

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH WAYNE DORSEY,  
Appellant,

vs.

THE STATE OF NEVADA,  
Respondent.

No. 49551

KENNETH WAYNE DORSEY,  
Appellant,

vs.

THE STATE OF NEVADA,  
Respondent.

No. 50294

**FILED**

JUL 11 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT

BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket Number 49551 is a proper person appeal from an order of the district court denying appellant's post-conviction motion to correct an illegal sentence. Docket Number 50294 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.<sup>1</sup> Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

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

On July 30, 2003, the district court convicted appellant pursuant to a jury verdict, of one count of burglary in district court case number CR02-0386 and adjudicated appellant a habitual criminal. The district court sentenced appellant to a term of life in the Nevada State Prison with the possibility of parole after ten years. The district court ordered appellant's sentence in district court case number CR02-0386 to be served consecutively with his sentence in district court case number CR97-1431. This court affirmed appellant's conviction on appeal.<sup>2</sup>

#### Motion to Correct an Illegal Sentence

On April 7, 2005, appellant filed a proper person motion to correct an illegal sentence. On May 16, 2007, the district court denied appellant's motion. This appeal followed.

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>3</sup> "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to

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<sup>2</sup>Dorsey v. State, Docket No. 41900 (Order of Affirmance, March 3, 2003).

<sup>3</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

challenge alleged errors in proceedings that occur prior to the imposition of sentence."<sup>4</sup>

In his motion, appellant claimed his sentence was illegal because his adjudication as a habitual criminal was constitutionally improper because the jury was not presented with the issue, contrary to Appendi v. New Jersey.<sup>5</sup>

Our review of the record on appeal reveals 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's sentences were facially legal,<sup>6</sup> and the record does not support an argument that the district court was without jurisdiction in this matter.

Moreover, as a separate and independent ground to deny relief, appellant's claim was without merit. In Appendi, the United States Supreme Court held that any fact that increases the penalty for an offense beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a

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<sup>4</sup>Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

<sup>5</sup>530 U.S. 466 (2000).

<sup>6</sup>NRS 1995 Nev. Stat., ch. 443, § 124, at 1215 (NRS 205.060); and NRS 207.010(1)(b)(2).

reasonable doubt.<sup>7</sup> As this court recently held in O'Neill v. State, NRS 207.010 comports with Apprendi because it does not require the district court to find any facts beyond prior convictions before sentencing a defendant as a habitual criminal.<sup>8</sup> In O'Neill, this court held that the only discretionary aspect of NRS 207.010 relates to the discretion to dismiss a count, which does not serve to increase the punishment; thus, the district court could sentence appellant as a habitual criminal, without submitting the issue to a jury, upon presentation and proof of the requisite number of prior convictions.<sup>9</sup> Here, appellant had five prior convictions, which the State proved through the entry of certified copies of those prior convictions into the record at appellant's sentencing hearing. Therefore, the district court did not err in denying appellant's motion.

#### Petition for a Writ of Habeas Corpus

On June 1, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus designating both district court cases. 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 September 25, 2007, the district court denied appellant's petition. This appeal followed.

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<sup>7</sup>530 U.S. at 490.

<sup>8</sup>O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007).

<sup>9</sup>Id.

In his petition, appellant claimed that the district court erred by refusing to provide him with complete trial records, which prevented him from making his claims and raising claims in the instant writ. This claim lacked merit. This claim does not challenge the validity of appellant's judgment of conviction and is therefore outside the scope of claims permissible in a petition for a writ of habeas corpus.<sup>10</sup> Therefore, the district court did not err in denying appellant's claim.

Appellant further contended that his trial counsel was ineffective during the pretrial stage, during his trial, and at sentencing. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>11</sup> Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant made no specific factual allegations to support his claims. Thus, appellant's petition contained only bare and naked claims for relief.<sup>12</sup> While the district court erroneously based its denial of appellant's claim upon his failure to raise

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<sup>10</sup>NRS 34.738.

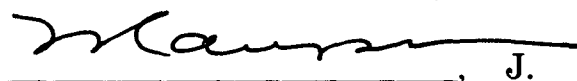
<sup>11</sup>See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

<sup>12</sup>See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

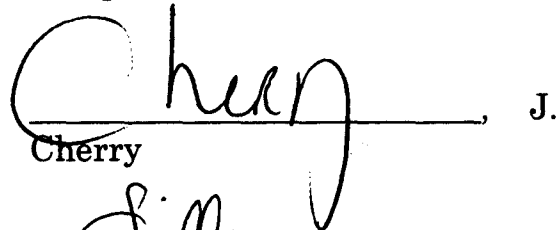
his claims of ineffective assistance of counsel on direct appeal, we nevertheless conclude that the district court reached the right result for the wrong reason.<sup>13</sup> Therefore, the district court did not err in denying appellant's claims of ineffective assistance of counsel.

Having reviewed the records on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>14</sup> Accordingly, we

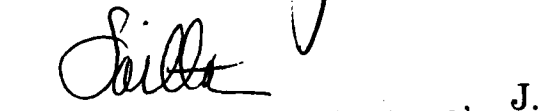
ORDER the judgments of the district court AFFIRMED.

 J.

Maupin

 J.

Cherry

 J.

Saitta

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<sup>13</sup>See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm judgment of district court if it reached the correct result for the wrong reason).

<sup>14</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Robert H. Perry, District Judge  
Kenneth Wayne Dorsey  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk