

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN AUGUSTINE
MENDILUCE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52216

FILED

JAN 09 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Benjamin Augustine Mendiluce's motion for modification of sentence. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

On July 19, 2001, the district court convicted Mendiluce, pursuant to a guilty plea, of one count each of burglary, first-degree kidnapping, robbery with the use of a deadly weapon, and attempted robbery with the use of a deadly weapon. The district court sentenced Mendiluce to serve a prison term of 27 to 72 months for burglary, a prison term of 48 to 120 months for kidnapping, two equal and consecutive prison terms of 48 to 120 months for robbery with the use of a deadly weapon, and two equal and consecutive prison terms of 12 to 72 months for attempted robbery with the use of a deadly weapon. Mendiluce did not file a direct appeal; however, he did file a motion for modification of sentence. The district court denied the motion, and we affirmed the district court's decision on appeal. Mendiluce v. State, Docket No. 48919 (Order of Affirmance, May 11, 2007).

On September 6, 2007, Mendiluce filed a proper person motion for modification of sentence in the district court. The State opposed the motion and Mendiluce filed a reply. The district court appointed counsel to represent Mendiluce and conducted a hearing on the motion, and subsequently denied the motion. This appeal followed.

Mendiluce contends that the district court erred by denying his motion for modification of sentence. Mendiluce specifically claims that the 2007 ameliorative amendments to NRS 193.165 (the deadly weapons enhancement statute) apply retroactively and that the district court erred by not applying them to his sentences for robbery with the use of a deadly weapon and attempted robbery with the use of a deadly weapon.¹

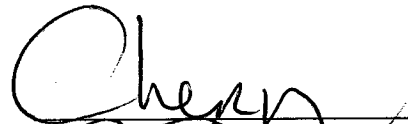
“[A] motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant’s criminal record which work to the defendant’s extreme detriment.” Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). A motion to correct an illegal sentence may only challenge the facial legality of the sentence, alleging that either the district court was without jurisdiction to impose a sentence or that the sentence imposed was in excess of the statutory maximum. Id. Any other issues concerning the validity of a conviction or a sentence must be raised in a petition for a writ of habeas corpus. Id.

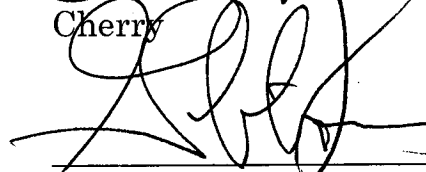
Mendiluce has not claimed that the district court relied upon mistaken assumptions about his criminal record, acted without jurisdiction, or imposed a sentence that exceeds the statutory maximums.

¹In State v. Dist. Ct. (Pullin), 124 Nev. ___, 188 P.3d 1079 (2008), we held that the 2007 ameliorative amendments to NRS 193.165 are not retroactive.

Accordingly, Mendiluce has not demonstrated that the district court erred by denying his motion, and we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Saitta

cc: Hon. J. Michael Memeo, District Judge
Lockie & Macfarlan, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk