IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD EDWARD GRAFF,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34707

FILED

FEB 22 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

RICHARD EDWARD GRAFF,

Appellant,

vs.

THE STATE OF NEVADA, NEVADA BOARD OF PAROLE COMMISSIONERS, DONALD L. DENISON, CORDELIA DUNFIELD, NORMAN ZIOLA AND TAMI BASS,

Respondents.

No. 36615

ORDER OF AFFIRMANCE

Docket No. 34707 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Docket No. 36615 is a proper person appeal from an order of the district court denying appellant's petition for a writ of mandamus. We elect to consolidate these appeals for disposition.[1]

On November 29, 1994, the district court convicted appellant, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon and misdemeanor trespassing. The district court sentenced appellant to serve two consecutive terms of 20 years in the Nevada State Prison for the attempted murder conviction and deadly weapon enhancement. The district court

[1]See NRAP 3(b).

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(O)-4892

further sentenced appellant to serve six months in the Elko County Jail for the trespassing violation. This court dismissed appellant's direct appeal from his judgment of conviction and sentence.[2]

Docket No. 34707

On June 10, 1999, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. Appellant filed a reply. On August 17, 1999, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that his sentence for attempted murder was facially invalid because the deadly weapon enhancement statute does not constitutionally apply to murder or to attempt crimes. Specifically, appellant argued that use of a deadly weapon is a necessary element of the crime of murder; thus, appellant contended, an attempted murder conviction cannot be enhanced by use of a deadly weapon under NRS 193.165(3). Appellant argued further that an attempt to commit a crime is not a "crime" which can be enhanced by NRS 193.165.

Our review of the record on appeal reveals that the district court properly noted that this court has found the deadly weapon enhancement statute to be constitutional.[3] Moreover, this court has held that use of a deadly weapon is not a necessary element of murder or attempted murder.[4] Third, an

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[2]Graff v. State, Docket No. 26805 (Order Dismissing Appeal, February 12, 1999).

[3]See Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975); see also Nevada Dept. of Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987).

[4]See Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983). By contrast, an example of an offense for which the use of a firearm is a necessary element is NRS 202.287 (Discharging Firearm out of Motor Vehicle).

attempt can be enhanced.[5] Thus, we conclude that the district court did not err in denying appellant's motion.

Docket No. 36615

On May 31, 2000, appellant filed a proper person petition for a writ of mandamus in the district court. On August 11, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the Board of Parole Commissioners exceeded its jurisdiction by (1) failing to grant appellant a statutory rehearing, and (2) abusing its discretion in denying appellant parole on two occasions.

Our review of the record on appeal reveals that the Board of Parole Commissioners did not exceed its jurisdiction in either of these respects. First, the record shows that appellant received the appropriate statutory rehearing.[6] Therefore, this claim is belied by the record.[7] As to appellant's second claim, we agree with the district court that the parole board did not abuse its considerable discretion in denying parole to appellant: the board must treat a deadly weapon enhancement as a separate sentence,[8] and the board may deviate from its own standards based on, among other factors, the severity of the prisoner's crime.[9]

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[5]See Williams, 99 Nev. at 798, 671 P.2d at 636 (citing LaFave & Scott, Handbook on Criminal Law § 68, at 538 (1972)).

[6]See NRS 213.142 (providing in pertinent part that "[u]pon denying the parole of a prisoner, the board shall schedule a rehearing. The date on which the rehearing is to be held is within the discretion of the board, but . . . the elapsed time between hearings must not exceed 5 years.")

[7]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[8]See Bowen, 103 Nev. at 481, 745 P.2d at 699.

[9]See Nevada Administrative Code 213.560(2)(providing that parole board may deviate from its standards based upon several factors, including the severity of the offense).

In sum, we conclude that the district court did not err in denying appellant's petition.

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.[10] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[11]

Young, J.

Rose, J.

Becker, J.

cc: Hon. Jack B. Ames, District Judge
Hon. Michael R. Griffin, District Judge
Attorney General
Elko County District Attorney
Richard Edward Graff
Elko County Clerk
Carson City Clerk

[10]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

[11]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted. This court received and considered the respondent's answering brief in Docket No. 34707.