

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. FRIEDMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63162

FILED

MAR 11 2014

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

ORDER OF AFFIRMANCE

This is an appeal from an order denying appellant's second motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Appellant Kenneth Friedman argues that the district court erred in denying his motion to correct an illegal sentence. For the reasons discussed below, we conclude that the district court did not err in denying the motion.

Friedman was convicted on April 13, 2004, pursuant to a jury verdict, of one count of aggravated stalking, four counts of indecent exposure, and seven counts of open or gross lewdness.¹ Friedman was adjudicated a habitual criminal and sentenced to a term of life without the possibility of parole for aggravated stalking and multiple concurrent twelve-month terms for the remaining offenses. This court affirmed the judgment of conviction and sentence on direct appeal. *Friedman v. State*, Docket No. 43260 (Order of Affirmance, November 16, 2005). Friedman

¹An amended judgment of conviction was entered on May 7, 2004, correcting a clerical error in the original judgment of conviction.

subsequently litigated a post-conviction petition for a writ of habeas corpus. *Friedman v. State*, Docket No. 48390 (Order of Affirmance, March 24, 2008).

On December 7, 2010, Friedman filed a proper person motion to correct an illegal sentence in the district court challenging his adjudication as a habitual criminal. Specifically, Friedman argued that the State had failed to present certified copies of the prior judgments of conviction and the documents presented failed to show that he was represented by counsel at prior sentencing hearings. The district court summarily denied the motion, citing to *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996) and NRS 207.010. On appeal, this court affirmed the order of the district court with a statement that appellant had not demonstrated that his sentence was facially illegal or that the court was without jurisdiction. *Friedman v. State*, Docket No. 57688 (Order of Affirmance, June 8, 2011).

Friedman filed a second motion to correct an illegal sentence in the district court on March 26, 2013. In his motion, Friedman again challenged his habitual criminal adjudication and sentence. Specifically, he argued that (1) the district court failed to conduct a separate hearing prior to adjudicating him a habitual criminal, (2) the State failed to present certified copies of the judgments of conviction, (3) the documents presented did not show that he was represented by counsel at all critical stages, (4) the State did not present a sufficient number of prior convictions, (5) and Nevada law required a term with parole eligibility. Appellant indicated that he was raising his claims as both state and federal constitutional violations. The district court concluded that the

motion was barred by the doctrine of the law of the case and denied the motion.

Friedman argues that this decision was in error as the claims raised in his prior motion were not identical to the claims raised in the 2013 motion and thus the motion was not barred by the law of the case. The State, while recognizing that the law of the case was arguably proper given the similarity of the issues raised in the first and second motions, argues that the district court and this court erred in reaching the merits of the claims raised in the first motion. The State indicates that it is the confusion regarding the first decision that has created a procedural muddle in state court and in federal court. The State argues that the claims raised in the 2013 motion fell outside the scope of claims permissible in a motion to correct an illegal sentence and that this is the proper basis to deny relief.

We agree with the State that the first four claims raised in the 2013 motion fell outside the scope of claims permissible in a motion to correct an illegal sentence. 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. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “A motion to correct an illegal sentence ‘presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.’” *Id.* (quoting *Allen v. United States*, 495 A.2d 1145, 1149 (D.C. 1985)). The first four claims in Friedman’s 2013 motion fell outside the scope of a motion to correct an illegal sentence as they raised alleged

errors that occurred prior to or during the sentencing proceedings.² Thus, the denial of these claims was not in error.

Regarding the law-of-the-case determination, we note that in the proceedings on the first motion the district court did not reach the merits of appellant's claims as the motion was summarily denied. And this court's decision on appeal merely concluded that Friedman had not demonstrated that he had received an illegal sentence or that the court was without jurisdiction. *Friedman v. State*, Docket No. 57688 (Order of Affirmance, June 8, 2011). While arguably imprecise, this language was not intended as a decision on the merits, but was rather a procedural determination that Friedman had not presented claims demonstrating a facially illegal sentence, in other words that the claims were outside the scope of claims permissible. This procedural determination that the claims raised in the first motion fell outside the scope of claims permissible is the law of the case notwithstanding any interpretation given by the federal court to the prior decision of this court. Thus, to the extent that the district court applied the doctrine of the law of the case to the procedural determination that the claims fell outside the scope of claims permitted, the district court did not err.³

²The alleged errors should have been objected to by Friedman at sentencing and raised on direct appeal. The first four claims did not deprive the district court of jurisdiction over Friedman at sentencing, *see* Nev. Const. art. 6, § 6; NRS 171.010, and the sentence was facially legal, *see* NRS 207.010(1)(b)(1), notwithstanding any alleged errors in the procedures used to adjudicate Friedman a habitual criminal.

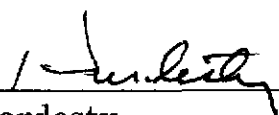
³We note that identical claims are not required to invoke the doctrine of the law of the case. Rather, the doctrine of the law of the case may be invoked when the facts are substantially the same, and the law of the case cannot be avoided by a more detailed and precisely focused


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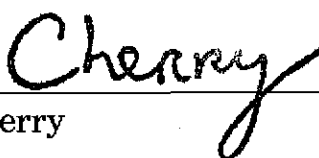
Friedman's final claim that his sentence was illegal because the district court failed to impose a term of parole eligibility, while within the scope of a motion to correct an illegal sentence and not barred by the law of the case, is without merit. The legislature has authorized a sentence of life without the possibility of parole for a defendant adjudicated a large habitual criminal. See NRS 207.010(1)(b)(1). Thus, Friedman fails to demonstrate that his sentence was facially illegal because of the lack of a parole term.

Having reviewed the documents presented to this court, we conclude that the district court did not err in denying the motion, and we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

...continued

argument made upon reflection of the prior proceedings. See *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

⁴We deny Friedman's motion for reconsideration of the order denying his motion to supplement the record on appeal. Any claims relating to the psychological assessments were outside the scope of claims permissible in a motion to correct an illegal sentence.

cc: Hon. Valorie J. Vega, District Judge
Potter Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk