

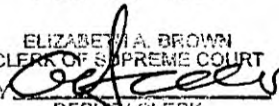
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87171-COA

FILED

FEB 23 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ferrill Joseph Volpicelli appeals from an order of the district court denying a motion to correct an illegal sentence filed on July 11, 2023. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

In his motion, Volpicelli claimed that the district court lacked jurisdiction to sentence him as a habitual criminal because the State improperly introduced a prior conviction during the grand jury proceedings. 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. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “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.” *Id.* (internal quotation marks omitted).

Volpicelli argued that the supreme court's decision in *Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008), and unpublished decisions in similar cases demonstrate that the failure to follow the procedures outlined in the habitual criminal statutes deprive the district court of jurisdiction to sentence a defendant under the habitual criminal statutes. Thus, according to Volpicelli, the State's error in presenting his prior conviction to the grand jury in violation of NRS 207.016(2) deprived the district court of jurisdiction to sentence him pursuant to the habitual criminal statutes. We disagree.

In *Grey*, the supreme court found that "the district court's authority to impose a habitual criminal sentence [is premised] on the State's filing of an allegation of habitual criminality." 124 Nev. at 124, 178 P.3d at 163-64. The decision in *Grey* was based primarily on language found in NRS 207.010(3) that says the State has the discretion to include a count of habitual criminality and the district court has the discretion to dismiss a count of habitual criminality.¹ Because the inclusion of a count and imposition of a habitual criminal sentence are discretionary, the supreme court held that the failure to file a notice that the State was seeking such a sentence deprived the district court of the authority to impose that sentence. In contrast, the part of NRS 207.016(2) that addresses the presentation of prior convictions to the grand jury does not contain language that limits the authority of the district court to impose a habitual criminal sentence.

¹At the time *Grey* was decided, this provision was codified at NRS 207.010(2). See 2019 Nev. Stat., ch. 633, § 86, at 4441.

Therefore, Volpicelli failed to demonstrate that the presentation of the prior conviction at a grand jury deprived the district court of jurisdiction to sentence him as a habitual criminal, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk