IN THE SUPREME COURT OF THE STATE OF NEVADA

WES BARBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53785

FILED

SEP 18 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

On May 6, 2008, the district court convicted appellant, pursuant to a guilty plea, of one count of driving under the influence of intoxicating liquor with a prior felony driving under the influence conviction, a violation of NRS 484.379 and NRS 484.3792(2). The district court sentenced appellant to serve a term of two to six years in the Nevada State Prison. No direct appeal was taken.

On March 9, 2009, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. Appellant filed a reply. On April 16, 2009, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that: (1) his due process rights were violated because the State did not allege facts concerning his prior conviction in the second amended criminal complaint; (2) the district court misunderstood his prior criminal history because the State set forth two prior convictions in the second amended criminal complaint when in actuality the dates provided related to only one prior felony conviction; and (3) his sentence was illegal because he did not have two prior driving under the influence convictions within a seven-year period.

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)).

Our review of the record on appeal reveals that the district court did not err in denying the motion. Appellant's sentence was facially legal and appellant failed to demonstrate that the district court was not a competent court of jurisdiction.[1] NRS 484.3792(2)(a), (d) (providing a

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[1]Appellant's reliance on case law discussing a former version of NRS 484.3792(2) was misplaced as those cases predated the enactment of the

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minimum term of not less than 2 years and a maximum term of not more than 15 years for an offender who commits a driving under the influence offense (in violation of NRS 484.379) when the offender has a previous felony conviction for driving under the influence (in violation of NRS 484.379 or another jurisdiction's statutes)). The State alleged in the second amended criminal complaint and in the information and proved at sentencing that appellant had one prior felony driving under the influence conviction.[2] Appellant's claim regarding the sufficiency of the notice fell outside the scope of claims permissible in a motion to correct an illegal sentence. To the extent that appellant sought modification of his sentence based upon a mistake about his criminal record, appellant failed to demonstrate that his sentence was based on a mistaken assumption about a defendant's criminal record which worked to the defendant's extreme detriment." Edwards, 112 Nev. at 708, 918 P.2d at 324. The district court sentenced appellant to serve a term less than that recommended in the

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. . . continued

current version of NRS 484.3792(2), which permits felony treatment of a driving under the influence offense when the offender has previously been convicted of a felony driving under the influence offense. 2005 Special Session Nev. Stat., ch. 6, § 15, at 102-04.

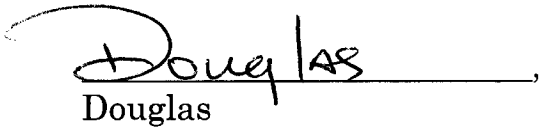
[2]Appellant waived his preliminary examination.

plea agreement. Therefore, we affirm the order of the district court denying the motion.

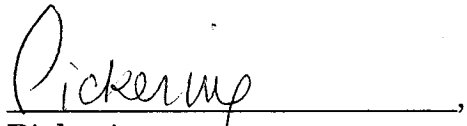
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

[3]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.

cc: Hon. Michael P. Gibbons, District Judge
Wes Barber
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk