

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. WILLIAMS,

No. 34714

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUN 27 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's motion for resentencing.

On April 17, 1992, the district court convicted appellant, pursuant to a jury verdict, of home invasion. The district court adjudicated appellant as a habitual criminal and sentenced him to serve life in prison with the possibility of parole after 10 years. Appellant pursued a direct appeal, which this court dismissed after concluding that the contentions raised by appellant lacked merit.¹ The remittitur issued on April 13, 1993.

On October 7, 1993, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 November 9, 1993, the district court dismissed the petition. Appellant

¹Williams v. State, Docket No. 23468 (Order Dismissing Appeal, March 25, 1993).

pursued an appeal, which this court dismissed after concluding that the allegations raised in the petition lacked merit.²

On October 2, 1997, appellant filed a proper person motion to correct an illegal sentence. The State opposed the motion. On November 7, 1997, the district court denied the motion.

On September 10, 1998, appellant, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus. The State opposed the petition as unverified and procedurally barred. In a minute order entered on November 12, 1998, the district court denied the petition "without prejudice to [appellant's counsel] to file in a more procedurally correct way."

On December 22, 1998, appellant, with the assistance of counsel, filed a motion for resentencing. The State opposed the motion. On August 26, 1999, the district court denied the motion. This appeal followed.

In his motion and a supplement thereto, appellant challenged the habitual criminal adjudication on four grounds. Specifically, appellant alleged that: (1) the district court erred in using his 1983 conviction for attempted burglary because he had been honorably discharged from probation, which resulted in the withdrawal of his guilty plea and dismissal of the information in that case; (2) the district court failed to exercise its discretion in adjudicating appellant as a habitual criminal, and appellate counsel was ineffective for failing to raise this issue on direct appeal; (3) the district

²Williams v. State, Docket No. 25261 (Order Dismissing Appeal, December 24, 1997).

court erred in failing to require the State to demonstrate that appellant was fully advised of the consequences of his 1983 conviction; and (4) the district court deprived appellant of his right to a hearing to challenge the validity of the prior convictions.

Other than a direct appeal from a judgment of conviction, there are limited remedies available to a defendant who seeks to challenge a judgment of conviction. The legislature has determined that the primary means for challenging a judgment of conviction is the post-conviction petition for a writ of habeas corpus. NRS 34.724(2) provides, in relevant part, that the post-conviction petition for a writ of habeas corpus:

(a) Is not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court or the remedy of direct review of the sentence or conviction.

(b) Comprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.

Thus, the post-conviction petition for a writ of habeas corpus subsumes any remedies previously available to challenge the validity of a conviction or sentence except review on direct appeal and remedies that are "incident to the proceedings in the trial court." We have explained that there are four motions that are incident to the trial court proceedings: a motion to modify a sentence based on certain limited grounds, a motion to correct a facially illegal sentence, a post-conviction motion to withdraw a guilty plea pursuant to NRS

176.165, and a motion for a new trial pursuant to NRS 176.515.³

Here, appellant's motion for resentencing is not one of the remedies that are incident to the trial court proceedings. Accordingly, appellant was required to raise his claims in a post-conviction petition for a writ of habeas corpus.⁴

Nonetheless, it appears that one of appellant's claims could be properly raised in a motion to modify a sentence. In Edwards v. State,⁵ we explained that such motions are "limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment." Arguably, appellant's claim that the district court was not properly informed that his 1983 conviction had been withdrawn following his dishonorable discharge falls within the scope of a motion to modify a sentence. Accordingly, we will treat appellant's motion for resentencing as a motion to modify a sentence for purposes of that claim.

Appellant argued that his 1983 conviction could not be used for habitual criminal enhancement because his

³Hart v. State, 116 Nev. ___, ___ & n.4, 1 P.3d 969, 971-72 & n.4 (2000).

⁴Appellant filed such a petition 1998, which raised the same issues that were raised in his motion for resentencing. That petition was procedurally barred because (1) it was filed more than one year after the remittitur issued on direct appeal, NRS 34.726(1); (2) it raised claims that could have been presented to the trial court or raised on direct appeal or in the prior petition for a writ of habeas corpus, NRS 34.810(1)(b); and (3) it was successive, NRS 34.810(2).

⁵112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

honorable discharge from probation effectively withdrew his guilty plea and dismissed the charges against him, thus mandating that his conviction be expunged. We disagree.

At the time of appellant's 1983 conviction, NRS 176.225(1) provided that a defendant who had fulfilled the terms and conditions of his probation could be allowed to withdraw his guilty plea.⁶ The statute further provided that the district court must then "dismiss the indictment or information" and that the defendant is "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."⁷ However, NRS 176.225(3) provided, in relevant part, that "in any subsequent prosecution of the defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the indictment or information had not been dismissed."⁸ We conclude that the latter provision permits the use of prior convictions for penalty enhancement.⁹ Accordingly, we conclude that appellant's contention lacks merit.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not

⁶1967 Nev. Stat., ch. 523, § 251, at 1436.

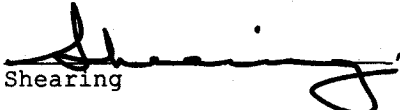
⁷Id.

⁸Id.

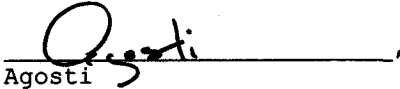
⁹See Hand v. State, 107 Nev. 577, 816 P.2d 468 (1991) (holding that prior conviction wherein defendant had been honorably discharged could be used as basis of subsequent prosecution for ex-felon in possession of a firearm); see also 83-13 Op. Att'y Gen. 46, 49 (1983) (opining that former NRS 176.225(3) permits use of conviction for enhancement purposes).

entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

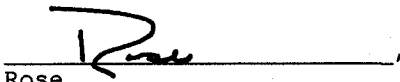
ORDER the judgment of the district court AFFIRMED.



Shearing J.



Agosti J.



Rose J.

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
Michael A. Williams
Clark County Clerk

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