IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD D. SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61368

FILED

SEP 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying a post-conviction motion to dismiss. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Because no court rule or statute appeared to provide for an appeal from a district court order denying a motion to dismiss, we ordered appellant's counsel to show cause why this appeal should not be dismissed. See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Appellant's counsel responds that the motion to dismiss is appealable because it was based on a double jeopardy claim and "was in effect a motion to correct an illegal sentence;" "[t]his Court authorized the district court to decide the motion based on double jeopardy principles" and "to now deny appellate relief would seem unfair;" and the order can be construed as a final judgment under NRS 177.015(3). We disagree.

First, although this court has determined that a party may appeal from an order denying a motion to correct an illegal sentence, a motion to correct an illegal sentence may only challenge "the facial legality of a sentence." See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant's motion to dismiss challenged the validity of the

12-28959

conviction based on a purported double jeopardy violation and sought to have the conviction entirely dismissed. Therefore, appellant's motion to dismiss was not, and cannot be construed as, a motion to correct an illegal sentence.

Second, contrary to counsel's assertion, this court did not authorize the district court to decide the motion on double jeopardy principles by granting an extension of time in his direct appeal. See Sullivan v. State, Docket No. 60231 (Order, June 15, 2012). We denied appellant's request to remand his direct appeal and granted the alternate request for an extension of time to file the fast track statement because, if the district court was inclined to hear and grant the motion, appellant's direct appeal would have been rendered moot.[1] When denying counsel's request to remand the direct appeal, we stated that appellant could pursue the motion to dismiss in the district court while this appeal was pending and noted that a remand would only be warranted if the district court was inclined to grant relief because the district court could deny the relief without a remand from this court. We never expressed any opinion regarding whether the motion to dismiss was properly raised in the district court or whether the denial of such a motion would be appealable to this court. Even if counsel construed our granting of the alternate request for an extension of time as authorizing the district court to decide the motion, this court's jurisdiction cannot be expanded "based on general

[1]Because a double jeopardy claim is properly raised on direct appeal from the judgment of conviction, we are at a loss to explain why appellant's counsel was determined to delay the briefing of the direct appeal in order to pursue such a motion in the district court, rather than simply raising the issue in the direct appeal.

principles of fundamental fairness." State v. Lewis, 124 Nev. 132, 137, 178 P.3d 146, 149 (2008).

Third, NRS 177.015(3) authorizes a defendant to "appeal from a final judgment or verdict in a criminal case." The order denying appellant's motion to dismiss is not the final judgment or verdict in appellant's criminal case, and therefore the order is not appealable under NRS 177.015(3).

Because no statute or court rule authorizes an appeal from an order denying a post-conviction motion to dismiss, we lack jurisdiction, and we

ORDER this appeal DISMISSED.[2]

Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. Joanna Kishner, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]In light of this order, we deny appellant's motion to consolidate this appeal with his appeal in Docket No. 60231.