

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD HARDISON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36527

**FILED**

JAN 31 2002

JANETTE M BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On June 26, 1987, the district court convicted appellant, pursuant to a jury trial, of first-degree murder with the use of a deadly weapon. The jury sentenced appellant to death. This court affirmed appellant's conviction and sentence.<sup>1</sup>

On March 2, 1989, appellant filed a petition for post-conviction relief in the district court pursuant to former NRS 177.315. The State opposed the petition and appellant filed a supplement to his petition. On April 21, 1989, the district court denied the petition. This court dismissed appellant's appeal from that order.<sup>2</sup>

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<sup>1</sup>Hardison v. State, 104 Nev. 530, 763 P.2d 52 (1988).

<sup>2</sup>State v. Hardison, Docket No. 20073 (Order Dismissing Appeal, February 22, 1990).

On November 19, 1991, appellant filed an amended petition for post-conviction relief in the district court pursuant to former NRS 177.315. The State moved to dismiss the petition. Appellant filed an opposition to the State's motion to dismiss. The State supplemented its motion to dismiss. Appellant filed a second amended petition. On February 4, 1993, the district court denied appellant's second amended petition. On appeal, this court concluded that appellant received effective assistance of counsel during the guilt phase of his trial, but ordered a new penalty hearing due to ineffective assistance of counsel at appellant's original penalty hearing.<sup>3</sup>

Prior to the second penalty hearing, appellant filed a petition for habeas corpus relief in the district court pursuant to NRS 34.410, et. seq. The State moved to dismiss the petition. Appellant filed an opposition to the State's motion to dismiss. On March 22, 1996, the district court dismissed appellant's habeas petition.

On August 28, 1996, pursuant to the second penalty hearing, the district court sentenced appellant to life without the possibility of parole for the first-degree murder conviction and to an equal and consecutive term of life without the possibility of parole for the deadly weapon enhancement. The district court entered a judgment of conviction on September 24, 1996. This court dismissed appellant's appeals from his sentence and from the district court's denial of his pre-hearing habeas petition.<sup>4</sup> Remittitur issued on December 15, 1998.

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<sup>3</sup>Hardison v. State, Docket No. 24195 (Order of Remand, May 24, 1994).

<sup>4</sup>Hardison v. State, Docket No. 29393 (Order Dismissing Appeal, November 25, 1998).

On October 12, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court challenging the proceedings at his second penalty hearing. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 18, 2000, the district court denied appellant's petition. This appeal followed.

The district court denied appellant's habeas petition having found that the petition was successive and untimely. The district court further concluded that appellant could have raised his claims in his direct appeal from his second penalty hearing. Our review of the record on appeal reveals that the district court erred in denying appellant's petition on these grounds. The instant habeas petition was not successive because it was the first habeas petition appellant filed with respect to his second penalty hearing. Appellant's petition was not untimely because appellant filed it within one year after this court issued the remittitur from appellant's direct appeal of his second penalty hearing.<sup>5</sup> Finally, appellant's claim of ineffective assistance of counsel was properly raised in his petition for a writ of habeas corpus.<sup>6</sup> Nevertheless, based upon our

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<sup>5</sup>See NRS 34.726(1) (providing that if an appeal has been taken, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after the supreme court issues its remittitur).

<sup>6</sup>See Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995) (claims of ineffective assistance of counsel "may not be raised on direct appeal, unless there has already been an evidentiary hearing.").

review of the record on appeal, we conclude that the district court reached the correct result in denying appellant's petition.<sup>7</sup>

In his petition, appellant first contended that the district court erred in sentencing him to an equal and consecutive term of life without the possibility of parole for the deadly weapon enhancement. Appellant waived this claim by failing to raise it in his direct appeal and by failing to plead specific facts that demonstrate good cause for failing to raise it in the prior proceeding.<sup>8</sup> Moreover, appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice.<sup>9</sup>

Appellant next contended that he received ineffective assistance of counsel. Specifically, appellant argued that his attorney failed to object to the imposition of the equal and consecutive term of life without the possibility of parole imposed by the district court for appellant's conviction for the deadly weapon enhancement. We conclude that appellant cannot demonstrate that his attorney's performance fell below an objective level of reasonableness or that he was prejudiced by his

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<sup>7</sup>See generally Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (stating that a correct result will not be reversed simply because it is based on the wrong reason).

<sup>8</sup>See NRS 34.810(1)(b),(3); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding that claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

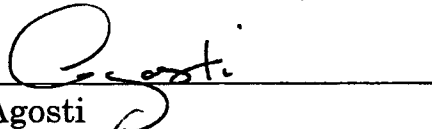
<sup>9</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

counsel's allegedly deficient performance because appellant's claim is without merit.<sup>10</sup> Pursuant to NRS 193.165, a person who uses a deadly weapon during the commission of a crime "shall be punished by imprisonment . . . for a term equal to and in addition to the term of imprisonment prescribed by statute" for the primary offense. Appellant's attorney cannot have been ineffective for failing to challenge imposition of a statutorily mandated sentence.

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>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. Lee A. Gates, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Richard Lee Hardison  
Clark County Clerk

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<sup>10</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

<sup>11</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).