

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
DEWAN BLACKBURN,  
Respondent.

No. 53153

**FILED**

**JUL 23 2009**

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting post-conviction relief. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Respondent Dewan Blackburn was convicted, pursuant to a jury verdict, of two counts of burglary while in possession of a firearm; four counts of first-degree kidnapping with the use of a deadly weapon; one count of first-degree kidnapping with the use of a deadly weapon, victim 60 years of age or older; four counts of robbery with the use of a deadly weapon; one count of robbery with the use of a deadly weapon, victim 60 years of age or older; and three counts of possession of stolen property. The district court sentenced Blackburn to serve multiple concurrent and consecutive prison terms totaling 10 to 30 years. We affirmed the judgment of conviction and sentence on direct appeal. Blackburn v. State, Docket No. 44831 (Order of Affirmance, January 19, 2006). The remittitur issued on February 14, 2006.

Blackburn filed a timely proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition and Blackburn filed a reply to the opposition. The district court appointed counsel to

represent Blackburn, and counsel filed a supplement to the petition and a motion for a new trial. The State filed an opposition to the supplement and the motion, and Blackburn filed a reply. After hearing arguments from counsel, the district court denied the petition, supplement, and motion. We affirmed the district court's order on appeal. Blackburn v. State, Docket No. 49944 (Order of Affirmance, March 28, 2008).

Blackburn subsequently filed in the district court a "Motion to Place on Calendar to Correct Illegal Sentence." In the motion, Blackburn argued that, because he and his codefendant were tried together and this court reversed his codefendant's convictions for kidnapping after finding that the jury was not properly instructed on kidnapping, his convictions for kidnapping were improper and the sentences for those convictions were illegally imposed. The State opposed the motion, arguing that several of the issues raised fell beyond the scope of issues that may be raised in a motion to correct an illegal sentence and the sentences imposed were not illegal. The State further argued that Blackburn's failure to receive the same relief as his codefendant resulted from Blackburn's failure to challenge the jury instructions in a prior proceeding and did not constitute an illegal sentence.

The district court heard arguments on the motion from counsel. Blackburn's counsel argued that Blackburn's convictions should be reversed because he received the same kidnapping instructions as his codefendant and stated that she was not sure how to present Blackburn's claim so she raised the claim in a motion to correct an illegal sentence. The State argued that the claim was not properly raised in a motion to correct an illegal sentence, the claim should have been raised in a post-conviction petition for a writ of habeas corpus, and because Blackburn had

already filed a post-conviction petition for a writ of habeas corpus he would need to overcome procedural bars if he filed another post-conviction petition. Blackburn's counsel responded that relief was necessary to correct a miscarriage of justice. The district court treated the motion as a post-conviction petition for a writ of habeas corpus, found that good cause existed to raise the claim and relief was necessary to prevent a manifest injustice, and reversed the kidnapping convictions. This appeal followed.

The State claims that the district court erred by granting relief because the sentences imposed were facially legal and by treating the motion to correct an illegal sentence as a post-conviction petition for a writ of habeas corpus. The State argues that any post-conviction petition for a writ of habeas corpus would have been procedurally barred and it was not given the opportunity to brief the issue as a post-conviction claim.

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. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "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.'" Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

In Edwards, we observed that defendants were using documents titled "motion to correct illegal sentence" to challenge the validity of their convictions in an attempt to circumvent the procedural bars that govern the filing of post-conviction petitions for habeas relief and we directed district courts to summarily deny such a motion if it raised issues outside the narrow scope of permitted issues. Id. at 708 n.2, 918

P.2d at 325 n.2. Here, the issue raised in the motion to correct an illegal sentence fell outside the narrow scope of issues permitted in such a motion. Therefore, the district court should have summarily denied the motion.

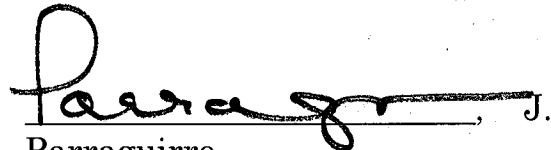
To the extent the district court attempted to avoid the problems identified in Edwards by addressing the procedural bars at the hearing, we conclude that the State was not given an adequate opportunity to respond. The motion to correct an illegal sentence did not substantially comply with the form provided in NRS 34.735 and did not address the procedural bars Blackburn would have to overcome before the district court could consider the merits of any of his claims.<sup>1</sup> The State did not have prior notice that the motion was going to be treated as a petition for a writ of habeas corpus and therefore was not given an adequate opportunity to fully develop its argument with regard to the procedural bars, respond to Blackburn's claim regarding a miscarriage of justice, or respond to the merits of the issues raised by Blackburn. If the district court wished to treat the motion to correct an illegal sentence as a post-conviction petition for a writ of habeas corpus, the district court should have ordered Blackburn to supplement the motion with a post-conviction petition that substantially complied with the form provided in NRS 34.735 and provided the State an opportunity to file a written response to the petition. Cf. Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 652

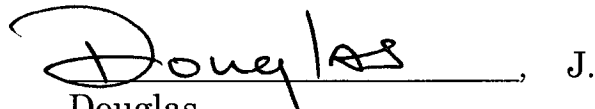
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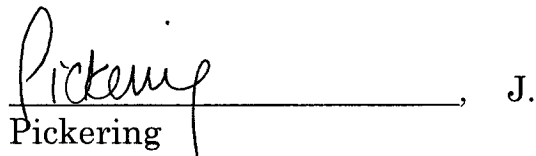
<sup>1</sup>Because Blackburn had previously filed a post-conviction petition for a writ of habeas corpus and more than one year had passed since the issuance of the remittitur in his direct appeal, any post-conviction petition for a writ of habeas corpus filed by Blackburn would have been both successive and untimely. See NRS 34.726(1); NRS 34.810(1)(b)-(3).

(2006) (holding that while a district court has discretion to allow a petitioner to raise new issues at an evidentiary hearing, the district court should only resolve the new issues after allowing the State an opportunity to respond, which may include allowing the parties to file supplemental pleadings after the hearing). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
Parraguirre

  
Douglas

  
Pickering

cc: Eighth Judicial District Court Dept. 8, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Law Offices of Cynthia Dustin, LLC  
Eighth District Court Clerk