SELECTED SIGNIFICANT LEGISLATION BY CATEGORIES

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VII. Courts, Corrections and Criminal Law.

Extensive revision of the laws on rape was among the most significant legislation in this area. Several bills were aimed at clearing up ambiguities in the criminal code pointed out by the courts. (See next page)

A.B. 97 (chapter 740) clears up the ambiguity in NRS 200.020 in which the conditions for capital murder are defined. Specifically, a district court found the term "common plan" as the basis for a multiple murder to be ambiguous. This law clarifies that section.

A.B. 284 (chapter 256) broadens the conditions under which payment may be made to victims of crime. The law currently is interpreted to allow compensation only to victims of crimes in which the victim was seeking to aid another person. This law broadens the applicability so that an individual who is injured in self defense after trying to first help another is still covered.

A.B. 456 (chapter 363) provides for separate penalties for conspiracy to commit murder, robbery, forcible rape, kidnapping or arson as opposed to other crimes. Conspiracy to commit the former is punishable as a felony with a 1 to 6 year term. Conspiracy to commit other crimes is a gross misdemeanor. Previously, all conspiracy was treated as a gross misdemeanor without regard to the object of the conspiracy.

A.B. 461 (chapter 707) affects judicial districts. It creates an additional judgeship for the eighth district, bringing Clark County up to 11 judges. It also transfers Churchill County from the ninth to the third judicial district.

A.B. 462 (chapter 563) provides that under certain circumstances an alcoholic or drug addict accused of a crime may elect treatment for his condition under the supervision of a state approved alcohol or drug treatment facility rather than stand trial. This option does not apply if the person is accused of a crime against the person or if he is accused of dealing in a controlled substance or if he has two or more felony convictions on his record. Also, the criminal charge is not dropped but prosecution is postponed while the accused undergoes treatment.

A.B. 502 (chapter 465) is another case of clarifying ambiguities in the criminal code perceived by the supreme court. NRS 193.165 provides that the use of a gun or other deadly weapon in the commission of a crime will cause an increased sentence. The clarification states that the use of the weapon is not a separate offense but a part of the crime itself.

A.B. 664 (chapter 654) provides for counties to establish programs of medical care for rape victims and for counseling for victims or their spouses. There is a $1,000 limit on either service.

S.B. 52 (chapter 607) defines what constitutes the sexual abuse of a minor and also broadens the circumstances under which a husband is guilty of raping his wife.

S.B. 222 (chapter 600) primarily deals with the evidence in a trial for rape. Specifically, the conditions under which evidence of prior sexual conduct of the victim may be admissible are greatly restricted. No reference to the "unchaste character" of a victim may be made in any instruction to the jury. Finally, no medical costs incurred on behalf of a rape victim for initial emergency medical care or for examination for the purpose of gathering evidence are to be charged to the victim. Counties are to pay such costs.

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Assembly Bill No. 234–Messrs. Dreyer, Dini, May, Banner, Schofield, Prince, Robinson, Demers, Bennett, Ullom, Craddock, Smalley, Mrs. Brookman, Messrs. Mello, Barengo, Ashworth, Hickey, Wittenberg, Vergiels and Bremner

CHAPTER 759

AN ACT relating to crimes and punishments; doubling the penalty for the use of a firearm or other deadly weapon in the commission of a crime; and providing other matters properly relating thereto.

[Approved May 3, 1973]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 193 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

2. The provisions of this section shall not apply where the use of a firearm or other deadly weapon is a necessary element of such crime.

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Assembly Bill No. 502--Assemblyman Dreyer

CHAPTER 465

AN ACT relating to crimes and punishments; clarifying the intent of the legislature in providing an additional penalty for the commission of a crime with the use of a deadly weapon.

[Approved May 15, 1975]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 193.165 is hereby amended to read as follows:

193.165 1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

2. *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.*

3. The provisions of this section [shall] *do* not apply where the use of a firearm or other deadly weapon is a necessary element of such crime.

TRANSCRIPT- ORAL ARGUMENTS
WOOFTER V. O'DONNELL

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TRANSCRIPT

Oral Arguments – For Cases #7939, #8124, and #8074 10/15/1975

JUDGE: "No.7939 Woofter v O'Donnell and 8074 Accairdi v Warden and 8124 Lamoreaux v the State of Nevada. Mr. Huffaker, you may proceed.

MR. HUFFAKER: May it please the court, my name is Stephen Huffaker, I'm a deputy public defender from Clark County, since these cases have been consolidated, I'm here on kind of an unusual assignment, I guess. Unique in the fact that I'm here as both appellant and responded. I'm respondent for Judge O'Donnell and what originally was the Dunkel case. The District Attorney has filed Petition on a Writ of Mandamus or in the alternative a Writ of Certiorari and I'm here as appellant in the Lamoureux case, which is our appeal, which was tried at trial by judge Babcock. I think your honors that our arguments will be somewhat the same, regardless of who I'm responding to, in judge Babcock's court, as far as Mr. Lamoreaux, our client, is concerned on this appeal. Mr. Lamoreaux was given sentences of 10 years consecutive, when the use of a deadly weapon statute was used and six years on another charge. In his honor judge O'Donnell's court, Mr. Dunkel was given probation and he is out on probation at this time, however I guess the point isn't entirely moot at this juncture, in as much as it would determine in case of a revocation, what sentence Mr. Dunkel would then be assigned. I think your honors, that my point of departure on this matter should be just explaining to this honorable court, Judge O'Donnell's position on this matter, and I think by explaining his position on this matter perhaps it will cover our appeal on Mr. Lamoreaux as well. We do not object to the principle of enhancement of penalty as far as NRS 193.165 is concerned, we feel that this is the right of the legislature to enhance any type penalty that they choose to do, but we do object to the manner in which the statute is being used by the state and we also submit your honors, that the statute is unconstitutional as written and it's unable actually, to be enforced, as it is written, and I would like to cover those two points. The statute in question of course is 193.165 the additional penalty on firearm deadly weapon or used in the Commission of a crime. The statute merely says that any person who uses a firearm or other deadly weapon in the Commission of a crime shall be punished by imprisonment in a state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crimes. Now I'd like to stop right there before I go on to the second sentence. This we feel, is unable to be accomplished, the terms of that statute are unable to be accomplished, because it says "shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such a crime. We submit your honors, that no term is prescribed by any statute in the Nevada statutory scheme, we give limits, we prescribe limits, that the court may determine to make a determinant sentence, but no term as prescribed by statute in our statutory scheme, and where this statute says "a term equal to and in addition to the term imprisonment prescribed by statute for such crime, it simply cannot be done. It should say "a term equal to in addition to the term of imprisonment the limits of which are prescribed by statute and term of which is determined by the court, after all these pre-sentence reports and circumstances of the case, and everything are taking into consideration. This specifically is not done and so, therefore this statue can't be carried out. The next sentence has the same fatal flaw, it says the sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crimes. That isn't what the statute meant to say either, we now know what the statute meant to say, because there's been an amendment to the statute in this last legislature. We know the statute meant to say that they meant to enhance the penalty by giving the term that the judge said in the sentencing with that the defendant was to have that term that he said would be added to the term of the basic crime, but that isn't what the statute says, and therefore we

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feel your honors, that the statute on its face, is unenforceable because the words simply do not say what the statute meant to say. Now there are lots of reasons for this and I guess the reason is because the legislature didn't anticipate that problem when they wrote it, and it was poorly drafted, but I think at this point your honors that it is our duty in the judiciary, the courts duty in the judiciary to send that back and have it drafted properly and have it drafted the way they mean to say it. We also think your honor that it is not, that this, the provisions of this statute cannot be carried out according to the statutory scheme of other statute, in the Nevada system, for instance NRS 176.033 says, is entitled sentence of imprisonment required or permitted by statute an indefinite period of time, this is the determinant sentence statute. It says where a sentence of imprisonment is required or permitted by statute the court shall sentence the defendant to imprisonment for a definite period of time within the maximum limit or the minimum-maximum limits provided by the applicable statute. This is where I gained my authority from your honors that this statute 193.165 cannot be carried out, because it says a term of years, provided by the statute and then you go right back to another statute 176.033 and it says the defendant shall be imprisoned for a definite period of time within the maximum limit, not a term, but the maximum limit or the minimum-maximum limits provided by the applicable statute. And then it says, take into the account of the gravity of the particular offense, and the character of the individual defendant. So, in this statue, it's giving the intent of what the legislatures meant when they said "we're not going to have indeterminant sentencing anymore, we're going to have determinant sentencing. We're not going to sentence the guy for 5 to 15 years or 1 to 15, we're going to give him 8 years" and the reason we want this to happen is that because we want the judge who has sat at trial who has, observed the demeanor and the character and the evidence that is all coming to say, this isn't in the hands of parole boards, it's in my hands and I determine this is an 8 year sentence. That's exactly what 193.165 on its face which that's exactly the thing that makes it unconstitutional we submit, is that it says that a definite limit and not, I mean an indeterminant limit and not a determinant sentence as 176.033 says that we must have, then we go down right to the next statute 176.035 and this is entitled conviction of two or more offenses concurrent and consecutive sentences and this says "except as provided in subsection 2 whenever a person is convicted of two or more offenses and sentence has been pronounced for one offense, the court and not by statute, the court in imposing any subsequent sentence may in its discretion provide that the sentence *substantively pronounce* shall run either concurrently or consecutively with the sentence first imposed. Now I submit your honors there is absolutely no way that Use of a Deadly Weapon statute can be, can be in concert with this statute, this statute specifically gives the judge, the trial court judge, the discretion of whether the sentences shall run concurrently or consecutively and 193.165 takes that discretion in the next breath right away from him and says the use of a deadly weapon, if found at trial or pled too, shall be a consecutive sentence and takes that discretion right away from him. We feel that this is a black and white contradiction taking a discretion that has been given in one statute away from him by taking it away in another statue and we feel that it is been done because of poor wording in the statute on one hand, but in this case, it's done because it's just a conflict in the statutes. Now once again this is probably done because of a press and rush of business in the legislature, but these statutes just weren't researched and found that there was a conflict in them. We feel then your honors in summary of this point we feel that number one, the statute is poorly written. The terms which it is used are legal terms they say certain legal things and they can't follow through on those things because it is poorly drafted. We feel as well that it wasn't researched for the conflict, and it is unable to be carried out because of conflict in the rest of the statutory scheme and we feel its vague, because it attempts to do too much. It attaches to each,

perhaps it should, each crime should list what it attaches to and not have one statue cover all crimes. For instance, in several other states, they say in the crimes of, and they list burglary, robbery, rape, arson, or whatever, and they say these are the things we want our deadly weapon statute to apply to. In our statute it just says "any felony where a deadly weapon is used" it probably won't, it probably is also vague for overdrafts, probably also unconstitutional for overdraft for that reason. For instance, if a deadly weapon was used in a trespass, would we apply the deadly weapon statute. If he was caught with a deadly weapon in a trespass or in any other crime that it, that usually aren't the crimes of violence that we attach deadly weapon statute to. I would like to quote now, if I can, from the brief of the state on page 4 of their brief, they quote State v Rose, and I would like to use the quote that they use, because I think it supports the position that I just outlined very well. It says from State v Rose, "the constitution does not require impossible standards as specificity in, in penal statutes the test of granting sufficient warning as to prescribe conduct will be met if there are well settled and ordinarily understood meanings of words employed when viewed in the context of the entire statutory provision" Now I submit your honor, that this hasn't been done in this case because the well settled and ordinary understanding of the meaning of the words is exactly what I'm talking about when I say the statute in question uses words that we all know what mean and by, and by using those words in the meaning that they are meant to be used that is a term as outlined by the statute, those words can't be applied, the ordinary meaning of the words can't be applied and then it says when viewed in the context of the entire statutory provision. Well, your honors when viewed in the context of the entire statutory provision 193.165 is in direct conflict with the rest of the statutory provision. So, by using the state's own justification, I feel that there's just no question that this statute violates the principle of vagueness and I'll show that it also violates the principle of due process. I'd like to bring up now if I may, for my own brief an example of how I feel it violates the principle of due process. The Dunkel case was pled, it didn't go to trial, and I will admit before I even read this, this repartee of the trial court in the pleading that this was early in the statute and so everyone didn't understand it, but I think it shows very clearly the pitfall, pitfalls that we can get ourseives into if we do not strike this statue down. This is from the transcripts of the Dunkel case, after the court told both council that it had in front of it, the companion case, not the case that was in front of it, the District Attorney said well it really doesn't matter which case you look at your honor, because they are both robbery's and they both amount to the same thing, so let's just go ahead with the case here, and then this following exchange took place, by the court. Then you're saying, and this is judge O'Donnell; "then you're saying your plea negotiation is that if he is willing to enter a plea to the charges contained on file in the information 28428.: Mr. Redmond the district attorney's office; "all of those charges, yes, your honor". By the court; "all of them, you talk like there is more than one count". By Mr. Redman: "well, the robbery with the use of a deadly weapon". By the court; "there is one crime on file here without any amendment to it, other than that, when you say: all the charges, that would indicate that there is more than one charge. There is only one charge here because he only had one count on the information". Mr. Redmond says; "I said that only your honor, so that it would be clear that the negotiation was a plea of the charge of robbery with the use of a deadly weapon". Then the court returns; "a plea of guilty to the charge on file here in a specified there is no amendment to it, it specifies the use of a deadly weapon because it has underneath the heading up there Use of Deadly Weapon NRS 193.165 although it had no count use of a deadly weapon down in the body of the information". Mr. Redmond says; "all right". Now by the above exchange, it appears everyone has reached an understanding of what this, what Mr. Dunkel is pleading to. The court has pointed out that the state has only charged one offense and the state has pointed out that although it's

not a penal statute

only charged one offense in the body that information it means that the enhancement penalty at 193.165 should be attached to it and they so indicated on the heading of their information, but then this next, this next exchange, I think is very important for the court to consider. By the court; "council have you informed the defendant of the penalty that can be imposed if I accept this plea of guilty?" Mr. Maynor; defense council says; "I have your honor, 1 to 15." By the court; "Is there any fine involved?" By Mr. Maynor; "no Sir, no fine." By the court; "Mr. Dunkel, are you aware if I accept your plea of guilty that you could be imprisoned in Nevada state prison for not less than one, nor more than 15 years?" By the defendant; "yes Sir." Now it's obvious you're honors that this statue is created some misunderstanding. We have a defendant standing here pleading to a charge that he thinks is going to be a maximum of 15 years, we have a judge sitting on our bench that thinks that, we have a defense counsel that thinks that, and we have a District Attorney standing there who lets it all happen, whether he thinks it or not. I have no idea but lets it all happen. Now it just so happens that Mr. Dunkel came back and was granted probation, but if he had been given 30 years, 15 and 15 there would be no question it's a violation of due process. if he had been given 8 years on the basic sentence, so that we had an 8 and 8, which totaled 16, there's no question, that would be a violation of due process, because he thought he was pleading to a maximum of 15 years. Now this is the misunderstanding that this statute is created, the District Attorney thinks it should be applied one way, trial, I mean defense counsel thinks it should be applied another way, and the trial court is up in the air and I submit that this isn't the first time, nor is it the last time that this sort of thing will happen, but it just happened, that on the very cases before us there is a definite violation of due process, had that sentence come back at more than 15 years, because no one understood it, and I think this happened your honors because the poor drafting of the statute itself. And if there are no questions on that, I would like to get on to my second argument and that concerns the manner in which the state is using this statue. First off, in summary, we think the statute is unconstitutional both on its face and as a violation of due process both for vagueness in violation of due process and secondly we think the manner in which the state is using it is also a violation to the defendants' rights and I don't know exactly where to put that violation of the defendants rights, but I'd like to show that it is a violation of them. The state insisted before this new clarification on the amendment came out that they only charge one offense on, when they use a deadly weapon statute, as it turns out, the new clarification of the statute says that they had been doing it right, they have only charged one offense. His honor Judge O'Donnell asked me to bring this argument before the court. Why is it a separate statute 193.165? And if it is a separate statute, how should it be pled? Now we have a defendant standing up here who has committed a robbery and the information says that he's used a deadly weapon. How are we to conduct a pleading? Are we to say, and he wants to plead to let's say the robbery, are we to say how do you plead to the robbery? And he says guilty or not guilty, or do we say; how do you plead to the robbery, and then say; how do you plead to the use of a deadly weapon? And let him make another response to that, or do we say; how do you plead to the robbery with the use of a deadly weapon? We have two statutes involved your honor. We don't only have one statue, so it creates a conflict in the trial judges mind to ask, to how to ask this defendant how he pleads. Whether he's to plea to one statute, to both statutes, or whether he pleads to robbery with the use of a deadly weapon, which is to combine the statutes. Now other states have solved this problem, as I said before, by putting the use of a deadly weapon in each one of the statues they meant to apply it to, like right in the robbery statue, at the end of the robbery statute they say "if a deadly weapon is used in the Commission of this crime then, and given an enhancement of penalty or they say it applies only to these certain specific crimes, but ours doesn't do that and therefore it creates a

problem, because of the way it's drafted. And then when you're asking the defendant, asking if he understands how, how, how the sentencing is to be, do you say; "do you understand that I could give you, now I'm the trial judge, do you understand that I could give you 1 to 30 years in Nevada state prison" is that what the trial judge is to say? Or is he to say; do you understand that I can give you two sentences... 1 to 15 years for the robbery and 1 to 15 years for the use of a deadly weapon? Or just how is he supposed to do it? It's not clear, because we don't have a definition of whether he's pleading to one sentence or whether he's pleading to two sentences at the time we take the pleading and we run into the same problem at sentencing whether when we go to trial. Judge O'Donnell also has the argument of this, and I brought this out in my brief. That if I was convicted of a crime, it's my first conviction, and under this statute I was given consecutive sentences and subsequently that's the only thing I've ever done wrong in my life and subsequently I go to another state and I get picked up for something that I got involved in, inadvertently, like I go to the aid of a young girl who's being raped and everyone takes off when the, when the police come and she thinks I'm part of it so she presses charges against me and I'm convicted inadvertent, on an inadvertent thing in another state and they see that I have a consecutive sentence back in Nevada, they see that I've been, I've been charged with a trespass with use of a deadly weapon, and I've been given a six month sentence for the trespassing, 6 month sentence for the use of deadly weapon, if that's possible, and I don't even know that it is and so they say that I have two convictions against me and their habitual criminal statute is the same as ours, that on three convictions you can have a habitual criminal charge placed against you, so they query Nevada and they just go through the NCIC or some other computer and they find that I do indeed do have consecutive sentences. How are they to take that, that I have one conviction or two? I think that anyone would assume that I have two convictions against me. I'm convicted under two statutes, but the statutory scheme says that I have only been convicted of one crime. I don't know that that's understandable by other states, and I think they might, just reading the printout on me, say that I have been convicted of two crimes, because I have a consecutive sentence on my record and thereby maybe put habitual criminal, habitual criminal charge against me. Now your honor, I think all of these things are made possible or impossible, as the case may be, because of the way this statute is worded, and I don't think that O'Donnell is the only one that's had problems with this statute. I know that judge Babcock did rule the other way on the statute after a hearing, but he had problems with it too and I think a lot of other judges have. We submit that the statute is unenforceable on its face, that it's in direct conflict with other statutes. And that the state perhaps in its use is made maybe the proper interpretation of it because that's the way the statutory, the new intent, the way it comes out now reads, that it is not a separate offense, but where you use two statues to complete one offense, it just creates doubt in the minds of everyone concerned, and I think that this statue, respectfully your honor, should be sent back to the legislature and have it written up the way they mean it, because it just creates doubt in the minds of all us and I think that, that's what we should do and I respectfully urge this court to do that.

JUDGE: Thank you, Mr. Huffaker. Mr. Cremen.

O.A.G. **MR. CREMEN**: Thank you, your honor. Honorable members of the court, counsel, ladies, and gentlemen, before the court are 3 cases, that brought by the Clark County District Attorney against Judge O'Donnell asking him to apply the statute in question NRS 193.165 against Mr. Dunkel, that brought by Mr. Lamoreaux an appeal for his conviction of Robbery with Use of a Deadly Weapon, and that brought by Mr. Accairdi in his motion or the Nile of his motion for modification of sentence before Judge Christiansen. Mr. Accairdi had been convicted of robbery with the use of a deadly weapon, received

consecutive, consecutive sentences for those charges subsequently filed a post-conviction petition asking that his sentence be modified because the second sentence was unconstitutional. Judge Christianson denied that, that relief and he filed his appeal; his appellate brief was filed by the State public defender. The three cases involved, one similar issue, one is the first effect of NRS 193.165 which as counsel has stated provides for an additional punishment when a deadly weapon is used during the Commission of another crime. I think councils' argument is predicated on the assumption that the statute, as originally written, created another and different offense which the state had to plead separately in another count, if you read his argument, he finds fault with the fact in Lamoreaux, that the information which read robbery with use of a deadly weapon and in the second, resisting arrest and resisting a peace officer, resulted in three sentences, he says because there were three sentences imposed, 3 charges had to be brought because there were only two counts and each charge must be pled in a separate count he is alleged that the state is violated the terms of the statute and of the constitution of the United states. I think a reading of the statute in question, NRS 193.165, will readily convince the reader, that it does not create a separate offense, it reads very briefly, "any person who uses a firearm, and this is the reading of the statute before it was amended by the legislature last summer, any person who uses a firearm or other deadly weapon in the Commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of the imprisonment prescribed by statute for such crimes, sentence prescribed by this section should run consecutively for the sentence prescribed by statute for such crimes." Now, when it was written, it was placed not in the *subject Crimes chapter, but in the chapter of NRS entitled Preliminary Provisions and it was titled that it was a statute to prescribe additional penalty when a deadly weapon was used, from the placement of the statute and from its title the clear, the intent of the legislature is quite clear, it was intended to enhance punishment, not create addition, an additional offense, but to enhance punishment when a deadly weapon was used in the Commission of another crime. This intent of the legislature was made even more clear this last legislative session where the legislature did amend the statute by adding a second provision to the effect that, the intent of the statute is to provide additional penalty and not to create a separate offense. With that understanding of the purpose of the statute and the effect of the statute, let's examine the cases before us, council finds fault with the fact, that judge O'Donnell, when he examined the statute, the information, saw that only one count was alleged, robbery with the use of a deadly weapon, that is the only count that had to be alleged. The state need not have, need not have pled a second count charging use with a deadly weapon independent of the robbery with, with the use of a weapon. It is quite clear from the effect of the statute and the purpose of the statute that only one count is to be pled. **JUDGE**: Now you say that, why would the effect, of the *end hit of the statute not be carried out by pleading separately? **MR. CREMEN**: Well, I believe. **JUDGE**: Wouldn't the penalty be enhanced in exactly the same way? **MR. CREMEN**: I believe they would and when the, when the statute first was passed the state had some problem with that and originally was pleading the statute in a separate count. We've since changed our application of the statute to plead it only in a single count. **JUDGE**: Initially, initially you thought that the statute was susceptible of the interpretation then that it was to be creating a separate crime, that's what you believed. **MR.CREMEN**: Well, I don't, I don't know that we believe that, so much as we were concerned with the fact of giving notice to the defendant that he was being charged not only with robbery or whatever the crime may have been, but also with the Use of a Deadly Weapon, thereby notifying him by his, that by his Use of a Deadly Weapon he was very likely to be, if convicted to be given an additional penalty at first, perhaps mistakenly, we chose to give him that notice by pleading it in a separate count the Use of a Deadly

Weapon statute, but after further study of the statute its title and its placement, we believe that the intend of the legislature was to in effect enhanced the penalty only and not to create an independent offense. So, originally to affect the notice provisions of due process, we did plead it in a separate count, since then, we have not. I believe the count against Mr., the case against Mr. Accairdi, did involve 2 counts, but the effect of the second count was to provide the individual defendant with notice. The fact of the matter is that the statute requires the state to give notice for due process purposes, but it does not require the state to plead the violation in a separate count. Now Mr. Huffaker complains or suggests that due process was violated at the time that Mr. Dunkel entered his plea for the fact that his counsel had advised him only that the robbery charge would result in a possible sentence of 15 years. Well, if that was in fact what Mr. Maynor advised his client, then Mr. Maynor was ill advised. He had not realized that the subsequent legislation had been passed and provided for an additional penalty. If those are the circumstances under which Mr. Dunkel entered his plea, due process may have been violated, because the plea was not knowing it intelligence, it was not violated if it were, by the effect of this statute, the statute gave him notice, we pled it very specifically. Now when we plead robbery, we don't plead also the penalty that is involved when a robbery is committed. We, we plead robbery and it is up to council to inform his client that, that the penalty for robbery is 15 years possibly. In this instance, it was up to council to inform his client that the possible sentence was 1 to 15 for robbery and, and additionally, a consecutive sentence of 1 to 15 for the Use of the Deadly Weapon in the Commission of the robbery. I think the case law throughout the country is rather clear. There are other states which have legislation quite similar to that which we have; California, Washington, and New Jersey notably have found that their statues are constitutional, they do not involve constitutional problems. The Supreme Court of Alaska, however, found that its statute was unconstitutional, not for violation of the United States Constitution, but for violation of that state's interpretation of its constitutional provisions against double jeopardy. But I might point out to the state, to the court, the statute involved in in the Alaska case made it quite clear from its context that the Use of a Deadly Weapon charge was in fact another offense that statute read; "a person who uses a, uses or carries a firearm during the Commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years, that was the distinction in those two statutes, in the in the Alaskan statue and in our statute it's quite clear, that in our case that this does not create an independent offense, it creates really or actually only an enhancement provision for a crime committed with the Use of a Deadly Weapon. I might point out that the language in the Alaska case, which I think is crucial is that, which I quote now, "this might be construed as showing that the legislature intended only to modify the penalty provisions of robbery and other crimes," this is referring to a, a legislative comment and offer crimes, in other crimes to provide for mandatory minimum sentences which were, where such crimes were committed by a person using or carrying firearm, on the other hand the committee report used the word offense in relation to the bill and the statute states that one who commits designated offenses while using or carrying a firearm, is guilty of a felony. This is an indication that the legislature did not really intend to provide for more severe penalties, which is our case, but contemplated that when one committed eg; a robbery while using or carrying a firearm, he would have committed an offense different from the crime of robbery, not involving a firearm. Well, that is not the case here. Our legislation is quite clear and in the recent amendment of the statue by the last legislature makes clear that the legislative intent was only to provide an enhancement of penalty. Now, Mr. Huffaker draws the attention of the court to, 2 statutes and says that NRS 193.165 somehow conflicts with those statutes. I respectfully suggest that there is no

conflict, that if there is a conflict, it is one of which Mr. Huffaker wants to read into the statutes, not one which is there by the action of the legislature, the two statues which he says conflict with NRS 193.165 are 176.035, which states that except as provided in subsection 2 whenever a person is convicted of two or more offenses and sentence has been pronounced before one offense, the court in imposing any subsequent sentence may, in its discretion, provided the sentences subsequently pronounced shall run either concurrently or consecutively with the first sentence imposed. The key word to that statute is two or more offenses. It is the position of the state that when the court implements NRS 193.165 and provides another consecutive sentence it does so, it does so by virtue of an enhancement provision for a single offense, two offenses are not involved, so this statute does not come into play and the judge is not robbed of any discretion because two offenses are not involved, rather the judge is following a legislative edict, which requires him, that when a felony is committed or a crime is committed with the use of a deadly weapon that he shall impose a second and consecutive sentence because of the use of that deadly weapon. The second sentence statutes which he claims the statute conflicts with is NRS 176.033 which reads "where a sentence of imprisonment is required or permitted by statute, the court shall sentence the defendant to imprisonment for a definite term, definite period of time within the maximum limit or the minimum and maximum limits provided by the applicable statute." Now because NRS 193.165 states that the punishment to be imposed by virtue of that statute shall be that prescribed by the statute, he finds fault and conflict. It is not the statute which prescribes punishment, Mr. Huffaker claims, but rather the judge. Well, I submit that the statute does prescribe punishment, a judge merely implements punishment, he imposes punishment, he does not prescribe punishment. The legislature determines what is the appropriate punishment in each and individual case of the crime if the judge does not impose a punishment such as the legislature has prescribed then he punished, punished, imposes a punishment which is illegal. He must follow the edict of the legislature and the legislature prescribes the term of punishment, the judge Merely imposes a sentence, and he determines the length of the sentence, but he does not prescribe punishment. Mr. Huffaker looks at the provision of a crime, such as robbery, which says; "that this crime shall be punishable by not less than one nor more than 15 years" and chooses to call that 'limits of punishment', rather than 'term of punishment', while I submit that it, is as easily accessible to the reading 'term' as is 'limits' it is a term of punishment, the length of that term is to be decided by the judge in the individual case, but he is to follow the edict of legislature in prescribing punishment. There is no conflict, only which, only that conflict which Mr. Huffaker chooses to read into the statute, the legislation can be read most reasonably without conflict. Now if he wants to inject conflict that's his prerogative, but this court must take that reading of the statute which can be most reasonably assumed and if it is a constitutional reading must take that reading, because it must presume that the legislature acted to, to pass constitutional legislation. He envisions also, with the, the statute that a due-process problem may well arise if the defendant is convicted of both Robbery and Use of a Deadly Weapon. Well, a conviction is not independent for each crime, the conviction is robbery with the use of a deadly weapon, true, two sentences are imposed, but the conviction is single. Robbery with the Use of a Deadly Weapon. Now, if in his hypothetical example, the state in which the second crime is allegedly committed, chooses to, to treat that man as an habitual criminal, they cannot prove that charge, because if they went to the state and asked for a certified and exemplified copy of the conviction they would soon realize that there was only one crime committed, Robbery with the Use of a Deadly Weapon, despite the fact that two sentences are imposed.

JUDGE: Well now, I'm not sure they would, in those cases, where you were charged with separate counts. How would they know that? They'd get a, they'd get a certified copy of the, of the initial

information that charged two crimes and they'd get a judgment that would reflect that he was sentenced on two crimes.

MR. CREMEN: I can see, I can see very well your honor's point, and it is one well taken and if that is in fact the case and I'm sure that it is in some instances, because I have personal knowledge that some of these crimes or some of these cases where a deadly weapon was used, were pled in two counts. Then I would suggest... **JUDGE**: We just confirmed one the other day. **MR.CREMEN**: I would suggest that, the problem is really a matter of form, rather than substance, and can be easily corrected by amending those Judgments of Conviction, and perhaps that is something that should be done, but because the state mispleaded in the past those cases I do not believe that a *substantive err* was committed rather is one of a matter of form which in a hypothetical, such as Mr. Huffaker envisions can possibly have an ill affect, but I would suggest that the problem can be remedied, not by throwing out the conviction, because all due process requirements were complied with, but rather by amending the Judgment of Conviction itself. I think it's problem, really that can be cured in that matter, it's not one of substance. For these reasons.... **JUDGE**: Is the district attorney's office gonna go back in and, and move to amend all of those judgments? **MR. CREMEN**: Well, if we were directed to do that by the court, I'm sure we would, it is a problem which I could bring up quite certainly, to the powers to be within my office and perhaps they would take some independent action. I don't know that we've ever had this problem, as I stated, that we may have once misread the statute to, to believe that it required pleading it two counts. I do not believe the traction, it's subsequent proper application and that is what we are concerned with in this case. It's proper application by the state, in these cases. For these reasons, I feel that the statute is more than proper, it does not at all create the problems which Mr. Huffaker envisions. It is constitutional, it is quite clear that it is meant only to enhance punishment that it does not do so, that the legislature did not choose to do that by stating that when a burglary is committed it, with a weapon, that it shall be punished more severely or that when a robbery is committed it shall be punished more severely or that when a rape is committed with the use of deadly weapon it should be punished more severely, but rather chose to, to make that same effect by implementing a single statute rather than multiple statutes is a matter of legislation, legislative discretion I submit and has been found appropriate by other courts dealing with these, with this identical issue. For these reasons we asked the relief prayed for by Mr. Lamoreaux and Mr. Accairdi, the denial not really be affirmed and that the relief which the state seeks against Judge O'Donnell be granted and that he be ordered to implement the statute. **JUDGE**: Thank you Mr. Cremen. Mr. Huffaker. **MR. HUFFAKER**: If I may just have a couple of minutes on rebuttal your honor. I'd like to point out a couple of things which I, which I think that I should point out. The state, in its breaking down of these statutes, which I have claimed are in conflict with the statute in question, I think is overlooked some wording in those statutes 176.033 which talks about the maximum limits and minimum limits of sentences, which the court is, is to look to, I think your honors, when the state says that, the court, that is the statute which prescribes the punishment, well, that is so obvious that it's hardly worth mentioning. Every criminal statute we all know prescribes punishment, but I think this is a crass attitude for the state to take to, to infer that a punishment of one year is the same as a punishment of two years, or the punishment of one year is the same as a punishment of 15 years. Yes, the statute prescribes punishments, but this statute 176.033 specifically, is entitled 'definite period of time' and it says it is up to the court, to prescribe within the maximum limits and minimum limits of the statute, a definite period of time and to say that isn't in conflict with the statute that says; a term prescribed by the statute, I think is, is wholly unreasonable. And the other one where were talking about, were talking about 193.165 where the state says, that it says two or more offenses and so,

therefore this 176.035 doesn't apply because it's not talking about two or more offenses, it's only talking about one offense. Well then, why does 193.165 use the word consecutively? If we're not talking, you know, if were only talking about one offense? Now I will submit that in this, in the new intent that has been submitted by this past legislature, that, that I agree we're talking about one offense now, but all, I'm also the thrust of my argument is talking about the wording of the statute in question and the wording is faulty and they shouldn't use the word consecutive with them, when they're talking about one offense, it's just an enhancement of penalty, just enhance it. A better reading would be Robbery at 1 to 15, Robbery with the Use of a Deadly Weapon 5 to 25 or whatever they want to use, but by using words like consecutively and giving those sentences, another state has no idea what we're using. And then I bring up the question, your honors, of also what if the defendant chooses to plead guilty to Robbery but chooses to plead not guilty to the Use of a Deadly Weapon. What do we do? Do we go to trial? I guess we have to under this scheme, but if it was better written, then we wouldn't have to because then he could plead to either two offenses, as perhaps, is the better way to do it or he could have to go to trial on the whole thing. So, I submit your honors, that the, the problem lies, and I think the state is skirted the problem, the problem lies in the wording of the statute and it's vague and it is contradictory and that's where the problem lies and that's the thrust of our argument. I respectfully submit your honors, that this is the place to do something about that wording and send it back to the legislature and get it cleared up. Thank you very much. **JUDGE**: Thank you Mr. Huffaker. Justice Thompson is ill this morning he will participate in the decision of this case on the briefs and on the record of the oral argument, that which has been transcribed. The case will stand submitted. The court will be in recess until 25 minutes of the hour.

(41)

ROY A. WOOFTER, District Attorney of Clark County, Nevada, Petitioner, v. THE HONORABLE THOMAS J. O'DONNELL, as District Judge, Eighth Judicial District Court, County of Clark, State of Nevada, Respondent
Supreme Court of Nevada
91 Nev. 756; 542 P.2d 1396; 1975 Nev. LEXIS 767
No. 7939
December 5, 1975

Editorial Information: Prior History

Original proceeding in mandamus/certiorari.

Disposition:

Writ of mandamus granted.

Counsel *Robert List,* Attorney General, Carson City; *George Holt,* District Attorney, and *Frank Cremen, Dan M. Seaton,* and *Sherman H. Simmons,* Deputy District Attorneys, Clark County, for Petitioner.

Morgan D. Harris, Public Defender, and *Stephen L. Huffaker,* and *Joseph T. Bonaventure,* Deputy Public Defenders, Clark County, for Respondent.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner district attorney, in an original proceeding, sought the issuance of a writ of mandamus directing respondent district judge to sentence a criminal defendant in accordance with the enhancement punishment provisions of Nev. Rev. Stat. § 193.165.District judge was directed to resentence a criminal defendant in accordance with a statute enhancing a penalty if a deadly weapon was used in an offense where the statute did not violate double jeopardy and was not unconstitutionally vague.

OVERVIEW: The legislature amended § 193.165 to create an additional penalty for a primary offense if a deadly weapon was used in the offense. The district judge sentenced a defendant who had entered a guilty plea to the crime of robbery with the use of a firearm. However, the district judge refused to impose an additional sentence because the defendant had used a firearm in the commission of the crime. The district judge ruled that § 193.165 was unconstitutional, concluding that § 193.165 imposed two penalties for one crime and that it was vague and uncertain. The district attorney, in an original proceeding, filed a petition seeking the issuance of a writ of mandamus directing the district judge to sentence the defendant according to § 193.165. The court granted the petition. The court reasoned that § 193.165 did not violate double jeopardy because it clearly did not create a separate offense but provided an additional penalty for the primary offense. Further, the court concluded that § 193.165 was not unconstitutionally vague. The court explained that § 193.165 defined a proscribed course of conduct for which a perpetrator may be imprisoned.

OUTCOME: The court granted the district attorney's petition in his proceeding seeking the issuance of a writ of mandamus directing the district judge to sentence according to the enhancement punishment statute.

LexisNexis Headnotes

Constitutional Law > Separation of Powers
Criminal Law & Procedure > Sentencing > Guidelines
Governments > Legislation > Enactment

The legislature has the power to declare certain conduct criminal and provide for its punishment. The power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Sentencing > Guidelines

Criminal statutes provide a single sentence of imprisonment for each distinct crime, and a defendant may not be punished more than once for the same offense.

Governments > Legislation > Interpretation
Governments > Legislation > Effect & Operation > Amendments

When a former statute is amended, or a doubtful interpretation rendered certain by subsequent legislation, such amendment is persuasive evidence of what the legislature intended by the first statute.

Criminal Law & Procedure > Sentencing > Adjustments
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements
Criminal Law & Procedure > Sentencing > Consecutive Sentences

Nev. Rev. Stat. § 193.165(1) reads thatany person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by Nev. Rev. Stat. § 193.165 shall run consecutively with the sentence prescribed by statute for such crime. Nev. Rev. Stat. § 193.165(2) reads that Nev. Rev. Stat. § 193.165 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. Nev. Rev. Stat. § 193.165(3) states that the provisions of Nev. Rev. Stat. § 193.165 does not apply where the use of a firearm or other deadly weapon is a necessary element of such crime.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Penalties
Governments > Legislation > General Overview
Governments > Legislation > Vagueness

The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the Due Process

Clause of the Fourteenth Amendment to the United States Constitution. The Constitution does not require impossible standards of specificity in penal statutes. The test of granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision.

Governments > Legislation > Interpretation

Where the intention of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not nullify its manifest purpose.

Opinion

Opinion by: PER CURIAM

Opinion

{91 Nev. 757}{542 P.2d 1397} Petitioner Woofter seeks in this original proceeding the issuance of a writ of mandamus directing the respondent district judge to sentence a defendant in accordance with NRS 193.165, commonly known as the enhanced punishment statute. 1 The district judge sentenced a defendant who had entered a plea of guilty to the crime of robbery with the use of a firearm to serve 8 years in the State prison, but suspended execution of the sentence for 5 years, during which period the defendant **{91 Nev. 758}** was placed on probation, serving the first 9 months in the county jail. The district judge refused, however, to impose an additional sentence because the defendant had used a firearm in the commission of the crime, declaring at the time of sentencing, ". . . [T]he other matter which called for the enhancement of the penalty under NRS 193.165, I am going to ignore it, as either unconstitutional or a Legislative encroachment on a judicial function." The district judge ruled that the statute was unconstitutional, "in that it calls for two penalties for one crime, and it is also vague and uncertain. . . ." 2

It is axiomatic that the Legislature has the power to declare certain conduct criminal and provide for its punishment. As early as 1820, in United States v. Wiltberger, 18 U.S. 76, 95 (5 Wheat.), Chief Justice Marshall declared: "[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."

It is also a fundamental concept expressed in criminal statutes providing a single sentence of imprisonment for each distinct crime that a defendant may not be punished more than once for the same offense.

Other jurisdictions having enhanced punishment statutes have considered and **{542 P.2d 1398}** ruled on the issue of whether such statutes **{91 Nev. 759}** place the defendant in double jeopardy. In People v. Henry, 91 Cal.Rptr. 841, 842-843 (Cal.App. 1970), the court resolved the question as follows:

". . . The fallacy of this contention is that section 12022.5 [of the California Penal Code] does not prescribe an offense. . . . Section 12022.5 merely provides additional punishment for an offense in which a firearm is used." 3

The California court further said, in People v. McDaniels, 102 Cal.Rptr. 444, 449 (Cal.App. 1972):

". . . That it [the Legislature] chose to accomplish its purpose through one rather than six amendments is not a valid reason for declining to carry out the legislative intent if that intent is clear, and if the

amendment is not invalid for other reasons. . . .

". . .

"We hold that the concern of the Legislature over the use of firearms in the commission of crimes, and its desire to deter the use thereof by increasing the penalties attendant upon this use constituted reasonable grounds for increasing the penalties theretofore provided for the crimes enumerated. . . ."

The State of Washington has an enhanced punishment statute. Wash. Rev. Code Ann. § 9.41.025 (Supp. 1974). 4 In {542 P.2d 1399} State {91 Nev. 760} v. Rose, 498 P.2d 897 (1972), the Washington Supreme Court rejected the argument that the statute posed a double jeopardy problem. The court ruled that the imposition of consecutive sentences resulting from the "use of firearms" statute was not objectionable, on the ground that all sentences resulted from the commission of a single act. Further, the court stated in Rose, 498 P.2d at 903-904:

"Neither do we find any merit in the defendant's contention that consecutive sentences are prohibited because they all result from the commission of a single act. The thrust of defendant's contention is that all of the counts charged amount to the commission of only one *offense*. The test to be applied to determine whether or not there is only one offense, is whether each count requires proof of an additional fact which the other does not. Blockburger v. United States, 284 U.S. 299 [parallel cites omitted] (1932). *See also* Gore v. United States, 357 U.S. 386 [parallel cites omitted] (1958)."

A New Jersey court also considered the double jeopardy {91 Nev. 761} issue in State v. Buffa, 168 A.2d 49, 52 (N.J.App. 1961), where the court held:

"The present claim that the indictment was defective is based on the contention that there was an illegal joinder or consolidation of two separate and distinct statutory violations within the one count of the indictment, namely, robbery . . . and being an armed criminal . . .

"As this court had occasion to say again only a few weeks ago, it is well settled that an indictment like the one here under consideration does not allege two separate crimes, but a single crime (robbery . . .) under circumstances which permit greater punishment for that crime . . .

"The sentences imposed by the court, being well within the maxima allowed under the respective two statutes, were proper. Any suggestion that defendant has been subjected to double jeopardy is without validity. He was punished for only one crime, robbery, for which he received an enhanced punishment because he used a revolver. That a statutory provision for the imposition of a greater sentence because of particular circumstances -- in this case, being armed while committing robbery -- is constitutionally proper, is too well settled to require discussion."

Finally, the Nevada Legislature on May 15, 1975, passed Assembly Bill 502, amending NRS 193.165. 5 The amendment {91 Nev. 762} was a tool of emphasis to clarify the original intent of the Legislature when it passed NRS 193.165, in 1973. It clearly states {542 P.2d 1400} that the section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of a prescribed fact. When a former statute is amended, or a doubtful interpretation rendered certain by subsequent legislation, it has been held that such amendment is persuasive evidence of what the Legislature intended by the first statute. Sheriff v. Smith, 91 Nev. 729, 542 P.2d 440 (1975).

In addition to his ruling that NRS 193.165 was unconstitutional because it placed the defendant in double jeopardy, the district judge held the statute void for vagueness. The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the due process clause of the Fourteenth Amendment to the United States Constitution. The Constitution does not require impossible standards of specificity in penal statutes. The test of granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinarily understood meanings for the words

employed when viewed in the context of the entire statutory provision. United States v. Brown, 333 U.S. 18, 25-26 (1948); United States v. Sullivan, 332 U.S. 689, 693-694 (1947). Under such a test, we are satisfied that the words "[using] a firearm or other deadly weapon in the commission of any crime [is punishable by imprisonment] equal to and in addition to the term of imprisonment prescribed by statute for such crime" define a proscribed course of conduct for which a perpetrator may be imprisoned. We do not find unconstitutional vagueness in the statute.

