

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC DEWAYNE ROGERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41756

FILED

MAR 25 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 February 28, 1995, the district court convicted appellant, pursuant to a guilty plea, of two counts of second degree kidnapping with the use of a deadly weapon (Counts I and II). The district court sentenced appellant to serve two consecutive terms of four years for each count and ordered that the terms for each count be served consecutively to one another—for a total of sixteen years in the Nevada State Prison. No direct appeal was taken. Appellant unsuccessfully sought post-conviction relief.¹

On May 2, 2003, appellant filed a proper person motion to correct an illegal sentence in the district court. On June 23, 2003, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that "separate enhancement of a sentence must each run consecutively with sentence prescribed for primary offense and concurrently to each other." Appellant

¹See Rogers v. State, Docket No. 35954 (Order of Affirmance, August 7, 2001); Rogers v. State, Docket No. 27758 (Order Dismissing Appeal, December 18, 1995).

appeared to claim that because the deadly weapon was used during only one incident that the district court should not have ordered the sentences for each count to be served consecutively. Appellant relied on this court's holding in Carter v. State in support of his claim.²

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 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 that district court did not err in denying appellant's motion. The terms for appellant's sentences were facially legal.⁵ In the instant case because appellant used a deadly weapon to commit each primary offense, the district court was required to impose the deadly weapon enhancement to be served consecutively to the primary offense for each count.⁶ Further, because two separate primary offenses were committed—kidnapping of two victims—

²98 Nev. 331, 647 P.2d 374 (1982).

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 1979 Nev. Stat., ch. 655, § 33, at 1425 (providing a penalty of not less than one year nor more than fifteen years for the crime of second degree kidnapping).


⁶See NRS 193.165(1) (providing that the deadly weapon enhancement runs consecutively to the sentence for the primary offense).


the district court had the discretion to run the terms for each count consecutively to one another.⁷ Appellant's reliance upon Carter v. State was misplaced because that holding was limited to the issue of whether a single primary offense could be enhanced with two separate sentencing enhancements—the deadly weapon enhancement and the elder victim enhancement.⁸ Finally, there is no indication that the district court was without jurisdiction. Therefore, we affirm the order of the district court.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁷See NRS 176.035(1) (providing that the district court may impose a subsequent sentence to run concurrently or consecutively to the first sentence).

⁸98 Nev. at 335, 647 P.2d at 377.

⁹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Janet J. Berry, District Judge
Eric Dewayne Rogers
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk