IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,

vs.

JOHN HAYWARD DUNN, JR.,
Respondent.

No. 56944

FILED

FEB 0 9 2011

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondent John Hayward Dunn, Jr.'s pretrial petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.
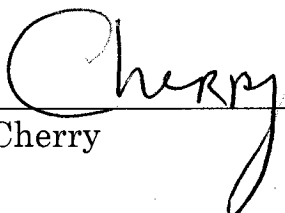
Dunn was charged by information with assault upon an officer with a deadly weapon (count I), "aiming a firearm at a human being; discharging a firearm where person might be endangered" (count II), and assault upon an officer (count III). In the proceedings below, the State argued that the non-firing replica gun brandished by Dunn was "readily capable of causing substantial bodily harm or death," NRS 193.165(6)(b), due to the potential reaction from the victim, a Nye County sheriff's deputy responding to a disturbance. The State now appeals from the district court's order granting the petition and dismissing counts I and II.

The district court's findings involved a matter of law and statutory interpretation which we review de novo. See Sheriff v. Marcus, 116 Nev. 188, 192, 995 P.2d 1016, 1018 (2000). In Berry v. State, 125 Nev. ___, ___, 212 P.3d 1085, 1089 (2009), we concluded "that a weapon must fall within NRS 193.165(6)'s definitions to uphold a finding that an instrument is a deadly weapon." Here, the district court found that the

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State failed to demonstrate that the replica gun was a deadly weapon pursuant to statute and whether it was capable of producing fear or harm was "an ancillary consideration." Id. at ___, 212 P.3d at 1093-94. We agree and conclude that the district court did not err by dismissing counts I and II and granting Dunn's pretrial petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Robert W. Lane, District Judge
        Michael C. Vieta-Kabell
        Gibson & Kuehn
        Nye County Clerk