

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38173

FILED

APR 17 2002

JANET E. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rishard*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence.

On July 22, 1987, the district court convicted appellant, after a jury trial, of one count of conspiracy to commit robbery, one count of burglary, and three counts of robbery with the use of a deadly weapon in district court case number C74915. The district court sentenced appellant to serve definite terms totaling one hundred and six years in the Nevada State Prison. This court affirmed appellant's judgment of conviction.¹

On May 31, 2001, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On June 20, 2001, the district court denied appellant's motion. This appeal followed.

In his motion, appellant challenged the deadly weapon enhancements. Appellant, relying upon Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999), argued that his sentences were illegal because the charging information failed to state that use of a deadly weapon exposed appellant to an equal and consecutive

¹Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988).

term of punishment.² Appellant also complained that the charging information failed to state the specific statutory subsection in violation of Jones.

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 that the sentence was imposed in excess of the statutory maximum.³ "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."⁴

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's challenge to the deadly weapon enhancements fell outside the narrow scope of claims permissible in a motion to correct an illegal sentence. Appellant's sentences were facially legal and there is no indication that the district

²In Apprendi, the United States Supreme Court held that any fact that increases the penalty for an offense beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490. The Jones Court, in construing a federal statute, held that any fact that increases the penalty for an offense beyond the prescribed statutory maximum, other than fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. 526 U.S. at 243, n.6.

³Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

⁴Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

court was without jurisdiction to impose the sentences.⁵ Moreover, as a separate and independent ground for denying relief, appellant's challenge lacks merit. Appellant was adequately informed in the charging information that he was charged with three counts of robbery with the use of a deadly weapon pursuant to NRS 200.380 and NRS 193.165. Appellant's reliance upon Jones is misplaced because the deadly weapon enhancement does not charge a separate offense.⁶ Therefore appellant did not need to be charged with a particular statutory subsection of NRS 193.165. Appellant did not need to be informed of the potential range of punishment in the charging information.⁷ The jury was given instructions on the deadly weapon enhancement. In returning the three verdicts of guilty of robbery with the use of a deadly weapon, the jury determined beyond a reasonable doubt that for each of the counts appellant had used a

⁵See 1983 Nev. Stat., ch. 525, § 1, at 1494 (conspiracy to commit robbery); 1983 Nev. Stat., ch. 294, § 1, at 717 (burglary); 1967 Nev. Stat., ch. 211, § 59, at 470-71 (robbery); 1981 Nev. Stat., ch. 780, § 1, at 2050 (deadly weapon enhancement).


⁶See 1981 Nev. Stat., ch. 780, § 1, at 2050 ("This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact."); but see Jones, 526 U.S. 227 (holding that where statute established three separate offenses by specification of distinct elements in three subsections that each subsection relating to a separate offense must be charged in the indictment, submitted to the jury and proved beyond a reasonable doubt).

⁷NRS 173.075(1) ("The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to the statement.").

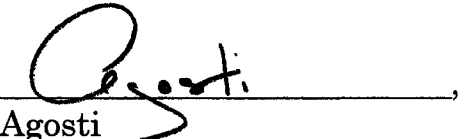
deadly weapon in commission of the crime of robbery. Therefore, we conclude that the district court did not err in denying appellant's motion.

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Maupin

 J.
Young

 J.
Agosti

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Michael Smith
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).