

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL JAVIER DIAZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53788

ANGEL JAVIER DIAZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53977

**FILED**

**JAN 07 2010**

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

ORDER OF AFFIRMANCE

Docket No. 53788 is a proper person appeal from an order of the district court denying a “motion to correct sentence.” Docket No. 53977 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus and a “2nd motion to vacate sentence on different grounds.” Eighth Judicial District Court, Clark County; Stefany Miley, Judge. We elect to consolidate these appeals for disposition. See NRAP 3(b).

Docket No. 53788

On April 22, 2009 appellant filed a “motion to correct sentence.” The State opposed the motion. On May 19, 2009, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that the district court should conduct a resentencing due to a change in NRS 193.165. At the time of appellant's offense, NRS 193.165 (deadly weapon enhancement) provided for an equal and consecutive sentence for the deadly weapon enhancement. 1991 Nev. Stat., ch. 403, § 6, at 1059. In 2007, the legislature amended NRS 193.165, providing for a term of 1 to 20 years for the deadly weapon enhancement. 2007 Nev. Stat., ch. 525, § 13, at 3188-89.

Our review of the record on appeal reveals that the district court did not err in denying appellant's "motion to correct sentence." See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (explaining that 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). Appellant's sentence was facially legal. NRS 200.010; NRS 200.030; 1991 Nev. Stat., ch. 403, § 6, at 1059; NRS 200.481. Further, there is nothing in the record indicating that the district court was without jurisdiction to impose a sentence in this case. As a separate and independent ground for affirming the district court's denial of appellant's motion, we note that this court has concluded that the 2007 amendment to NRS 193.165 does not apply retroactively, but rather applies based on the date the offense was committed. State v. Dist. Ct. (Pullin), 124 Nev. \_\_\_, \_\_\_, \_\_\_, 188 P.3d 1079, 1080, 1083-84 (2008). Therefore, the district court did not err in denying this motion.

Docket No. 53977

Appellant filed his petition for a writ of habeas corpus on March 16, 2009, more than eight years after the judgment of conviction was filed on December 14, 2000.<sup>1</sup> Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition constituted an abuse of the writ as his claim was new and different from those claims raised in his previous post-conviction petitions for a writ of habeas corpus.<sup>2</sup> See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

To excuse the procedural defects, appellant claimed that he is disabled and that he can raise a competency issue at any time.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition as procedurally defective. Appellant failed to demonstrate that an

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<sup>1</sup>No direct appeal was taken.

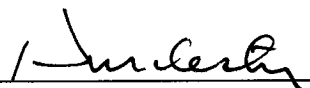
<sup>2</sup>Appellant unsuccessfully sought post-conviction relief by way of two post-conviction petitions for a writ of habeas corpus, a motion to withdraw guilty plea, and a "motion for specific performance of plea agreement." Diaz v. State, Docket No. 42598 (Order of Affirmance, November 15, 2004); Diaz v. State, Docket No. 50826 (Order of Affirmance, April 25, 2008); Diaz v. State, Docket No. 51476 (Order of Affirmance, August 29, 2008); Diaz v. State, Docket No. 52700 (Order of Affirmance, September 25, 2009).

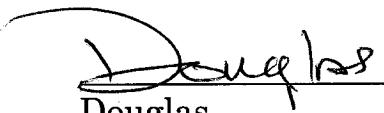
impediment external to the defense excused the procedural defects or prevented him from raising a claim regarding his competency in an earlier petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). That appellant has a disability did not demonstrate good cause. See generally Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition). Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court dismissing the petition as procedurally barred and barred by laches.

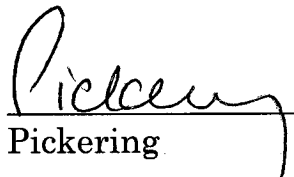
Our review of the record on appeal reveals that the district court correctly construed appellant's "2nd motion to vacate sentence on different grounds" as a motion to correct an illegal sentence and did not err in denying appellant's motion. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (explaining that 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). Appellant's sentence was facially legal. NRS 200.010; NRS 200.030; 1991 Nev. Stat., ch. 403, § 6, at 1059; NRS 200.481. Further, there is nothing in the record indicating that the district court was without jurisdiction to impose a sentence in this case. 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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgments of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Stefany Miley, District Judge  
Angel Javier Diaz  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk