IN THE SUPREME COURT OF THE STATE OF NEVADA

LEO JOHN PLUNKETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58265

FILED

DEC 07 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Leo John Plunkett's motion to modify his sentence. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

First, Plunkett contends that the district court abused its discretion by denying his motion to modify his sentence from 365 days to 364 days because the sentencing court relied on a mistake of fact contained in his presentence investigation report which indicated that deportation proceedings were not being pursued against him. See Warden v. Peters, 83 Nev. 298, 301, 429 P.2d 549, 551 (1967) (affirming the district court's modification of defendant's sentence based on a mistake of fact relating to his conviction). Plunkett, a legal resident of the United States from Ireland, is currently subject to removal proceedings under the Immigration and Nationality Act because his 1999 conviction for a gross misdemeanor is considered an "aggravated felony" for immigration purposes. 8 U.S.C. § 1101(a)(43). Plunkett contends that if the sentencing court had been aware that he was subject to deportation it would not have sentenced him to a year in prison. We conclude that Plunkett's claim lacks merit. The presentence investigation report explicitly states that "[a]s of this writing, deportation proceedings are not being pursued."

(Emphasis added.) Immigration and Customs Enforcement did not initiate proceedings against Plunkett until eleven years later. Therefore, the report was not mistaken and the district court did not abuse its discretion by denying the motion.[1]

Second, Plunkett argues that Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473 (2010), applies retroactively and his sentence should be vacated because his counsel provided ineffective assistance by not apprising him of the immigration consequences of his guilty plea. We decline to address this claim because it is not properly raised by a motion to modify sentence. See Edwards v. State, 112 Nev. 704, 708 n.2, 918 P.2d 321, 324 n.2 (1996) (explaining that motion to modify sentence must involve "mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment" and motions raising issues outside the narrow scope of claims permitted should be summarily denied). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

[1]To the extent that Plunkett asks us to adopt the reasoning in State v. Lewis, 797 A.2d 1198 (Del. 2002), we decline to do so.

cc: Hon. Douglas W. Herndon, District Judge
Steven J. Karen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk