

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE TOLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent

No. 35262 **FILED**
FEB 15 2002

JANET M. BLOOM
CLERK OF SUPREME COURT

GEORGE TOLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent

No. 35760 BY *Richard*
CHIEF DEPUTY CLERK

GEORGE TOLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent

No. 36441

GEORGE TOLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent

No. 36560

ORDER OF AFFIRMANCE

Docket No. 35262 is a proper person appeal from an order of the district court denying appellant's motion to modify his sentence. Docket No. 35760 and Docket No. 36441 are proper person appeals from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. Docket No 36560 is a proper person appeal from an order of the district court denying appellant's motion to correct or

modify an illegal sentence. We elect to consolidate these appeals for disposition.¹

On September 18, 1998, the district court convicted appellant, pursuant to an Alford² plea, of possession of a stolen vehicle (count I), possession of stolen property (count II), stop required on signal of police officer (count III), and assault with a deadly weapon (count IV). The district court sentenced appellant to serve the following terms in the Nevada State Prison: for count I, 19 to 48 months; for count II, 38 to 96 months, to be served consecutively to count I; for count III, 24 to 60 months, to be served consecutively to counts I and II; and for count IV, 24 to 60 months, to be served concurrently to count III. Each sentence was suspended and appellant was placed on probation for a term not to exceed 5 years. On August 24, 1999, after a probation revocation hearing, the district court revoked appellant's probation and modified appellant's original judgment from consecutive sentences to concurrent sentences. Appellant did not file an appeal.

Docket No. 35262

On October 22, 1999, appellant filed a proper person motion to modify his sentence. The State opposed the motion. The district court denied the motion on November 15, 1999. This appeal followed.

In his motion, appellant challenged his probation revocation hearing and the revocation of his probation. Specifically, he claimed that (1) he was not allowed to view the probation file prior to the hearing, (2) his probation officer initiated revocation proceedings while appellant was

¹See NRAP 3(b).

²See North Carolina v. Alford, 400 U.S. 25 (1970).

enrolled in a treatment program and had not acquired a substance abuse violation or a new charge or conviction, (3) he was not given any warning that his second probation officer would follow the terms of appellant's probation more stringently than his first probation officer, and (4) he was not given notice that his actions (the use of controlled substances) could lead to revocation of his probation.

A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."³ Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's claims challenging his probation revocation hearing and the revocation of his probation fell outside the scope of a motion to modify a sentence because he failed to demonstrate that the district court relied on untrue assumptions about his criminal record.⁴ Moreover, the district court modified appellant's sentence after it revoked his probation from consecutive terms to concurrent terms. Thus, appellant is not entitled to relief. We affirm the order of the district court.

Docket No. 35760

On November 30, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On December 7, 1999, appellant filed a supplement to his petition. The State filed an opposition. Appellant filed a reply. On February 9, 2000, the district court denied appellant's petition. This appeal followed.

³See Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).

⁴See id.

In appellant's petition, he challenged his probation revocation hearing and the revocation of his probation. Specifically, appellant claimed that: (1) evidence used against him at the revocation hearing, specifically that he failed to notify his probation officer of a change of residence, was not included in the violation report or disclosed to appellant before the hearing and FRCP 32(1)(a)(2)(b) requires disclosure; (2) he should have been notified that his second probation officer would adhere to the terms and conditions of appellant's probation more stringently than his first probation officer; (3) he did not receive notice of the revocation proceedings and did not receive notice as to what conduct may lead to revocation including the use of a controlled substance; and (4) his due process rights were violated when his probation was revoked because revocation was based upon violations that occurred in the past and had not previously resulted in revocation.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. Appellant waived these claims by failing to raise them on appeal from the order revoking his probation.⁵ Moreover, as a separate and independent ground to deny the petition, these claims lack merit. First, when the court placed appellant on probation, he was notified of the terms and conditions of his probation in the "probation agreement and rules" which he signed and dated. Subsequently, appellant was given proper notice of the probation revocation proceedings, including the place and time of the inquiry, the purpose of the inquiry, and what violations of probation had

⁵See generally Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

been alleged.⁶ Appellant's probation was ultimately revoked after a probation revocation hearing, which he attended and spoke on his own behalf while being represented by counsel, because he violated two conditions of his probation, which included the use of a controlled substance and the violation of state laws. Thus, appellant is not entitled to relief on these claims. We affirm the order of the district court.

Docket No. 36441

On May 10, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 11, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that "multiplicious information violated the double jeopardy clause" resulting in an illegal sentence, and he was improperly charged and sentenced for possession of a stolen vehicle and possession of stolen property because his actions support one offense of possession.

Based upon our review of the record on appeal we conclude that the district court did not err in denying appellant's petition. Appellant's claims fell outside the scope of claims that can be raised in a post-conviction petition for a writ of habeas corpus when the judgment of conviction is based upon a guilty plea.⁷ Thus, appellant is not entitled to relief. We affirm the order of the district court.

⁶See NRS 176A.600

⁷See NRS 34.810(1)(a).

Docket No. 36560

On July 21, 2000, appellant filed a proper person “motion to correct and illegal sentence, motion to modify sentence and vacate count II, possession of stolen property, of the information.” The State opposed the motion. On August 7, 2000, the district court denied appellant’s motion.

In his motion, appellant claimed that “multiplicious information” violated double jeopardy which caused an illegal sentence, and he can not be convicted of and sentenced for possession of a stolen vehicle and possession of stolen property because they constitute a single offense of theft by receiving.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant’s motion. A motion to correct an illegal sentence addresses only 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.⁸ “A motion to correct an illegal sentence. . .cannot. . .be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing.”⁹ A motion to modify a sentence “is limited in scope to sentences based on mistaken assumptions about a defendant’s criminal record which work to the defendant’s extreme detriment.”¹⁰ Appellant’s claims fell outside the proper scope of these motions. There is no indication in the record that

⁸See Edwards, 112 Nev. 704, 918 P.2d 321.

⁹See id.

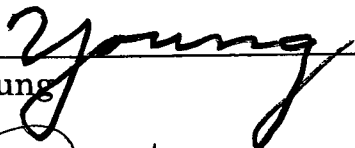
¹⁰See id.

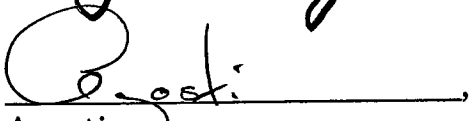
appellant's sentences are illegal or that the district court relied on mistaken assumptions about appellant's criminal record. Thus, appellant is not entitled to relief, and we affirm the order of the district court.


Conclusion

Having reviewed the records 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.¹¹ Accordingly, we

ORDER the judgments of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
George A. Toliver
Clark County Clerk

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).