuant to NRS 207.010(1)(a), the district court adjudicated appellant a small habitual criminal and sentenced appellant to serve a term of five to twenty years in the Nevada State Prison. This court affirmed appellant's judgment of conviction and sentence on appeal.¹ The remittitur issued on January 17, 2006.

On January 19, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Kennedy v State, Docket No. 42471 (Order of Affirmance, December 20, 2005).

State opposed 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 May 4, 2006, the district court denied appellant's petition. On appeal, this court affirmed the district court's denial of appellant's petition.²

On January 11, 2006, appellant filed a motion to modify and correct sentence in the district court. On November 7, 2006, the district court denied appellant's motion. On appeal, this court affirmed the district court's denial of appellant's motion.³

On May 18, 2007, appellant filed a motion for modification or correction of sentence. On January 3, 2008, the district court denied appellant's motion. This appeal followed.

In his motion, appellant claimed that the district court incorrectly sentenced him as a habitual criminal because the State did not present evidence concerning his criminal history in accordance with the Federal Rules of Criminal Procedure, which is a violation of his right to Due Process under the U.S. Constitution. In particular, appellant claimed the State violated the Federal Rules when demonstrating his prior conviction for petit larceny because the State failed to produce the following: a written statement of the offense, probable cause that an

²Kennedy v. Warden, Docket No. 47368 (Order of Affirmance, November 28, 2006).

³Kennedy v. State, Docket No. 48550 (Order of Affirmance, April 6, 2007).

offense had been committed, and an indictment or information. Appellant further claimed this conviction involved a single act but three separate charges were erroneously set forth. Appellant claimed that the State's failure to present his criminal history in accordance with the Federal Rules should have invalidated the use of his prior conviction for petit larceny, thus he should not have been adjudicated a habitual criminal.

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 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 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.'"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

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

⁵Id.

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

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

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant failed to demonstrate that his sentence was based upon any material mistakes about his criminal record that worked to his extreme detriment. Further, appellant challenged the criminal habitual enhancement on direct appeal, in his habeas petition, and again in his previous motion to modify and correct sentence, and this court rejected all of those challenges. The doctrine of law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument.⁸ Moreover, even if appellant's claim was not barred by the doctrine of the law of the case, his claim did not implicate a mistake about appellant's criminal record. Finally, even assuming that appellant's claim was permissible, the record reveals that the State presented sufficient certified copies of the prior judgments of conviction to demonstrate appellant's eligibility for adjudication as a habitual criminal.

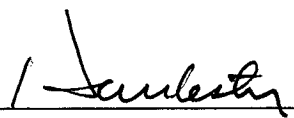
Additionally, appellant's claim concerning evidence of his criminal history fell outside of the scope of claims permissible in a motion to correct an illegal sentence. Appellant's sentence was facially legal, and appellant failed to demonstrate that the district court was not a competent court of jurisdiction.⁹ Therefore, the district court did not err in denying appellant's motion.

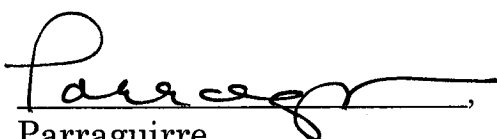
⁸See Hall v State, 91 Nev. 314, 316 535 P.2d 797, 799 (1975).

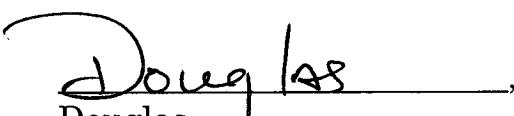
⁹See NRS 207.010(1)(a).

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Steve L. Dobrescu, District Judge
Kevin Kennedy
Attorney General Catherine Cortez Masto/Carson City
White Pine County District Attorney
White Pine County Clerk

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.