

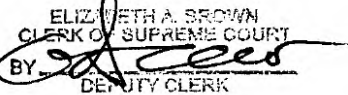
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO A. CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87562-COA

FILED

MAY 01 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Francisco A. Cruz appeals from a district court order denying his motion to modify or correct an illegal sentence filed on September 13, 2023. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

In his motion, Cruz claimed that the sentencing court erred when it relied on inaccurate and irrelevant information. “[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).¹

First, Cruz claimed that the sentencing court erred by sentencing him based on a presentence investigation report (PSI) that contained three errors: it reflected his “status” as “expired” even though

¹Although Cruz styled his motion as a “motion for modification (or correction) of illegal sentence,” he neither alleged that his sentence was illegal nor raised any claims that implicated the legality of his sentence. Accordingly, we address his claims only in the context of whether he was entitled to modify his sentence.

Cruz told the interviewer that he had temporary protected status but was not sure if it was expired; it misidentified Cruz's race; and it contained his codefendant's name and information under "gang activity/affiliation." None of these alleged errors implicate a mistaken assumption about Cruz's criminal record, nor did Cruz demonstrate that they worked to his extreme detriment. We therefore conclude the district court did not err by denying this claim.

Second, Cruz claimed the sentencing court should not have relied on statements by the prosecutor regarding a new charge that Cruz committed and was convicted of while awaiting trial in the instant case. Cruz did not dispute the accuracy of the prosecutor's statements and thus failed to identify a mistaken assumption about his criminal record. We therefore conclude the district court did not err by denying this claim.

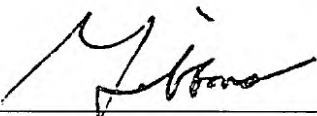
Third, Cruz claimed the sentencing court erred for the following reasons: it was not neutral; it did not ensure Cruz had reviewed his PSI or ask whether there were any errors in the PSI; it did not consider mitigating factors or make an individualized assessment; it did not adequately explain why it imposed the sentence it did; it based Cruz's sentence on speculation and unfounded allegations; the sentencing procedures did not comport with various federal statutes and rules; and the sentence constituted cruel and unusual punishment and violated the Due Process Clause. He also claimed counsel failed to explain to him the importance of the PSI interview. All of these claims are outside the scope of claims permitted in a motion to modify a sentence. We therefore conclude the district court did not err by denying these claims.

On appeal, Cruz argues that counsel was not present for the PSI interview; his sentence violates the Equal Protection Clause and A.B.

267; he received ineffective assistance of appellate and postconviction counsel; the prohibition against raising claims of ineffective assistance of trial counsel on direct appeal deprived him of a fair direct appeal; and he should be allowed to file a postconviction habeas petition in order to have his claims heard on the merits. These arguments were not raised 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).

Cruz also argues on appeal that the district court erred by denying his motion to appoint counsel. Because no statute or court rule allows for the appointment of counsel for a motion to modify sentence, we conclude the district court did not err by denying the motion to appoint counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

²Cruz filed a motion to consolidate this case with his pending appeal in *Cruz v. Williams*, Docket No. 87810-COA. While we acknowledge the similarities between the cases, it does not appear that consolidation is appropriate. Accordingly, the motion to consolidate is denied.

cc: Hon. Carli Lynn Kierny, District Judge
Francisco A. Cruz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk