

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ANGELO DRAKE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51286

**FILED**

NOV 06 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 appellant's motion to vacate an illegal sentence. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On April 13, 1999, appellant was convicted, pursuant to guilty pleas entered in three separate cases, of two counts of grand larceny and one count of embezzlement. Appellant was sentenced to serve two terms of 48 to 120 months in the Nevada State Prison for the larceny counts. For the embezzlement count, the district court adjudicated appellant a habitual criminal and sentenced him to a term of life with parole eligibility after ten years in the Nevada State Prison. This court affirmed the judgments of conviction on direct appeal.<sup>1</sup> The remittitur issued on March 27, 2000.

On August 9, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The petition was dismissed

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<sup>1</sup>Drake v. State, Docket Nos. 34146, 34147, and 34148 (Order Dismissing Appeals, February 25, 2000).

by stipulation and a new petition was filed by appointed counsel on July 26, 2000. The State opposed the petition. Following an evidentiary hearing the district court denied the petition. This court affirmed the decision on appeal.<sup>2</sup>

On August 16, 2006, appellant filed a proper person “motion to vacate an illegal sentence (NRS 176.555), or in the alternative, motion to withdraw guilty plea to correct a manifest injustice (post-sentencing phase), pursuant to NRS 176.165.” A supplement to the motion was filed on August 31, 2006. The State opposed the motion. On March 6, 2008, the district court denied appellant’s motion. This appeal followed.

In his motion, appellant claimed that his sentence was illegal because the charging document did not specify under which subsection of the habitual criminal statute he was being charged. He also contended that he should be permitted to withdraw his guilty plea agreement because (1) it followed an illegally supplemented grand jury indictment and defects in the charging process, (2) it was not made knowingly and intelligently, (3) his plea canvass was deficient because he was never informed of his right to have a jury determine his habitual criminal status, pursuant to Apprendi v. New Jersey,<sup>3</sup> (4) he received ineffective assistance of counsel, and (5) there were defects in the process of his habitual criminal adjudication. Finally, appellant claimed that his constitutional rights were violated because the district court adjudicated him a habitual

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<sup>2</sup>Drake v. State, Docket Nos. 38742, 38743, and 38744 (Order of Affirmance, August 28, 2002).

<sup>3</sup>530 U.S. 466 (2000).

criminal based on a mistaken assumption regarding the number and validity of appellant's prior felony convictions.

Motion to "vacate" illegal sentence

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.<sup>4</sup> "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.'"<sup>5</sup>

Our review of the record on appeal reveals that appellant's claims related to proceedings in the district court prior to the imposition of his sentence, and were thus outside the scope of a motion to correct an illegal sentence. Appellant failed to demonstrate that the district court lacked jurisdiction or that his sentence was in excess of the statutory maximum.<sup>6</sup> Thus, the district court did not err in denying appellant's motion.

To the extent that appellant's claims constitute a motion to modify a sentence, we conclude that the district court did not err in denying them. Appellant failed to demonstrate that his sentence was the result of a mistaken assumption about his criminal record which worked

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

<sup>5</sup>Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

<sup>6</sup>NRS 207.010(1)(b).

to his extreme detriment.<sup>7</sup> Appellant's claim that his sentence was the result of a misapprehension about the number of his prior felony convictions was belied by the record.<sup>8</sup>

Motion to withdraw guilty plea

With regard to appellant's alternative motion to withdraw his guilty plea, this court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches.<sup>9</sup> Application of the doctrine requires consideration of various factors, including: "(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State."<sup>10</sup> Failure to identify all grounds for relief in a prior proceeding seeking relief from a judgment of conviction should weigh against consideration of a successive motion.<sup>11</sup>

Based upon our review of the record on appeal, we conclude that appellant's motion is subject to the equitable doctrine of laches. Appellant filed his motion more than six years after his direct appeal was resolved. Appellant failed to provide any explanation for the delay.

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<sup>7</sup>See Edwards, 112 Nev. at 708, 918 P.2d at 324.

<sup>8</sup>Moreover, even if we exclude all of the felony convictions that appellant complains were inappropriately considered, there would still be more than the three felony convictions required for a habitual criminal adjudication. See NRS 207.010(1)(b).

<sup>9</sup>Hart v. State, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000).

<sup>10</sup>Id. at 563-64, 1 P.3d at 972.

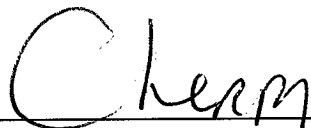
<sup>11</sup>Id. at 564, 1 P.3d at 972.

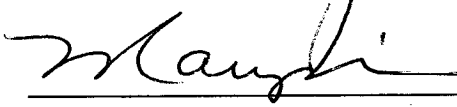
Appellant previously pursued a direct appeal and a post-conviction petition for a writ of habeas corpus. Appellant failed to indicate why he was not able to present his claims prior to the filing of the instant motion. Finally, it appears that the State would suffer prejudice if it were forced to proceed to trial after such an extensive delay. Accordingly, we conclude that the doctrine of laches precludes consideration of appellant's motion on the merits.

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.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>13</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Saitta

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<sup>12</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>13</sup>In light of our decision, appellant's motion for leave to file proper person appellate briefs, or in the alternative appoint counsel, is hereby denied.

cc: Hon. Janet J. Berry, District Judge  
Michael Angelo Drake  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk