


IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW ANDREW SMITH A/K/A
MATTHEW SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49774

FILED

NOV 13 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On April 20, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, two counts of second-degree kidnapping with the use of a deadly weapon, one count of possession of a stolen vehicle, and one count of possession of stolen property. The district court further convicted appellant, pursuant to a guilty plea, of one count of ex-felon in possession of a firearm. The district court sentenced appellant to serve terms totaling 432 months with minimum parole eligibility after 95 months had been served.

On direct appeal, this court reversed appellant's convictions for second-degree kidnapping with the use of a deadly weapon.¹ The

¹Smith v. State, Docket No. 36144 (Order of Reversal and Remand, December 4, 2001).

remittitur issued January 2, 2002. On March 8, 2002, the district court entered an amended judgment of conviction, striking the two counts of second-degree kidnapping with the use of a deadly weapon.

On July 29, 2002, appellant filed a post-conviction petition for a writ of habeas corpus, which the district court denied. On appeal, this court reversed the district court's order in part and remanded for further consideration of whether appellant's counsel was ineffective for failing to challenge the possession counts.² On February 18, 2004, the district court entered a second amended judgment of conviction, striking the count of possession of a stolen vehicle and the count of possession of stolen property.³

On May 15, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On June 6, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the deadly weapon enhancement was not sufficiently proved at trial. Specifically, appellant argued that the State failed to show at trial that the firearm used in the commission of the robberies was, in fact, a deadly weapon.

²Smith v. State, Docket No. 40394 (Order Affirming in Part, Reversing in Part and Remanding, December 10, 2003).

³Appellant is currently serving time for the following: burglary while in possession of a firearm; conspiracy to commit robbery; two counts of robbery with the use of a deadly weapon; and possession of a firearm by an ex-felon. Appellant is now serving terms totaling 226 months with minimum parole eligibility after 48 months.

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 this motion. Appellant's sentence was facially legal, and there was no indication that the district court was without jurisdiction in this matter.⁶ Finally, appellant's claim lacked merit because a firearm is a per se deadly weapon.⁷ Therefore, we affirm the order of the district court.

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

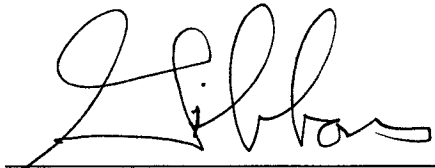
⁵Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

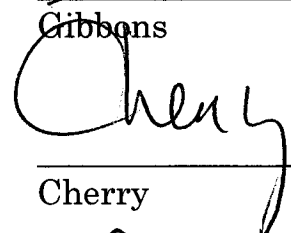
⁶See NRS 200.380(2) (setting forth the penalty for robbery); 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165) (setting forth the penalty for deadly weapon enhancement).

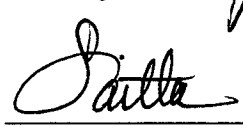
⁷See 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165(5)) (defining a "deadly weapon"); Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980) ("In order to 'use' a deadly weapon for purposes of NRS 193.165, there need not be conduct which actually produces harm but only conduct which produces fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime."); McIntyre v. State, 104 Nev. 622, 764 P.2d 482 (1988) (noting that inoperable or blank guns are per se deadly weapons, but because a toy gun is not a firearm, it does not partake of a firearm's per se deadly status).

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Sally L. Loehrer, District Judge
Matthew Andrew Smith
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).