

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR J. BREWER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40737

FILED

FEB 18 2004

ORDER OF REVERSAL AND REMAND

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

This is an appeal from an order of the district court denying a motion to correct an illegal sentence.

After a jury trial in Elko County in 1991, appellant Arthur J. Brewer was convicted of unauthorized absence from place of classification assignment for leaving the prison conservation camp in Carlin. At his sentencing, the district court adjudicated him a habitual criminal under NRS 207.010(2) and sentenced him to a prison term of life with the possibility of parole after ten years.¹ More than ten years later, in January 2002, he filed a motion in the district court to correct an illegal sentence. The court denied the motion, and Brewer has appealed.

Brewer contends that the district court erred because his habitual criminal adjudication and sentence enhancement were

¹Brewer was adjudicated under NRS 207.010(2). See 1985 Nev. Stat., ch. 544, § 1, at 1643-44 (version of NRS 207.010 still effective in 1991). The statute has since been amended, but the relevant provisions remain essentially the same as currently codified at NRS 207.010(1)(b), which provides that a person convicted of "[a]ny felony, who has previously been three times convicted . . . of any crime which under the laws of the situs of the crime or of this state would amount to a felony . . . is a habitual criminal and shall be punished" by a term in prison, the maximum possible term being life without the possibility of parole.

improperly based on a conviction that did not precede his primary offense. The primary offense occurred on January 28, 1990, when Brewer left the Carlin conservation camp. After he left the camp, he stole a truck and drove to Washoe County, where he was arrested and later convicted of possession of a stolen motor vehicle. This Washoe County conviction occurred on August 23, 1990, before Brewer's Elko County conviction on April 22, 1991, but after the primary offense itself. Nevertheless, the sentencing court relied on the August 1990 conviction in adjudicating Brewer a habitual criminal. This reliance was improper. This court held in Brown v. State that for a habitual criminal adjudication, "[a]ll prior convictions used to enhance a sentence must have preceded the primary offense."²

The record shows that the sentencing court also relied on three other prior convictions, for a total of four, to support the habitual criminal adjudication. (In denying Brewer's motion, the district court only cited three prior convictions used by the sentencing court, and in his appeal Brewer only discusses three.) NRS 207.010(2) only required three prior felony convictions to support the enhancement of Brewer's sentence,³ so if the three remaining convictions were appropriate, Brewer's sentence would still be valid. But one of those three remaining convictions, for a burglary in Washoe County, was entered on February 12, 1991, after Brewer's primary offense. Therefore, only two of the convictions relied on by the sentencing court were appropriate prior convictions under Brown.

²97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981); see also Carr v. State, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980).

³See footnote 1 above.


The State, however, does not address Brown or the suitability of the prior convictions. Instead, it argues that Brewer's motion to correct an illegal sentence raised issues that should have been brought in a habeas petition and therefore that neither the district court nor this court has jurisdiction. The State cites this court's opinion in Edwards v. State, where we stated: "If a motion to correct an illegal sentence or to modify a sentence raises issues outside of the very narrow scope of the inherent authority recognized in this Opinion, the motion should be summarily denied."⁴ The State's argument is not persuasive. Edwards holds that courts have "inherent authority to correct, vacate or modify a sentence that is based on a materially untrue assumption or mistake of fact that has worked to the extreme detriment of the defendant" if the mistaken sentence results from the sentencing court's misapprehension of the defendant's criminal record.⁵ Regardless of whether Brewer raised some issues in his motion which went beyond strictly this question, the crux of his motion was that the sentencing court made a material mistake to his extreme detriment when it found that his August 1990 conviction could be used to support his habitual criminal enhancement. Brewer asked the district court to vacate his habitual criminal adjudication and resulting sentence and resentence him appropriately. The district court had the authority to do so and erred in denying the motion. Accordingly, we


⁴112 Nev. 704, 708 n.2, 918 P.2d 321, 325 n.2 (1996).

⁵Id. at 707, 918 P.2d at 324; see also NRS 176.555 ("The court may correct an illegal sentence at any time.").

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁶


Shearing, C.J.


Rose, J.


Maupin, J.

cc: Hon. Andrew J. Puccinelli, District Judge
Federal Public Defender
Attorney General Brian Sandoval/Carson City
Attorney General Brian Sandoval/Reno
Elko County District Attorney
Elko County Clerk

⁶We admonish Brewer's counsel, Paul G. Turner, Assistant Federal Public Defender, for failure to comply with this court's Rules of Appellate Procedure. NRAP 28(a)(3) requires an opening brief to contain "a statement of the facts relevant to the issues presented for review, with appropriate references to the record." See also NRAP 28(e); NRAP 28A. The opening brief includes nearly a page and a half of factual assertions that lack any supporting references to the record. Further, most of the facts asserted are not relevant to the issue raised on appeal. In response to the State's complaint regarding his failure to refer to the record, Mr. Turner states in the reply brief that language "essentially identical" to the opening brief's assertions appears in points and authorities that Turner filed in the district court. This response does not justify the lack of references in the opening brief, nor does it make the factual assertions relevant, nor is it acceptable for counsel to refer to allegations made below as support for assertions of fact made on appeal. We caution Mr. Turner that this court will consider sanctions for similar conduct in the future.