

IN THE SUPREME COURT OF THE STATE OF NEVADA

ENOCH EARL MCCURDY, JR.,

No. 37258

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 31 2001

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's motion to modify or correct an illegal sentence.

On April 3, 1990, the district court convicted appellant, pursuant to a jury verdict, of one count of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of fifteen years in the Nevada State Prison. This court affirmed the judgment of conviction.¹ The remittitur issued on May 21, 1991.

On May 21, 1992, appellant filed a proper person petition for post-conviction relief in the district court. The State opposed the petition. On July 8, 1992, the district court denied the petition. The district court did not serve notice of entry of the order on appellant, but rather served notice on the public defender's office. On June 12, 1995, the district court entered an amended order denying the petition and reflecting that appellant had represented himself in the post-conviction proceedings. This court dismissed appellant's subsequent appeal.²

On November 28, 2000, appellant filed a proper person motion to modify or correct an illegal sentence in the district court. The State opposed the motion. On December 19, 2000, the district court construed appellant's motion to be a post-conviction petition for a writ of habeas corpus and denied appellant's motion because it was procedurally time

¹McCurdy v. State, 107 Nev. 275, 809 P.2d 1265 (1991).

²McCurdy v. State, Docket No. 27555 (Order Dismissing Appeal, May 14, 1998).

01-18231

barred and raised claims that fell outside the scope of a motion to modify or correct an illegal sentence. This appeal followed.

In his motion, appellant argued that the deadly weapon enhancement was improperly applied in his case because he did not have actual or constructive possession of the gun used during the shooting. Appellant argued that his trial attorney was ineffective for failing to pursue a "two-gun theory." Although appellant acknowledged that his co-defendant had taken a gun from appellant, appellant argued that no witness testified that the gun appellant had in his possession prior to and after the shooting was the same gun used in the shooting. Appellant requested that the deadly weapon enhancement be vacated.

To the extent that appellant's motion was a motion to modify or correct an illegal sentence, we conclude that the district court did not err in denying the motion. 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 A motion to correct an illegal sentence addresses only the facial legality of a sentence: either the district court was without jurisdiction to impose a sentence or that the sentence was imposed in excess of the statutory maximum.⁴ "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."⁵ Appellant's claims fell outside the proper scope of these motions. There is no indication in the record here that the district court relied on mistaken assumptions about appellant's record, or that the sentence imposed is illegal.⁶ Thus, the district court properly concluded appellant's claims fell outside the scope of a motion to modify or correct an illegal sentence.

³Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

⁴Id.

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

⁶In rejecting appellant's claim on direct appeal that there was insufficient evidence to support his conviction of second degree murder, this court stated,

The circumstances of this killing were that McCurdy approached the victim and his friends in order to stir up trouble. McCurdy threatened the

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To the extent that appellant's motion could be construed as a post-conviction petition for a writ of habeas corpus, appellant's motion was untimely and successive.⁷ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁸ Appellant did not attempt to demonstrate good cause to excuse his procedural infirmities. Thus, the district court properly denied appellant's motion on the ground that it was procedurally barred.

Having reviewed the record 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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰



Shearing J.



Rose J.



Becker J.

cc: Hon. Mark W. Gibbons, District Judge
Attorney General
Clark County District Attorney
Enoch Earl McCurdy, Jr.
Clark County Clerk

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group with a gun, and this behavior eventually led to a confrontation involving opposing gang members. During the turmoil, McCurdy handed [the co-defendant] the loaded and cocked gun. Before long, [the co-defendant] joined the fight and eventually shot and killed [the victim] with the gun which McCurdy had given him.

⁷See NRS 34.726(1); NRS 34.810(1)(b)(2); NRS 34.810(2).

⁸See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

¹⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.