

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERNEST JORD GUARDADO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72158

**FILED**

NOV 14 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Ernest Jord Guardado appeals from district court orders denying his September 23, 2016, motion to correct illegal sentence and his January 23, 2017, postconviction petition for a writ of habeas corpus.<sup>1</sup> Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Guardado filed his petition more than 11 years after issuance of the remittitur on direct appeal on June 28, 2005. *See Guardado v. State*,

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

Guardado's September 2016 pleading also contained a postsentencing motion to withdraw his guilty plea. The district court correctly noted such a claim could only be raised in a postconviction petition for a writ of habeas corpus, *see Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014), and directed Guardado to correct the procedural defects in accord with NRS 34.700, et seq. Guardado did so, filing his postconviction petition for a writ of habeas corpus, which the district court denied in an order filed April 12, 2017.

Docket No. 44334 (Order of Affirmance, June 2, 2005). Guardado's petition was therefore untimely filed. *See* NRS 34.726(1). Guardado's petition was also successive and an abuse of the writ.<sup>2</sup> *See* NRS 34.810(2). Guardado's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice.<sup>3</sup> *See* NRS 34.726(1); NRS 34.810(3).

Guardado claimed he had good cause to overcome the procedural defects of his petition because he only recently became aware of the issues. Guardado had to demonstrate "an impediment external to the defense prevented him . . . from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). As Guardado's claims were based on perceived issues with documents filed well before the remittitur issued in his direct appeal, the only impediment to raising the claims in a timely fashion must have been Guardado's initial lack of legal knowledge. However, such an impediment is not external to the defense and thus cannot constitute cause. Further, Guardado did not allege specific facts to indicate he would suffer actual prejudice. *Cf. Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (bare claims unsupported by specific factual allegations do not warrant an evidentiary

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<sup>2</sup>*See Guardado v. State*, Docket No. 63785 (Order of Affirmance, March 12, 2014); *Guardado v. State*, Docket No. 52639 (Order of Affirmance, February 3, 2010).

<sup>3</sup>The entry of a corrected judgment on October 7, 2015, did not provide good cause because the substance of the claims raised in Guardado's petition did not arise from the changes in the judgment of conviction. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004); *see also infra* note 4.

hearing). We therefore conclude the district court did not err in denying Guardado's petition as procedurally barred.

In his motion to correct illegal sentence, Guardado claimed his sentences for two counts of felony possession of stolen property were illegal because he was actually guilty only of misdemeanor offenses and the district court thus lacked jurisdiction to impose felony sentences. A motion to correct an illegal sentence may address 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. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Guardado's claims did not implicate the jurisdiction of the district court. *See Nev. Const. art. 6, § 6; NRS 171.010; United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[T]he term jurisdiction means . . . the courts’ statutory or constitutional power to adjudicate the case.” (internal quotation marks omitted) (emphasis omitted)).

Further, Guardado's sentences were within the statutory limits. As to count 7, he was convicted of possession of a stolen firearm in violation of NRS 205.275(2)(c), a category B felony subject to a sentencing range of one to ten years.<sup>4</sup> As to count 8, Guardado was convicted of

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<sup>4</sup>Guardado pointed to his presentence investigation report, which referred to count 7 as charging a category C felony. This was clearly a typographical error. As Guardado noted, count 7 did not specify the value of the property, but the value was only necessary if the stolen property were something other than a firearm. *See NRS 205.275(2)*. Count 7 charged Guardado with possession of a stolen firearm. Accordingly, the value was not necessary to determine his sentencing exposure: one to ten years for

possession of stolen property in violation of NRS 205.275(2)(b), a category C felony subject to a sentencing range of one to five years. See NRS 193.130(2)(c). Guardado was sentenced to terms of two to five years for each count, well within the statutory limits. Because Guardado's sentences were facially legal, we conclude the district court did not err in denying these claims.

Guardado also claimed counts 7 and 8 were multiplicitous and thus violated the Double Jeopardy Clause. "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.'" *Edwards*, 112 Nev. at 708, 918 P.2d at 324 (quoting *Allen v. United States*, 495 A.2d 1145, 1149 (D.C. 1985)). We therefore conclude the district court did not err in denying this claim.

To the extent Guardado argued for a modification of his sentence, he was not entitled to relief. Guardado claimed the district court sentenced him based on an untrue assumption of fact that worked to his

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possession of a stolen firearm, pursuant to NRS 205.275(2)(c). This was further supported by Guardado's guilty plea memorandum and plea colloquy, in both of which he acknowledged he could face up to 10 years in prison, a potential sentence which would only apply if he were sentenced for a category B felony pursuant to NRS 205.275(2)(c). See NRS 205.275(2).


Unfortunately this error was carried forward, at Guardado's request, into his amended judgment of conviction. The clerical error did not affect his sentence, and because the category of felony is not a material part of a judgment of conviction, see NRS 176.105, the error had no effect on the validity of the judgment.

extreme detriment. However, "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." *Id.* (emphasis added). Guardado did not allege any errors in his criminal record. Accordingly, his claim was outside the scope permissible for a motion to modify a sentence, *see id.* at 708 n.2, 918 P.2d at 325 n.2, and we conclude the district court did not err in denying this claim. For the foregoing reasons, we

ORDER the judgments of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Lynne K. Simons, District Judge  
Ernest Jord Guardado  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk