

IN THE SUPREME COURT OF THE STATE OF NEVADA

MILTON DAVID PLUMMER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53963

FILED

APR 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying two motions for modification of sentence.¹ Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Having reviewed the record on appeal, we conclude that substantial evidence supports the decision of the district court to deny relief and that the district court did not err as a matter of law. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). We therefore affirm the denial of the motions for the reasons stated in the attached district court order. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Robert H. Perry, District Judge
Milton David Plummer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
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9 MILTON DAVID PLUMMER,

10 Petitioner,

11 vs.

Case No. CR01-2499B

12 E.K. McDANIEL, Warden,
13 ELY STATE PRISON, STATE OF
14 NEVADA, Et. Al.

Dept. No. 9

15 Respondent,
16

ORDER

17 The Court has reviewed and considered the points and authorities in support of and in
18 opposition to Petitioner's *in propria persona*, Motion for Modification of Sentence filed on February
19 25, 2008 and subsequently filed again on September 4, 2008. The Court is also in receipt of the
20 State's *Opposition* to these two *Motions*, submitted for this Court's consideration.

21 Petitioner contends his sentence should be modified because the sentence was allegedly
22 based upon a material mistake of fact in regards to Petitioner's Pre-Sentence Report and other Parole
23 and Probation documents submitted to the Court for consideration. Petitioner asserts that the
24 sentencing judge relied upon an incorrect Pre-Sentence Report and upon Parole and Probation
25 reports, which contained contradictory information, which resulted in Petitioner receiving such a
26 harsh sentence.

27 A motion to modify a sentence based upon a material mistake of fact may only be granted in
28 extraordinary circumstances. Indeed, "if a sentencing court pronounces sentence within statutory
limits, the court will have jurisdiction to modify, suspend, or otherwise correct a sentence if it is

1 based upon materially untrue assumptions or mistakes which work to the extreme detriment of
2 defendant." *State Dep't of Prisons v. Kinsey*, 109 Nev. 519, 522, 853 P.2d 109, 111 (1993). Also,
3 "a motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about
4 a defendant's criminal record that work to the defendant's extreme detriment" *Kirkpatrick v. State*,
5 122 Nev. 846, 137 P.3d 1193 (2006).

6 After reviewing the record, the Court finds no material mistake of fact occurred at the
7 sentencing proceeding. The Court further finds the sentence imposed was within the statutory
8 guidelines in effect when the crime was committed. Additionally, there was no objection made by
9 Petitioner in regards to the incorrect information provided within the report during sentencing. The
10 record indicates that sentencing Judge Hardesty relied upon the severity of the crimes for which
11 Petitioner was charged at the time. Judge Hardesty stated, ". . . but you are a danger to society. I am
12 utterly astounded at the extent of the crimes committed in *this* case, . . . (emphasis added)" (Sentencing
13 Transcript, August 23, 2003, page 11).

14 Thus, it appears that even if the Pre-Sentence Report contained incorrect facts, it appears the
15 sentencing judge did not materially rely upon the report in his imposition of Petitioner's sentence.
16 Accordingly, the Court finds that the modification of Petitioner's sentence is not warranted.

17 Petitioner additionally filed a subsequent *Motion* in which he requests a Stay in regards to the
18 restitution charges pending until he is released from prison. Petitioner asserts the payment of these
19 charges places an undue burden upon Petitioner while he is incarcerated. However, the Court feels a
20 Stay is not warranted at this time.

21 The Court has reviewed the entire file, the pleadings, points and authorities, and exhibits
22 filed therein. Good cause appearing, IT IS HEREBY ORDERED that Petitioner's *Motion for*
23 *Modification of Sentence* is DENIED.

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25 DATED: This 22 day of May, 2009.

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DISTRICT JUDGE