

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RAY SWEET,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37121

FILED

DEC 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

MICHAEL RAY SWEET,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37371

ORDER OF AFFIRMANCE

Docket No. 37121 is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Docket No. 37371 is a proper person appeal from an order of the district court denying appellant's post-conviction "motion for modification or correction of sentence (NRS 176.555)" and "request for submission of motion to recuse the Washoe County District Attorney for cause." We elect to consolidate these appeals for disposition.¹

On December 12, 1996, the district court convicted appellant, pursuant to a guilty plea, of drawing and passing a check without sufficient funds with intent to defraud. The district court sentenced

¹See NRAP 3(b).

appellant to serve a term of three years in the Nevada State Prison, and ordered appellant to pay restitution in the amount of \$10,130.70. The sentence was suspended and appellant was placed on probation for a period not to exceed five years with special conditions. On February 1, 2000, the district court revoked appellant's probation and ordered the original sentence be executed. Appellant did not file a direct appeal.

On August 9, 2000, appellant filed a proper person "request for reduction in sentence" in the district court. On August 16, 2000, the district court denied appellant's request, stating that it lacked jurisdiction to modify appellant's sentence. Appellant did not file an appeal.

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On September 27, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 27, 2000, the district court dismissed appellant's petition as being untimely filed. This appeal followed.

Appellant filed his petition more than three years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.³ In his petition, appellant did not attempt to demonstrate good cause for the untimely filing of his petition. Rather, appellant merely made the unsupported assertion that his petition was timely filed. We therefore conclude that the district court properly dismissed appellant's petition as procedurally barred.

²See NRS 34.726(1).

³See NRS 34.726(1); 34.810(3).

Docket No. 37371

On December 21, 2000, appellant filed a proper person "motion for modification or correction of sentence (NRS 176.555)" and "request for submission of motion to recuse the Washoe County District Attorney for cause" in the district court. The State opposed the motion. On January 19, 2001, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the district court erroneously sentenced appellant to a greater prison term because the court incorrectly believed he owed a greater amount of restitution.

Although a motion to correct an illegal sentence is available to challenge a sentence in a criminal case, it is narrow in scope. The district court may grant a motion to correct or modify a sentence only if it appears that the sentencing court had misapprehended a material fact about the defendant's criminal record that worked to his or her extreme detriment or if the defendant's sentence is facially illegal, that is, if the sentencing court imposed a sentence in excess of the statutory maximum or otherwise acted without jurisdiction.⁴ "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.'"⁵

Appellant's sentence was not facially illegal as it was within the statutory limit, and there is nothing to suggest that the sentencing court lacked jurisdiction to sentence him. Further, appellant failed to demonstrate that the sentencing court misapprehended any material facts about his criminal record that worked to his extreme detriment. There is nothing in the record suggesting the district court erroneously sentenced

⁴See Edwards v. State, 112 Nev. 704, 707-08, 918 P.2d 321, 323-24 (1996).

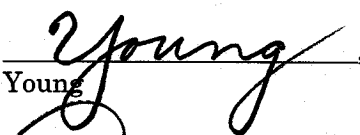
⁵Id. at 708, 918 P.2d at 324 (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

appellant to a greater prison term because the court incorrectly believed he owed a greater amount of restitution. Moreover, appellant failed to demonstrate that the district court improperly calculated the amount of restitution. Therefore, our review of the record on appeal reveals that the district court did not err in denying appellant's motion.

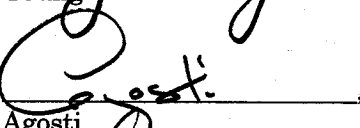
Conclusion

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.⁶ Accordingly, we


ORDER the judgments of the district court AFFIRMED.



Young J.



Agosti J.



Leavitt J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Michael Ray Sweet
Washoe County Clerk

⁶See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).