

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARUCH ARMIEN WASHINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38202

FILED

APR 24 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *Richard*
CHIEF DEPUTY CLERK

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

On July 26, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary (Count 1), one count of robbery with the use of a deadly weapon (Count 2), one count of conspiracy to commit robbery (Count 3), and one count of coercion (Count 4). The district court sentenced appellant to serve the following terms in the Nevada State Prison: for Count 1, a term of twenty-two months to ninety-two months, for Count 2, two consecutive terms of thirty-five months to one hundred and fifty-six months, for Count 3, a term of thirteen months to sixty months, and for Count 4, a term of thirteen months to sixty months. The district court ordered the counts be run concurrently with each other. This court dismissed appellant's direct appeal but remanded

for correction of a clerical error in the judgment of conviction.¹ The district court entered a corrected judgment of conviction on June 12, 2001.

On May 28, 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 enhancement. 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 sentence was illegal because the charging information failed to explicitly state that use of a deadly weapon exposed appellant to an equal and consecutive term of punishment.² Appellant also complained that the charging information failed to state the specific statutory subsection in violation of Jones. Finally, appellant argued that pursuant to NRS

¹Washington v. State, Docket No. 36496 (Order Dismissing Appeal and Remanding to Correct Judgment of Conviction, March 15, 2001).

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 the 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.

193.165(3) he could not have his sentence for robbery enhanced because use of a deadly weapon was an element of the crime.

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 enhancement fell outside the narrow scope of claims permissible in a motion to correct an illegal sentence. Appellant's sentence for robbery with the use of a deadly weapon was facially legal and there is no indication that the district court was without jurisdiction to impose the sentence.⁵

Moreover, as a separate and independent ground for denying relief, appellant's challenge to the deadly weapon enhancement lacks merit. Appellant was adequately informed in the charging information

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)).

⁵See NRS 200.380; NRS 193.165.

that he was charged with 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 NRS 193.165 involves an additional penalty when a crime is committed with the use of a deadly weapon but 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 verdict of guilty of robbery with the use of a deadly weapon, the jury determined beyond a reasonable doubt that appellant had used a deadly weapon in commission of the crime of robbery. Finally, the use of a deadly weapon is not an element of the crime of robbery but is a fact that may lead to an additional penalty

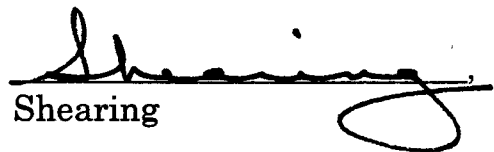
⁶See 1981 Nev. Stat., ch. 780, § 1, at 2050 ("This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact."); but see Jones, 526 U.S. 227 (holding that where statute established three 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).

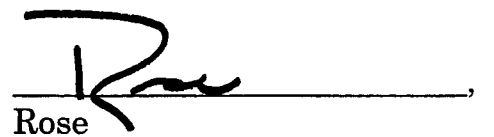
⁷NRS 173.075(1) ("The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to the statement.").

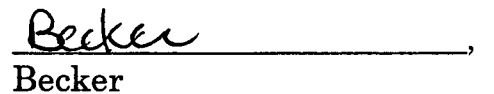
pursuant to NRS 193.165. Therefore, we conclude that the district court did not err in denying appellant's motion.

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.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Baruch Armien Washington
Clark County Clerk

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