Where the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not nullify its manifest purpose. State ex rel. Barrett v. Brodigan, 37 Nev. 245, 141 P. 988 (1914); State ex rel. Mighels v. Eggers, 36 Nev. 364, 136 P. 104 (1913); In re Prosole, 32 Nev. 378, 108 P. 630 (1910).

We conclude that NRS 193.165 is constitutional and that the word "shall" embodied within it operates to make its use mandatory. We therefore order that a writ of mandamus issue, **{91 Nev. 763}** directing the respondent district judge to resentence the defendant in the case before the court, in accordance with the provisions of NRS 193.165.

Footnotes

1

NRS 193.165, prior to the 1975 amendment:

"1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

"2. The provisions of this section shall not apply where the use of a firearm or other deadly weapon is a necessary element of such crime." Stats. Nev. 1973, ch. 759, at 1593.

2

The judge, in passing on the constitutionality of the statute, said in part:

"If they [the Legislature] don't give us a new crime, then they put the Court in the awkward position, if it [the Court] follows the statute, to impose two sentences for one crime, and thus an individual stands convicted twice for the commission of one offense.

"I feel that there is something inherently wrong with this method of enhancing the criminal penalty, and that there are many other ways in which the penalties could be enhanced: They could go through the statutes -- take Robbery, Burglary, Rape, and set up specific penalty sections for those crimes when they were shown to have been committed with the use of a deadly weapon, or they could simply say that if during the course of a trial it was clearly demonstrated to the Court that the deadly weapon was used in the commission of such crimes, which ordinarily do not necessarily -- as one of their elements -- include the use of a deadly weapon, and have another penalty provision, but only one penalty and not two penalties for one crime.

"I feel that it is unconstitutional and I am taking this time to declare it so, so that in the event someone wants to attempt to clarify this matter or our Supreme Court [does], then they can study the provisions of NRS 193.165."

3

Section 12022.5 of the California Penal Code (West 1970) provides as follows:

Blacks law 2nd Ed. Prescribable adj. (of a right) that can be acquired by prescription
Merriam Web. Collegiate Dict. Prescribed v/b. 1. to lay down a rule; DICTATE 2. Title to something by right of prescription
Merriam Webster. Proscribe: To condemn Proscription: An imposed restraint

(46)

"Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, rape, burglary, or kidnaping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years. Such additional period of imprisonment shall commence upon expiration or other termination of the sentence imposed for the crime of which he is convicted and shall not run concurrently with such sentence.

"Upon a second conviction under like circumstances, the additional period of imprisonment shall be for a period of not less than 10 years, and upon a third conviction under like circumstances the additional period of imprisonment shall be for a period of not less than 15 years, such terms of additional imprisonment to run consecutively.

"Upon a fourth or subsequent conviction under like circumstances, the defendant may be imprisoned for life or a period not less than 25 years, in the discretion of the court.

"This section shall apply even in those cases where the use of a weapon is an element of the offense."
4

Wash. Rev. Code. Ann. § 9.41.025 (Supp. 1974):

"Any person who shall commit or attempt to commit any felony, or any misdemeanor or gross misdemeanor categorized herein as inherently dangerous, while armed with, or in the possession of any firearm, shall upon conviction, in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, be imprisoned as herein provided:

"(1) For the first offense the offender shall be guilty of a felony and the court shall impose a sentence of not less than five years, which sentence shall not be suspended or deferred;

"(2) For a second offense, or if, in the case of a first conviction of violation of any provision of this section, the offender shall previously have been convicted of violation of the laws of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than seven and one-half years, which sentence shall not be suspended or deferred;

"(3) For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the law of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than fifteen years, which sentence shall not be suspended or deferred;

"(4) Misdemeanors or gross misdemeanors categorized as 'Inherently Dangerous' as the term is used in this statute means any of the following crimes or an attempt to commit any of the same: Assault in the third degree, provoking an assault, interfering with a public officer, disturbing a meeting, riot, remaining after warning, obstructing firemen, petit larceny, injury to property, intimidating a public officer, shoplifting, indecent liberties, and soliciting a minor for immoral purposes.

"(5) If any person shall resist apprehension or arrest by firing upon a law enforcement officer, such person shall in addition to the penalty provided by statute for resisting arrest, be guilty of a felony and punished by imprisonment for not less than ten years, which sentence shall not be suspended or deferred."
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Stats. Nev. 1975, ch. 465, at 720:

"Assembly Bill No. 502 -- Assemblyman Dreyer

"CHAPTER 465

"AN ACT relating to crimes and punishments; *clarifying the intent of the legislature in providing an additional penalty for the commission of a crime with the use of a deadly weapon.* [Emphasis added.]

"The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

"SECTION 1. NRS 193.165 is hereby amended to read as follows:

"193.165 1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

"2. *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.* [Italicized material in this section was added by the 1975 amendment.]

"3. The provisions of this section [shall] *do* not apply where the use of a firearm or other deadly weapon is a necessary element of such crime." [In this section, the bracketed word "shall" was deleted, and the italicized material was added, by the 1975 amendment.]

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EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd Fl.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

September 1, 2021

Dear Sir or Madam:

Your copy request cannot be completed for the following reason(s):

_____ Case file is not available at this time.
____ Incorrect case number was provided.
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_____ Request is not legible.
_____ Insufficient information was provided.
X Other: We have searched the microfilm records for case C028424 and do not find a filed copy of an Amended JOC.

SEVEN

DR
IR, Deputy Clerk

(49)

FILED
Sep 27 11 44 AM '74
LORETTA BOWMAN
CLERK
BY Janet Cole

CASE NO. 28424

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,
Plaintiff,
-vs-
DAVID ELDON DUNCKEL
Defendant.

JUDGMENT OF CONVICTION

WHEREAS, on the 12th day of August, 19 74, Defendant DAVID ELDON DUNCKEL, entered a plea of guilty to the crime of ROBBERY, NRS 200.380, the above entitled Court thereafter, on the 19th day of September, 19 74, did adjudge the Defendant guilty by reason of his plea of guilty and sentenced Defendant to serve a term of eight (8) years in the Nevada State Prison, suspended, Defendant placed on probation for a period of five (5) years, to spend the first nine (9) months in the Clark County Jail, with no credit for time served.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 26th day of September, 19 74, in the City of Las Vegas, County of Clark, State of Nevada.

74-F-1234/sm
LVMPD DR#74-19157

DISTRICT JUDGE