

IN THE SUPREME COURT OF THE STATE OF NEVADA

DELWYN VENNARD WELLS A/K/A
DELWYN WELLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48884

FILED

JUL 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *JMB*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Joseph T. Bonaventure, Judge.

On September 8, 2003, appellant was convicted, pursuant to a jury verdict, of one count of conspiracy to commit robbery and/or kidnapping (count 1); one count of burglary while in possession of a deadly weapon (count 2); one count of invasion of the home while in possession of a deadly weapon (count 3); two counts of robbery with the use of a deadly weapon (counts 4 and 5); one count of first degree kidnapping with the use of a deadly weapon (count 6); and one count of second degree kidnapping with the use of a deadly weapon (count 7). The district court sentenced appellant to serve two consecutive life terms in the Nevada State Prison with the remaining fixed terms to run concurrently. On direct appeal, this court affirmed appellant's judgment of conviction.¹ The remittitur issued on September 21, 2004.

¹Wells v. State, Docket No. 42067 (Order Dismissing Appeal, August 26, 2004).

On December 15, 2006, appellant filed a motion to set aside, correct or vacate an illegal sentence. The State opposed the motion. On February 13, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the deadly weapon enhancement was illegal because the jury did not find the facts necessary to enhance his sentence, namely that he used a deadly weapon in the commission of a crime, pursuant to NRS 193.165. Appellant claimed that the deadly weapon enhancement was improper because the jury was not presented with the issue, contrary to Apprendi v. New Jersey.² Appellant further argued that the State improperly included language relating to the deadly weapon enhancement within the counts of the primary offenses thereby joining "the primary charge with the additional penalty, knowing that such additional penalty is only [sic] after conviction, and is to be determined by the jury." Appellant argued that because of this the charging document was defective at the outset, and as a result, the district court was without jurisdiction to hear his case. Appellant also contended that NRS 193.165 is unconstitutional. Finally, appellant argued that his sentence was improper because the use of a firearm is already an element of the crime of robbery.

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

²530 U.S. 466 (2000).

the statutory maximum.³ "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.'"⁴

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 sentences were facially legal,⁵ 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 claims were without merit. A deadly weapon is not a necessary element of the crime of robbery.⁶ Significantly, the jury found appellant guilty of using or possessing a deadly weapon in the commission of his offenses. Thus, the district court was permitted to impose the deadly weapon enhancement on the robbery and kidnapping counts and enhance the burglary and home invasion sentences.⁷ Finally,

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

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

⁵See NRS 200.380; NRS 199.480; 1995 Nev. Stat., ch. 443 § 124, at 1215 (NRS 205.060); NRS 205.067; NRS 200.320, NRS 200.330; and 1995 Nev. Stat., Ch. 455 § 1 at 1431 (NRS 193.165).

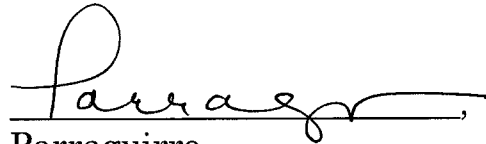
⁶NRS 200.380 merely requires the use of force or violence or fear of injury to accomplish the crime of robbery, and not the use of a deadly weapon.


⁷See Blakely v. Washington, 542 U.S. 296, 303 (2004) (stating that precedent makes it clear that the statutory maximum that may be
continued on next page . . .


the State did not err in charging the deadly weapon enhancement along with the primary offense, as the deadly weapon enhancement constitutes an additional penalty for the primary offense rather than a separate offense.⁸

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.
Parraguirre

 J.
Hardesty

 J.
Saitta

... continued

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).

⁸NRS 193.165(2); See Woofter v. O'Donnell, 91 Nev. 756, 761-62, 542 P.2d 1396, 1399-1400 (1975).

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

cc: Eighth Judicial District Court Dept. 6, District Judge
Delwyn Vennard Wells
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk