

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR D. HOLMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52003

**FILED**

NOV 07 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On May 1, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, and one count of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve three concurrent terms of life in the Nevada State Prison with the possibility of parole. This court affirmed the judgment of conviction on direct appeal.<sup>1</sup> The remittitur issued on February 3, 2004. The district court entered multiple amended judgments of conviction to correct the clerical error in the judgment of conviction. Appellant unsuccessfully sought post-

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<sup>1</sup>Holmes v. State, Docket No. 41484 (Order Affirming but Remanding for Entry of a Corrected Judgment of Conviction, January 9, 2004).

conviction relief from his conviction by way of a post-conviction petition for a writ of habeas corpus.<sup>2</sup>

On May 20, 2008, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On July 28, 2008, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that: (1) the State failed to file notice of habitual criminality prior to sentencing; (2) the amended judgments incorrectly stated that the habitual criminal adjudication was pursuant to a jury verdict and guilty plea when in fact the habitual criminal decision was presented to and made by the district court; (3) his convictions for robbery with the use of a deadly weapon and burglary while in possession of a firearm violated double jeopardy; (4) the district court did not have jurisdiction to adjudicate him a habitual criminal because there was only one valid prior judgment of conviction, the remaining four convictions involved drug offenses, non-violent property crimes, and were not felonies; (5) the district court did not disclose it weighed the factors in habitual criminal adjudication and the issue of habitual criminality should have been presented to a jury; (6) appellant could not have his sentence enhanced for burglary while in a possession of a firearm and use of a deadly weapon pursuant to NRS 193.165; (7) insufficient evidence was presented to sustain the burglary conviction; (8) the charging information failed to set forth a plain and concise statement of the offenses; (9) the district court erroneously allowed irrelevant

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<sup>2</sup>Holmes v. State, Docket No. 50379 (Order of Affirmance, April 10, 2008).

evidence of the gun to be presented; (10) the weapons enhancements should have been set forth in separate charges and not charged with the primary offenses; (11) insufficient evidence was presented to sustain a conviction of conspiracy; (13) his rights were violated when the judgment of conviction was amended outside his presence; and (14) cumulative error based on the foregoing claims.

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>3</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>4</sup>

Our review of the record on appeal reveals that the district court did not err in denying appellant’s motion. Appellant’s claims challenging the charging documents, the sufficiency of the evidence, the presentation of evidence, the amendments to the judgments of convictions to correct clerical errors, and the district court’s determination regarding habitual criminality fell outside the narrow 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

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

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

competent court of jurisdiction in the instant case.<sup>5</sup> Notably, the notice of intent to seek habitual criminality was filed on July 30, 2002, well before the sentencing hearing. Further, the record on appeal contains copies of five prior felony judgments of conviction—a sufficient number of large habitual criminal adjudication—and NRS 207.010 makes no specific allowance for stale or trivial prior felony convictions.<sup>6</sup> Convictions for robbery with the use of a deadly weapon and burglary while in possession of a firearm do not violate double jeopardy.<sup>7</sup> The issue of habitual criminality was not required to be presented to a jury.<sup>8</sup> Therefore, we affirm the order of the district court denying the motion.

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<sup>5</sup>See NRS 207.010(1)(b).

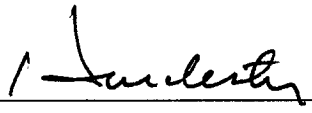
<sup>6</sup>See Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996).

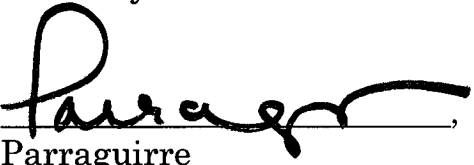
<sup>7</sup>See McIntosh v. State, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997) (recognizing that this court follows the test articulated by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932), for determining whether two separate offenses exist for double jeopardy purposes—a defendant may not be convicted of two offenses premised on the same facts unless each offense requires proof of a fact which the other does not); see also NRS 205.060 (defining burglary as the entry into a building, vehicle, or other enumerated location with the intent to commit grand or petit larceny, assault or battery on any person or any felony) compare to NRS 200.380 (defining robbery as unlawful taking of property of another by force or threat of force or fear). The fact that the same deadly weapon was involved in both offenses does not render the convictions violative of double jeopardy.

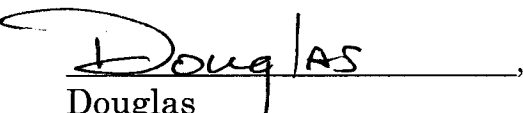
<sup>8</sup>See O'Neill v. State, 123 Nev. 9, 153 P.3d 38 (2007).

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.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>10</sup>

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. James M. Bixler, District Judge  
Victor D. Holmes  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>9</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>10</sup>We 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.