

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

No. 37087

Appellant,

vs.

FILED

BRIAN BUTTERFIELD,

FEB 21 2001

Respondent.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. B. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court granting respondent's post-conviction petition for a writ of habeas corpus. Respondent was originally convicted, pursuant to a guilty plea, of one count of embezzlement. The district court sentenced respondent to a prison term of 24 to 72 months, and ordered respondent to pay restitution in the amount of \$51,000.00 and a fine in the amount of \$2,500.00.

Respondent appealed from his judgment of conviction, and that appeal was dismissed by this court. *Butterfield v. State*, Docket No. 33966 (Order Dismissing Appeal, September 24, 1999). Respondent then filed a motion to modify his sentence. The district court denied the motion, finding that respondent's claim was more appropriately raised in a habeas corpus petition. Accordingly, respondent filed a post-conviction petition for a writ of habeas corpus. Following a hearing on respondent's petition, the district court entered a modified judgment. In the modified judgment, the district court reduced the amount of restitution to \$4,056.72, and sentenced respondent to time served.

On appeal, the State contends that the district court erred by granting respondent's petition. Specifically, the State argues that the petition was not pleaded with enough

specificity and that the district court therefore erred by granting a hearing.

We note that the State filed a motion to dismiss the petition, based on this same argument and that the district court denied the motion to dismiss. Because respondent made factual allegations in his petition that were not belied or repelled by the record, we conclude that the district court did not err in denying the motion to dismiss and setting this matter for hearing.¹

The State further argues that the district court erred by entering a modified judgment, because the district court found that respondent's trial counsel was not ineffective for failing to challenge the restitution at sentencing. The district court did, however, find that the sentence was based on a material mistake of fact that worked to respondent's extreme detriment. This court has held that the district court has the authority to correct, at any time, a sentence entered in violation of a defendant's right to due process, e.g., where the sentence is based on a mistake of material fact.² We therefore conclude that the district court did not err by entering the modified judgment.

Finally, the State argues that the district court had no authority to enter an amended judgment prior to issuing a final judgment in the habeas corpus action. As previously noted, under the circumstances present in this case, the district court has the authority to correct a sentence at any

¹See NRS 34.770(1) (judge shall determine necessity of an evidentiary hearing); Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (petitioner not entitled to evidentiary hearing where factual allegations are belied or repelled by the record).

²Passanisi v. State, 108 Nev. 318, 322-23, 831 P.2d 1371, 1373-74 (1992).

time. We therefore conclude that this argument is without merit.

Having considered the State's contentions and concluded that they are without merit, we

ORDER the modified judgment of conviction AFFIRMED.

Young J.
Young

Rose J.
Rose

Becker J.
Becker

cc: Hon. Brent T. Adams, District Judge
Attorney General
Washoe County District Attorney
Thomas E. Vilorio
Washoe County Clerk