

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MICHAEL ALLINGER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50815

**FILED**

OCT 21 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's motion for modification. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On March 15, 1995, the district court convicted appellant John Michael Allinger, pursuant to a guilty plea, of robbery with the use of a firearm. The district court sentenced appellant to serve a term of fifteen years in the Nevada State Prison for robbery, plus an equal and consecutive 15 year term for the use of a firearm. Appellant voluntarily dismissed his direct appeal in 1995.<sup>1</sup>

On February 6, 2007, appellant filed a proper person motion for sentence modification in the district court. The State opposed the motion. On November 16, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant claimed that the original sentencing court falsely advised him that the deadly weapon enhancement was

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<sup>1</sup>Allinger v. State, Docket No. 27063 (Order Dismissing Appeal, September 20, 1995).

mandatory. Appellant's argument was based on the fact that, upon remand following a successful post-conviction petition, his co-defendant was re-sentenced and received only a single twenty year term. Accordingly, appellant contended that the weapon enhancement was discretionary and that by failing to exercise its discretion, the sentencing court also failed to consider his criminal record, to his extreme detriment.

A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."<sup>2</sup> A motion to modify a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied.<sup>3</sup>

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant failed to demonstrate that his sentence was based upon a material mistake about his criminal record that worked to his extreme detriment. The statute applicable to the appellant at the time his offense was committed required an equal and consecutive term for the use of a deadly weapon.<sup>4</sup> Inasmuch as appellant contended that the sentencing court misapprehended or misrepresented the statute, appellant was in error. Notably, appellant's co-defendant was adjudicated a habitual criminal and the district court

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<sup>2</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

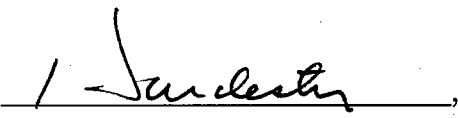
<sup>3</sup>Id. at 708-09 n.2, 918 P.2d at 325 n.2.


<sup>4</sup>1991 Nev. Stat., ch. 403, § 6, at 1059 (providing "any person who uses a firearm or other deadly weapon . . . in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime") (emphasis added).

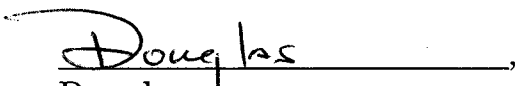
properly determined that the co-defendant's sentence could not be enhanced twice.<sup>5</sup> Therefore, appellant's claim was subject to summary denial.

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.<sup>6</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>7</sup>

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>5</sup>See Odoms v. State, 102 Nev. 27, 31-34, 714 P.2d 568, 571-73 (1986).

<sup>6</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>7</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Jerome Polaha, District Judge  
John Michael Allinger  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk