

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY POSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87119-COA

FILED

MAY 16 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Anthony Posey appeals from district court orders denying a “motion for amended judgment of conviction to include jail time credits,” a “motion to establish factual innocence,” a motion to modify and/or correct an illegal sentence, and a motion for modification of sentence. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Motion for amended judgment of conviction to include jail time credits

The notice of appeal purports to be from a district court decision denying a “motion for amended judgment of conviction to include jail time credits.” The district court has not entered an order denying such a motion, and Posey thus fails to identify an appealable order. Further, no statute or court rule would permit an appeal from an order denying a motion for amended judgment of conviction to include jail time credits. Therefore, we lack jurisdiction to consider this portion of Posey’s appeal, and we order it dismissed. *See* NRAP 3(c)(1)(B); *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990).

Motion to establish factual innocence

Posey’s informal brief on appeal challenges the district court’s denial of his motion to establish factual innocence filed on May 10, 2023. In

his motion, Posey claimed he did not know K.H. was a minor and that he had new evidence to support his claim: (1) the terms of services for several service providers, which purportedly indicate that users must be 18 years or older and/or require users to verify a form of government issued identification; and (2) a Washington law that purportedly helped people defend themselves from sex advertisements that contain minors posing as adults. Posey also claimed that counsel was ineffective for, *inter alia*, failing to investigate and/or present this evidence.

A person who has been convicted of a felony may petition the district court for a hearing to establish their factual innocence. NRS 34.960(1). A petitioner is factually innocent if they did not (1) “[e]ngage in the conduct for which he or she was convicted,” (2) “[e]ngage in conduct constituting a lesser included or inchoate offense of the crime for which he or she was convicted,” (3) “[c]ommit any other crime arising out of or reasonably connected to the facts supporting the . . . information upon which he or she was convicted,” and (4) “[c]ommit the conduct charged by the State under any theory of criminal liability alleged in the . . . information.” NRS 34.920.

The petition must contain supporting affidavits or other credible documents indicating that newly discovered evidence exists and, if credible, would establish a bona fide issue of factual innocence. NRS 34.960(2)(a). The petition must also assert that “[n]either the petitioner nor the petitioner’s counsel knew of the newly discovered evidence at the time of trial or sentencing . . . , and the evidence could not have been discovered by the petitioner or the petitioner’s counsel through the exercise of reasonable diligence.” NRS 34.960(3)(a).

Posey pleaded guilty and was convicted of luring children or mentally ill persons with the use of technology with the intent to engage in sexual conduct, a violation of NRS 201.560, based on the facts set forth in an information.¹ The information alleged that Posey contacted K.H., a child under 16 years of age or a person Posey believed to be under 16 years of age, through a networking website and/or via text messaging with the intent to lure K.H. away from her home to engage in sexual conduct. Even assuming the evidence presented demonstrated Posey did not know K.H. was a minor, it does not implicate Posey's factual innocence because it does not indicate that Posey did not engage in the conduct alleged in the information.

Moreover, the district court found that the evidence presented was not newly discovered and that Posey had conflated a failure to investigate available evidence with the discovery of new evidence. This finding is supported by the record. Although Posey contended that this evidence was not previously available to him, the terms of services and the Washington law were publicly available. And Posey did not contend that his counsel was unaware of this evidence or that counsel could not have discovered this evidence through the exercise of reasonable diligence. Therefore, Posey failed to identify any newly discovered evidence that, if credible, would establish a bona fide issue of factual innocence.²

¹Posey was also convicted of engaging in soliciting a child for prostitution, an offense that involved a different minor victim. Posey did not allege that he was factually innocent of this conviction.

²Because Posey's petition failed to identify any newly discovered evidence, his petition failed to meet the pleading requirements of NRS 34.960(2), and we need not consider the merits of Posey's ineffective-assistance-of-counsel claims. See NRS 34.960(4)(a). And to the extent Posey raises new ineffective-assistance-of-counsel claims on appeal and

Accordingly, we conclude the district court did not err by denying Posey's "motion."

Motion to modify and/or correct an illegal sentence

Posey's informal brief on appeal also challenges the district court's denial of his motion to modify and/or correct an illegal sentence filed on May 24, 2023. In his motion, Posey claimed his sentence should be modified or corrected because, under Washington law, it is a defense that a defendant make a reasonable bona fide attempt to ascertain the true age of a minor depicted in a sex advertisement and because the victim used the Cash App, which required the victim and/or the business to "verify" a government issued form of identification.

"[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). 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. *Id.* Without considering the merits of Posey's claim, we conclude that it falls outside the narrow scope of claims permissible in a motion to modify or correct an illegal sentence. Accordingly, we conclude the district court did not err by denying Posey's motion.

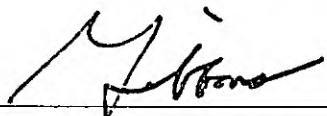
claims that a New Jersey law constitutes newly discovered evidence of his innocence, Posey did not raise these claims in his petition below, and we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Motion for modification of sentence

Posey's informal brief on appeal also challenges the district court's denial of his motion for modification of sentence filed on May 10, 2023. In his motion, Posey claimed (1) the presentence investigation report (PSI) contained several factual errors, (2) counsel was ineffective for failing to investigate certain evidence, and (3) several searches were warrantless and unlawful. Posey did not specify which facts in the PSI were erroneous or that any alleged errors in the PSI concerned his criminal record. Therefore, Posey failed to demonstrate that his sentence was based on mistaken assumptions about his criminal record that worked to his extreme detriment. And without considering the merits of Posey's remaining claims, we conclude that they fall outside the narrow scope of claims permissible in a motion to modify a sentence. Accordingly, we conclude the district court did not err by denying Posey's motion.

For the foregoing reasons, we

ORDER the judgments of the district court AFFIRMED and the appeal DISMISSED IN PART.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Joseph Hardy, Jr., District Judge
Anthony Posey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk