

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD J. PHELPS,

No. 37052

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

DEC 10 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Edward J. Phelps' post-conviction petition for a writ of habeas corpus.

On December 5, 1996, Phelps was convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Phelps to a term of life in prison with the possibility of parole plus a consecutive life sentence for the use of a deadly weapon. Phelps filed a direct appeal, and this court affirmed his conviction.¹ Phelps then filed a post-conviction petition, alleging that his appellate counsel was ineffective and that the deadly weapon enhancement statute was unconstitutionally vague. After hearing argument from counsel, the district court denied the petition.

Phelps first contends that the district court erred in denying his petition because his appellate counsel was ineffective. We disagree.

A claim of ineffective assistance of appellate counsel is reviewed under the two-part test set forth in Strickland v. Washington.² We have explained that to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must "show that the omitted issue would have a reasonable probability of success on appeal."³ Here, Phelps contends that his appellate counsel was ineffective because he failed to

¹Phelps v. State, Docket No. 29985 (Order Dismissing Appeal, March 24, 1999).

²466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

³Id. at 998, 923 P.2d at 1114.

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raise the issue of whether a commercial trash compactor is a deadly weapon for purposes of NRS 193.165. We conclude that Phelps' appellate counsel was not ineffective in failing to raise the deadly weapon issue because it had no probability of success on the merits.

Pursuant to NRS 193.165(5)(b), a deadly weapon is any "device . . . which, under the circumstances in which it is used . . . is readily capable of causing substantial bodily harm or death." Phelps murdered his victim by suffocating him through compaction in a commercial trash compactor. We conclude that the district court did not err in finding that the commercial trash compactor was a deadly weapon under the circumstances in which it was used because substantial bodily harm or death is likely to result when a commercial trash compactor is used to compress a human being. Accordingly, Phelps' contention lacks merit.⁴

Phelps next contends that that his sentence enhancement is improper because NRS 193.165 is unconstitutionally vague. Specifically, Phelps contends that because the statutory definition of "deadly weapon" may include even ordinary, common, and harmless household items, it is insufficient to put a person of ordinary intelligence on notice as to what a deadly weapon is. We disagree.

To satisfy the due process requirement of fair notice, a criminal statute must be sufficiently specific to allow a person of ordinary intelligence to determine if a proposed course of conduct is prohibited.⁵ Statutes challenged for vagueness are evaluated on an as-applied basis where, as here, First Amendment interests are not implicated.⁶

⁴In a related argument, Phelps contends that the trash compactor was not a deadly weapon because he used it to dispose of a body, rather than as a weapon, because he thought he had already killed the victim when he placed him into the compactor. We reject this argument in light of the fact that the medical testimony proved that the victim was alive when he was placed in the compactor, and the evidence showed that Phelps turned the key and then pushed the button to activate the compression process after placing a live human being inside.

⁵See Sheriff v. Anderson, 103 Nev. 560, 562, 746 P.2d 643, 644 (1987).

⁶Lyons v. State, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989).

In Clem v. State,⁷ this court adopted a "functional test" to determine what instruments are included in the category of "deadly weapons" under NRS 193.165. That test looks at how an instrument is used and the facts and circumstances relating to its use to determine whether the instrument is a deadly weapon.⁸ Under the functional test, "simple household items" may be properly included in the category of "deadly weapons."⁹ However, in Zgombic v. State,¹⁰ this court overruled the aspect of Clem announcing the functional deadly weapon test and concluded that the legislature intended the definition of deadly weapons to include only those weapons that are "inherently dangerous," i.e., an instrumentality that "if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause a life-threatening injury or death."

At the time of the Clem and Zgombic decisions, NRS 193.165 stated that "[a]ny person who uses a firearm or other deadly weapon . . . in the commission of a crime" shall be subject to a sentence enhancement. However, the term "deadly weapon" was not defined in the statute. In 1995, the legislature amended NRS 193.165 to add the following definitions of "deadly weapon":

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.¹¹

"When a former statute is amended, or a doubtful interpretation rendered certain by subsequent legislation, . . . such amendment is persuasive

⁷104 Nev. 351, 356-57, 760 P.2d 103, 106-07 (1988), overruled by Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1997).

⁸Id.

⁹Id.

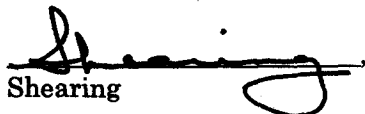
¹⁰106 Nev. 571, 576-77, 798 P.2d 548, 551 (1990), superseded by statute as stated in Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998).

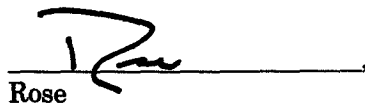
¹¹1995 Nev. Stat., ch. 455, § 1, at 1431.

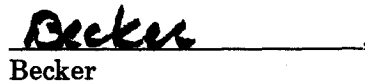
evidence of what the Legislature intended by the first statute."¹² By enacting the 1995 amendment to NRS 193.165, the legislature clearly intended to incorporate weapons meeting the functional test, which may include the deadly use of ordinary household items, as well as weapons meeting the inherently dangerous test into the definition of "deadly weapon." Moreover, we have held that NRS 193.165 was not unconstitutionally vague, even prior to the 1995 amendments defining "deadly weapon."¹³ As amended, NRS 193.165 provides several alternative, independently sufficient tests for the deadliness of a weapon. Therefore, we conclude that NRS 193.165 is adequate to put Phelps on notice that his use of a commercial trash compactor in the course of murder would subject him to a deadly weapon enhancement.

Having considered Phelps' contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Christopher R. Oram
Clark County Clerk

¹²Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).

¹³See Woofter, 91 Nev. at 762, 542 P.2d at 1400; Woods v. State, 95 Nev. 29, 588 P.2d 1030 (1979). Additionally, we have recognized that if the legislature chose to enact legislation that resulted in sentence enhancement in cases where, during the course of a crime, the defendant used an instrument meeting the broad, functional, deadly weapon test, such a result would not be "absurd or unreasonable." Zgombic, 106 Nev. at 576, 798 P.2d at 551.