

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE SALVADORE A/K/A JOSE
SALVADOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49440

FILED

SEP 24 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Alvarado
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; David B. Barker.

On April 30, 2002, the district court convicted appellant, pursuant to a guilty plea, of one count of conspiracy to commit robbery, (count 1), and one count of robbery with the use of a deadly weapon (count 2). The district court sentenced appellant to serve a term of 12 to 30 months in the Nevada State Prison on count 1, to run concurrently with 2 consecutive terms of 48 to 120 months on count 2. Appellant did not file a direct appeal.

On March 26, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On June 5, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the deadly weapon enhancement was illegal because a jury did not find the facts necessary to enhance his sentence, namely that he used a deadly weapon in the commission of a crime, nor did he admit those facts when he entered his guilty plea until after the district court had accepted his plea. As a result,

appellant contended that his sentence for the deadly weapon enhancement runs contrary to Apprendi v. New Jersey.¹ Appellant further argued that the State improperly included language relating to the deadly weapon enhancement within the count of the primary offense of robbery. Appellant argued that because of this the charging document was defective at the outset, and as a result, the district court was without jurisdiction to hear his case. Appellant also contended that "the fact of the (a) weapon and the aggravating factors was 'double counting' this fact." Appellant apparently contended that his sentence was improper because the use of a firearm was already an element of the crime of robbery.

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.² "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.'"³

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's claims fell outside the very narrow scope of claims permissible in a motion to correct

¹530 U.S. 466 (2000).

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

³Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

an illegal sentence. Appellant's sentences were facially legal,⁴ and the record does not support an argument that the district court was without jurisdiction in this matter. Moreover, as a separate and independent ground to deny relief, appellant's claims lacked merit. Appellant admitted all of the facts necessary to support the charges before the court entered his guilty plea and thus, the judge could apply the deadly weapon enhancement in this case.⁵ Furthermore, a deadly weapon is not a necessary element of the crime of robbery, and therefore, the State did not 'double count' this fact, as it was only considered for the purposes of the enhancement.⁶ Finally, the State did not err in charging the deadly weapon enhancement along with the primary offense, as the deadly weapon enhancement constitutes an additional penalty for the primary offense rather than a separate offense.⁷

⁴See NRS 199.480(1)(a); NRS 200.380; 1995 Nev. Stat., ch. 455 § 1, at 1431 (NRS 193.165(1)).

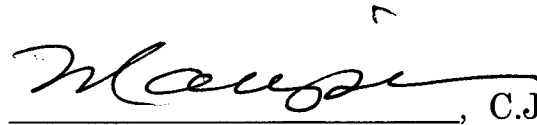
⁵See Blakely v. Washington, 542 U.S. 296, 303 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") (emphasis in original).

⁶See NRS 200.380 (requiring the use of force or violence or fear of injury to accomplish the crime of robbery). Notably, a deadly weapon is not required to accomplish a robbery.

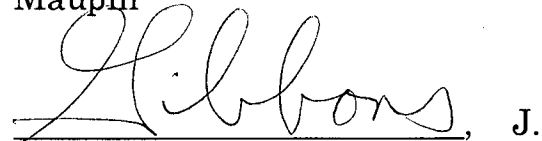
⁷1995 Nev. Stat., ch. 455 § 1, at 1431 (NRS 193.165(2)); see Woofter v. O'Donnell, 91 Nev. 756, 761-62, 542 P.2d 1396, 1399-1400 (1975)).

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

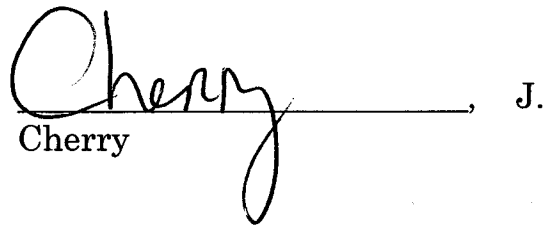
ORDER the judgment of the district court AFFIRMED.

 _____, C.J.

Maupin

 _____, J.

Gibbons

 _____, J.

Cherry

cc: Hon. David B. Barker, District Judge
Hon. Elizabeth Halverson, District Judge
Jose Salvadore
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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