

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES M. BAUMSTARK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34664

**FILED**

**SEP 12 2001**

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

JAMES M. BAUMSTARK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35354

ORDER OF AFFIRMANCE

Docket No. 34664 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Docket No. 35354 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.<sup>1</sup>

On January 30, 1990, the district court convicted appellant, pursuant to jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court

<sup>1</sup>See NRAP 3(b).

sentenced appellant to serve two consecutive terms of fifteen years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence.<sup>2</sup> The remittitur issued on January 15, 1991.

On June 24, 1992, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On July 27, 1992, the district court denied the petition. This court dismissed appellant's untimely appeal from the district court's order for lack of jurisdiction.<sup>3</sup>

Docket No. 34664

On June 18, 1999, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On February 16, 2000, the district court denied the motion. This appeal followed.

Appellant argued that his offense was improperly enhanced pursuant to NRS 193.165, the deadly weapon enhancement. Specifically, appellant argued that: (1) the use of a deadly weapon is a necessary element of the offense of attempted murder; (2) NRS 193.165 as applied to appellant violated equal protection because it distinguishes which offenses will be enhanced based upon the methods used to

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<sup>2</sup>Baumgarden v. State, Docket No. 20863 (Order Dismissing Appeal, December 27, 1990). Appellant is also known under the name "Baumgarden."

<sup>3</sup>Baumstark v. State, Docket No. 24701 (Order Dismissing Appeal, October 1, 1993).

commit the offenses;<sup>4</sup> (3) NRS 193.165 is unconstitutionally vague; (4) application of NRS 193.165 to the attempted commission of an offense violates the Cruel and Unusual Punishment Clauses of the United States and Nevada Constitutions; and (5) NRS 193.165 violates the Double Jeopardy Clause of the United States Constitution because it constitutes multiple punishment for the same offense. Therefore, appellant argued that the deadly weapon enhancement must be vacated.

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.<sup>5</sup> "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."<sup>6</sup>

Based upon our review of the record on appeal, we conclude that the district court did not err in denying

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<sup>4</sup>In appellant's opinion it is absurd, illogical, and unjust to apply an enhancement to an offense committed with the use of a deadly weapon because the use of a deadly weapon to commit an offense is less torturous and brutal than an offense achieved through other means, including but not limited to, strangulation, suffocation, drowning, electrocution, and fire.

<sup>5</sup>Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).

<sup>6</sup>Id. at 708, 918 P.2d at 324 (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

appellant's motion. Appellant's challenge to the deadly weapon enhancement fell outside the narrow scope of claims permissible in a motion to correct an illegal sentence because his claims attacked the validity of the judgment of conviction. Appellant's sentence was facially legal and there is nothing in the record to indicate that the district court was without jurisdiction to impose a sentence.<sup>7</sup> Moreover, we note that appellant's challenge to the deadly weapon enhancement is patently without merit.<sup>8</sup> Accordingly, we affirm the order of the district court.

Docket No. 35354

On June 10, 1998, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. On October 22, 1998, the district court ordered the State to respond to the petition. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the

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<sup>7</sup>See NRS 193.165; NRS 193.330; NRS 200.010; NRS 200.030.

<sup>8</sup>See DeRosa v. Dist. Court, 115 Nev. 225, 236, 985 P.2d 157, 164 (1999) ("Absent the involvement of a suspect classification or a fundamental right, a classification is constitutional if it 'bears a rational relationship to the legislative purpose sought to be effected.'" (quoting Armijo v. State, 111 Nev. 1303, 1304, 904 P.2d 1028, 1029 (1995)); Griego v. State, 111 Nev. 444, 447, 893 P.2d 995, 997-98 (1995) (holding that "a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional") (citing Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978)); Williams v. State, 99 Nev. 797, 671 P.2d 635 (1983) (holding that use of a deadly weapon is not a necessary element of attempted murder and thus attempted murder may be enhanced pursuant to NRS 193.165); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975) (holding that NRS 193.165 was not unconstitutionally vague and did not violate double jeopardy).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 8, 1998, the district court orally denied the petition, and on February 10, 2000, the district court entered a written order denying appellant's petition. This appeal followed.

Appellant filed his petition approximately seven and one-half years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>9</sup> Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.<sup>10</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>11</sup> NRS 34.735 further requires a petitioner to demonstrate good cause on the face of the petition.

Appellant did not attempt to demonstrate good cause on the face of the petition.<sup>12</sup> Therefore, we conclude that the

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<sup>9</sup>See NRS 34.726(1).

<sup>10</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>11</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

<sup>12</sup>We note that after the district court orally denied the petition, but prior to entry of the written order, appellant filed a reply to the State's opposition. In his reply, appellant attempted to demonstrate good cause to excuse the procedural defects. The district court did not grant appellant permission to file his reply and did not consider his reply in the written order denying the petition. See NRS 34.750(5) ("No further pleadings may be filed except as ordered by the court."). Therefore, we decline to consider the reply.


district court did not err in procedurally barring appellant's petition, and we affirm the order of the district court.

Conclusion

Having reviewed the records 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>13</sup> Accordingly, we

ORDER the judgments of the district court AFFIRMED.<sup>14</sup>

  
Shearing, J.

  
Rose, J.

  
Becker, J.

cc: Hon. Donald M. Mosley, District Judge  
Attorney General  
Clark County District Attorney  
James M. Baumstark  
Clark County Clerk

<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

<sup>14</sup>We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.