

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAUNTAY WHEATON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44093

FILED

MAR 24 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On March 1, 2001, appellant Shauntay Wheaton was convicted, pursuant to a jury verdict, of various crimes, including burglary, robbery and murder. Wheaton filed a direct appeal, and on May 14, 2002, this court affirmed Wheaton's conviction.¹ On October 1, 2002 Wheaton filed a pro per petition for writ of habeas corpus and requested that counsel be appointed to help formulate his claims for relief. The district court appointed counsel to represent Wheaton and counsel filed a supplemental petition. The district court declined to conduct an evidentiary hearing and denied the petition on October 8, 2004. This appeal followed.

Wheaton raises three issues on appeal. First, Wheaton asserts that he is entitled to a new trial based on ineffective assistance of appellate counsel for failing to put proper emphasis on the invalidity of his

¹Wheaton v. State, Docket No. 37553 (Order of Affirmance, May 14, 2002).

confession because no parental notification of his interrogation occurred. Wheaton was a minor at the time of his confession and the police did not notify Wheaton's parents he was in custody.

The trial court conducted an evidentiary hearing prior to trial on Wheaton's motion to suppress his statements to police and denied the motion to suppress the statements. Appellate counsel did in fact contest the issue of parental notification on direct appeal. This court addressed the issue. Citing to Elvik v. State, this court stated that "[t]he absence of a minor's parent or guardian is a relevant consideration in determining the voluntariness of a minor's confession; however it is merely one consideration under the totality of the circumstances."² In Elvik, this court upheld the district court's finding that Elvik's confession was voluntary, despite the fact Elvik did not have a parent present during the interrogation. Given the similarity to Elvik, this court determined in Wheaton's direct appeal that there was adequate evidence to support the district court's finding that Wheaton's statements were, under the totality of the circumstances, voluntarily made.

Further, in light of the evidence of his guilt apart from the statement, Wheaton has not demonstrated that appellate counsel's performance was deficient or that the outcome would have been different on appeal, even if counsel had emphasized the issue.³

²Wheaton, Docket No. 37553, at 3; citing Elvik v. State, 114 Nev. 883, 893, 965 P.2d 281, 287 (1998).

³Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

Next, Wheaton contends both trial and appellate counsel were ineffective for failing to raise the issue that NRS 193.165(5) is unconstitutionally vague and ambiguous. This claim is without merit. Nevada's deadly weapon enhancement statute specifically refers to firearms used in the commission of a crime.⁴ Wheaton in fact killed his victims with a firearm. Additionally, this court has determined that NRS 193.165 is not unconstitutionally vague.⁵

Last, Wheaton contends the district court erred in not holding an evidentiary hearing on his petition. Wheaton "is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief."⁶ Neither of these claims presented any factual allegation that would entitle Wheaton to relief, therefore there was no need for the district court to conduct an evidentiary hearing.

Having considered Wheaton's contentions and concluded that they are without merit, we affirm the decision of the district court. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Wheaton was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Wheaton was convicted pursuant to a jury verdict. We therefore

⁴NRS 193.165(1): "Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon" (Emphasis added.)

⁵Hernandez v. State, 118 Nev. 513, 528, 50 P.3d 1100, 1110 (2002).

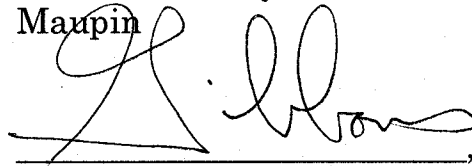
⁶Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004).

conclude that this matter should be remanded to the district court for correction of the judgment of conviction. Accordingly we,

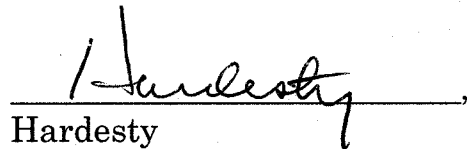
ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk