

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK A. COSTANTINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45635

FILED

SEP 26 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying a motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On August 27, 1996, the district court convicted appellant, pursuant to a guilty plea, of one count of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of twenty-five years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on March 18, 1997. Appellant unsuccessfully sought post-conviction relief.²

On May 20, 2005, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On June 22, 2005, the district court denied appellant's motion. This appeal followed.

¹Costantino v. State, Docket No. 28854 (Order Dismissing Appeal February 26, 1997).

²Costantino v. State, Docket No. 42609 (Order of Affirmance, August 23, 2004); Costantino v. State, Docket Nos. 30734, 31276 (Order Dismissing Appeals, December 10, 1999).

In his motion, appellant contended that the deadly weapon enhancement was illegal because the legislature never intended NRS 193.165 be used to enhance the offense of murder and because a deadly weapon is a necessary element of murder. Appellant argued that application of the deadly weapon enhancement in murder cases violated equal protection and due process. Appellant further claimed that the deadly weapon enhancement was infirm because the jury was not presented with the issue contrary to Apprendi v. New Jersey.³ Finally, appellant requested the appointment of counsel.

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.⁴ "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.'"⁵

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's claims fell outside the very narrow scope of claims permissible in a motion to correct an illegal sentence. Appellant's sentence was facially legal, and the record does not support an argument that the district court was without jurisdiction in this matter.⁶ Moreover, as a separate and independent

³530 U.S. 466 (2000).

⁴Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

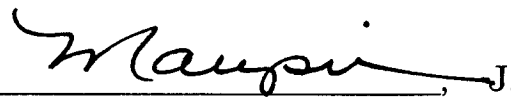
⁵Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

⁶1989 Nev. Stat., ch. 631, § 1.

ground to deny relief, appellant's claims were without merit. A deadly weapon is not a necessary element of the crime of murder.⁷ Appellant pleaded guilty to second degree murder with the use of a deadly weapon, and appellant admitted to the facts supporting the deadly weapon enhancement. Thus, the district court was permitted to impose the deadly weapon enhancement.⁸ Finally, the district court did not abuse its discretion in denying appellant's request for the appointment of counsel.

Having reviewed the record 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.⁹ Accordingly, we

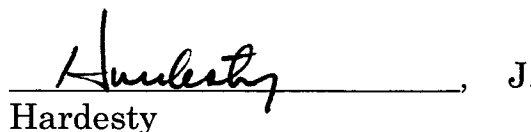
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

⁷See NRS 200.030; Williams v. State, 99 Nev. 797, 671 P.2d 635 (1983).

⁸See Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") (emphasis in original).

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Donald M. Mosley, District Judge
Derek A. Costantino
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk