

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSWALDO P. LOPEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

OSWALDO P. LOPEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38761 **FILED**

APR 10 2003

No. 39194  
JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Rihard*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

Docket No. 38761 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Docket No. 39194 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.<sup>1</sup>

On April 1, 1998, the district court convicted appellant, pursuant to a plea of guilty but mentally ill, of two counts of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

Docket No. 38761

On September 25, 2001, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On October 17, 2001, the district court denied appellant's motion. This appeal followed.

---

<sup>1</sup>NRAP 3(b).

In his motion, appellant claimed that the deadly weapon enhancements were improper. Specifically, appellant claimed that a kitchen knife was not a deadly weapon, and thus, his sentences were improperly enhanced because he had used household kitchen knives.

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.<sup>2</sup> "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.'"<sup>3</sup>

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's motion. Appellant's claim fell outside the very narrow scope of claims permissible in a motion to correct an illegal sentence. Appellant admitted his use of a deadly weapon during the commission of his crimes when he entered his plea to second degree murder with the use of a deadly weapon. Any challenge to the validity of his guilty plea was improperly raised in a motion to correct an illegal sentence. Moreover, as a separate and independent ground to deny relief, we conclude that appellant's claim lacked merit. This court has held that a butcher knife with a blade of five to seven inches is a deadly weapon for purposes of the deadly weapon enhancement statute.<sup>4</sup> The record reveals that in the instant case three knives were found embedded in the bodies of the victims, one knife

---

<sup>2</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

<sup>3</sup>Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

<sup>4</sup>Steese v. State, 114 Nev. 479, 498-99, 960 P.2d 321, 334 (1998).

measuring nine inches in length, a second knife measuring eight inches in length, and a third knife measuring six inches in length. Therefore, we conclude that the district court did not err in denying the relief requested, and we affirm the order of the district court.

Docket No. 39194

On December 4, 2001, appellant filed a proper person document labeled, "motion for leave to submit a proper person petition for a writ habeas corpus." The district court construed appellant's petition to be a post-conviction petition for a writ of habeas corpus and directed the State to submit a response.<sup>5</sup> The State opposed 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 January 23, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant challenged the constitutionality of the 1995 amended version of NRS 174.035 abolishing the defense of legal insanity. Appellant attempted to enter a plea at his arraignment of "not guilty by reason of insanity" but his plea was rejected by the district court due to the 1995 amendment of NRS 174.035. Ultimately, appellant entered a plea of guilty but mentally ill to the murder of his parents. The district court, in accepting appellant's guilty plea, specifically determined that appellant was mentally ill at the time he committed the murders.

The district court denied the petition on the grounds that the petition was not substantially in the form required by NRS 34.735, that the claim raised in the petition was not cognizable because it was not framed as a claim challenging the validity of the guilty plea or the effective assistance of counsel, and that the petition was untimely filed. Based upon our review of the record on appeal, we conclude that the

---

<sup>5</sup>See NRS 34.724(2)(b).

district court erred in denying appellant's petition for the reasons discussed below.

First, appellant's petition, filed in proper person, was in substantial compliance with NRS 34.735. Appellant submitted an affidavit with his petition verifying the contents of the petition. The record contains a certificate of service of mail indicating that the petition was mailed to the clerk of the district court, the attorney general, and the district attorney. Appellant stated on the face of the petition that he was in custody in the Nevada State Prison at Ely. Appellant's narrative contains the pertinent information relating to the procedural history in his case. Thus, although appellant did not use the form set forth in the statute, appellant's petition contained sufficient information to substantially comply with NRS 34.735.

Second, we conclude that the district court erred in concluding that appellant's claim was not cognizable pursuant to NRS 34.810(1)(a). Although appellant focused his attention upon the constitutionality of NRS 174.035, appellant argued that his counsel was ineffective in this regard and sought to withdraw his guilty plea. Thus, appellant's petition raised a claim within the scope of NRS 34.810(1)(a).

Third, we conclude that the district court erred in determining that appellant had not demonstrated good cause to excuse the delay in his petition. In order to demonstrate good cause sufficient to overcome the three year delay in filing his petition, appellant was required to demonstrate that some impediment external to the defense prevented him from filing his petition earlier.<sup>6</sup> An impediment external to the defense may be demonstrated by showing that the factual or legal basis for the

---

<sup>6</sup>See NRS 34.726(1); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

claim was not reasonably available prior to the filing of the untimely petition.<sup>7</sup> Appellant was further required to demonstrate that dismissal of his petition as untimely would unduly prejudice him.<sup>8</sup> Prejudice can be shown by demonstrating that the errors worked to a petitioner's actual and substantial disadvantage.<sup>9</sup>

In 2001, after appellant's conviction had become final, this court found the amended version of NRS 174.035 to be unconstitutional and unenforceable and determined that the pre-existing statutes that were amended or repealed in 1995 should remain in full force and effect.<sup>10</sup> Appellant's challenge was not reasonably available prior to this court's 2001 decision in Finger; thus, appellant had good cause to raise the claim in his 2001 petition. The statutory scheme under which appellant entered his guilty pleas was unconstitutional and unenforceable, therefore, appellant demonstrated that he would be unduly prejudiced if his petition was denied on procedural grounds. The order of the district court denying appellant's petition is reversed, and this case is remanded to the district court. The district court shall appoint appellant counsel and provide appellant an opportunity to enter a new plea.<sup>11</sup>

### Conclusion

---

<sup>7</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); see also Murray v. Carrier, 477 U.S. 478, 488 (1986).

<sup>8</sup>See NRS 34.726(1).

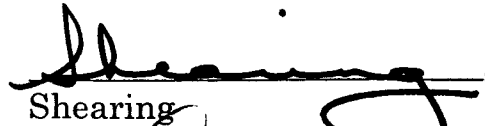
<sup>9</sup>Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).


<sup>10</sup>Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001), cert. denied, 534 U.S. 1127 (2002); see also O'Guinn v. State, 118 Nev. \_\_\_, 59 P.3d 488 (2002).

<sup>11</sup>On remand, the State will not be bound by any plea negotiations previously agreed to by the parties and the original charges may be reinstated.

Having reviewed the records on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.<sup>12</sup> Accordingly, we

ORDER the judgments of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND these matters to the district court for proceedings consistent with this order.<sup>13</sup>

  
Shearing, J.

  
Leavitt, J.

  
Becker, J.

cc: Hon. Valorie Vega, District Judge  
Oswaldo P. Lopez  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

---

<sup>12</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>13</sup>We have considered all proper person documents filed or received in these matters. We conclude that appellant is entitled only to the relief described herein. This order constitutes our final disposition of these appeals. Any subsequent appeal shall be docketed as a new matter.