


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83274-COA

**FILED**

FEB 09 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

James Howard Hayes, Jr., appeals from an order of the district court denying a motion to modify and/or correct an illegal sentence filed on March 25, 2021. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

In his motion, Hayes first claimed the sentencing court's decision to adjudicate him a small habitual criminal was based on mistaken assumptions about his criminal record. Hayes claimed he lacked the requisite number of prior felony convictions to qualify for habitual criminal treatment, because he had only one prior felony conviction at the time he was adjudicated and not the three the State claimed. "[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." *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

First, Hayes claimed he lacked the requisite number of prior felony convictions because one of the offenses the State relied upon—a 2007 Texas conviction for credit card abuse—was nonviolent and would not be a

felony in Nevada. A prior offense may be used to adjudicate a person as a habitual criminal so long as the offense would amount to a felony “under the laws of the situs of the crime or of this State.” NRS 207.010(1)(a). “NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.” *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Credit card abuse is a felony under Texas law, *see* Tex. Penal Code Ann. § 32.21(d) (West 2005), and it was within the sentencing court’s discretion to consider this prior felony conviction despite it being nonviolent. Hayes thus failed to demonstrate that the sentencing court’s reliance on this conviction amounted to a mistaken assumption about his criminal record. Therefore, we conclude this district court did not err by denying this claim.

Second, Hayes claimed he lacked the requisite number of prior felony convictions because one of the offenses the State relied upon—a 2017 burglary conviction—was entered after the commission of the primary offense. “All prior convictions used to enhance a sentence must have preceded the primary offense.” *Brown v. State*, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). Because Hayes committed the instant offense in 2013, the 2017 burglary conviction could not be used to adjudicate him a habitual criminal.

However, at the time Hayes committed his crimes, anyone who was convicted of a felony and had two prior felony convictions qualified for habitual criminal treatment. *See* 2009 Nev. Stat., ch. 156, § 1, at 567. In addition to the Texas conviction discussed above, the State also provided evidence that Hayes had a 2011 felony conviction for attempted possession

of a credit or debit card without the cardholder's consent. Because Hayes had two other prior felony convictions, he failed to demonstrate that he lacked the requisite number of felony convictions to qualify for habitual criminal treatment. Hayes thus failed to demonstrate any mistaken assumptions about his criminal record worked to his extreme detriment. Therefore, we conclude this district court did not err by denying this claim.

Hayes next claimed his sentence was facially illegal because the district court lacked subject matter jurisdiction. 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*, 112 Nev. at 708, 918 P.2d at 324. Hayes claimed the crime to which he entered his *Alford*<sup>1</sup> plea was dismissed by the justice court after his preliminary hearing. Hayes was bound over to the district court on one count of burglary but resolved the matter by entering an *Alford* plea to one count of attempted grand larceny. Hayes failed to demonstrate the *Alford* plea divested the district court of subject matter jurisdiction. See Nev. Const. art. 6, § 6(1); NRS 4.370(3); NRS 171.010; *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011) ("Subject matter jurisdiction is the court's authority to render a judgment in a particular category of case." (internal quotation marks omitted)). Therefore, we conclude the district court did not err by denying this claim.

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<sup>1</sup>See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Hayes also raised claims challenging the validity of his judgment of conviction and sentence. These claims were outside the scope of claims permissible in a motion to modify or correct an illegal sentence. *See Edwards*, 112 Nev. at 708, 918 P.2d at 324. Therefore, we conclude the district court did not err in denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Monica Trujillo, District Judge  
James Howard Hayes, Jr.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>Hayes raises several new claims on appeal. We decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999)