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***Brooks v. State of Nevada*, 124 Nev. Adv. Op. Citation 19 (April 3, 2008)**

**Criminal Law – Deadly Weapon Enhancement for Unarmed Offender**

Summary

This is an appeal from a judgment of conviction of conspiracy to commit robbery and robbery with the use of a deadly weapon

Disposition/Outcome

Appellant James Brooks' judgment of conviction of conspiracy to commit robbery and robbery with the use of a deadly weapon is reversed and the matter is remanded to the district court for a new trial. The district court erred in refusing to instruct the jury what it was required to find to subject an unarmed offender to the deadly weapon enhancement. The district court further erred in refusing to instruct the jury that absent an agreement to cooperate in achieving a criminal purpose, mere knowledge of, acquiescence in, or approval of that purpose does not establish conspiracy.

Factual and Procedural History

On November 14, 2003, Christianne Davis arrived at her home and drove in the garage. Davis left the garage door open and when she exited the vehicle, she was confronted by a man with a gun standing in her garage. The armed man demanded Davis's purse and she gave it to him. The armed man exited the garage and ran towards a dark green Saturn near the driveway. The armed man got into the car which then sped away. Davis observed the driver of the getaway car, memorized the car's license plate number and called 911.

The police officers that responded to Davis's 911 call obtained the name and address of the owner of the dark green Saturn. James Brooks appeared at the address driving the dark green Saturn. He told police officers that he had possession of the car and no one else had driven before leading police officers to a dumpster containing Davis's purse.

Brooks was arrested and escorted to Clark County Detention Center. Brooks admitted to driving the getaway car, but refused to identify the gunman. Davis arrived at Clark County Detention Center shortly after Brooks' apprehension and identified him as the driver of the getaway car.

At trial, Brooks proffered a jury instruction that provided an unarmed offender is subject to the deadly weapon enhancement only if he had knowledge that the armed offender was armed and had the ability to exercise control over the weapon. The State offered a more general instruction that an unarmed offender's participation by aiding or abetting the armed offender in the unlawful use of the weapon subjects the unarmed offender to the deadly weapon enhancement. The district court accepted the State's instruction and expressed doubt that the State is required to prove that the unarmed offender had the ability to exercise control over the

weapon. The district court stated the focus should be whether the unarmed offender had knowledge that a weapon would be used during the commission of the underlying offense.

Brooks also proffered an instruction advising the jury that absent an agreement to cooperate in achieving a criminal purpose, mere knowledge of, acquiescence in, or approval of that purpose does not establish conspiracy. The district court refused to give the proffered jury instruction.

A jury found Brooks guilty of robbery with the use of a deadly weapon and conspiracy to commit robbery. Brooks appealed the conviction to the Nevada Supreme Court. Brooks' first main challenge to his conviction is that the district court erroneously refused to give an instruction offered by the defense regarding the circumstances in which an unarmed offender is subject to a deadly weapon enhancement. The second main challenge is that the district court erroneously refused to give an instruction that absent an agreement to cooperate in achieving a criminal purpose, mere knowledge of, acquiescence in, or approval of that purpose does not establish conspiracy. Brooks also advanced multiple other challenges to his conviction that were not addressed by the Court.

## Discussion

### A. *Deadly Weapon Instruction*

The Court begins its analysis of the deadly weapon instruction by stating that the constructive possession test in Brooks' proffered instruction is an accurate statement of current Nevada law. NRS 193.165(1) states that any person who "uses" a deadly weapon in the commission of a crime is subject to a sentence enhancement.<sup>1</sup> The Court cites *Anderson v. State*<sup>2</sup> for the proposition that an unarmed offender's participation by aiding and abetting an armed offender "in the unlawful use of the weapon, makes the [unarmed offender] equally subject to the assed penalty inflicted upon defendants who commit crimes through the use of deadly weapons." The Court in *Anderson* set forth scenarios where an unarmed offender could be subject to the sentence enhancement and the focus of the scenarios is on whether the unarmed offender had knowledge of the use of the weapon and his criminal acts were facilitated by the use of the weapon.

However, the *Anderson* Court went on to state that "the possession necessary to justify statutory enhancement may be actual or constructive; it may exclusive or joint."<sup>3</sup> Furthermore, constructive possession for the purposes of the deadly weapon enhancement requires that "the unarmed participant has knowledge of the other offender's being armed and [has] the ability to exercise control over" the weapon.<sup>4</sup> The Court noted two problems with the *Anderson* constructive possession test. First, NRS 193.165(1) requires "use" of a deadly weapon in the commission of an offense, not possession, so *Anderson*'s reliance on constructive possession was outside the statute's limits. Second, the control prong of the *Anderson* test can lead to absurd

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<sup>1</sup> NEV. REV. STAT. § 193.165(1)

<sup>2</sup> 95 Nev. 625, 630 (1979)

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

results depending on whether the unarmed offender could actually exert verbal or physical control over the weapon. For these reasons the Court explicitly rejected the constructive possession test in *Anderson* for the purposes of determining whether an unarmed offender is subject to an enhanced sentence for an accomplice's use of a deadly weapon.

The new test proffered by the Court is that to determine whether an unarmed offender is subject to an enhanced sentence under NRS 193.165, the appropriate test is whether the unarmed offender "used" the deadly weapon in the commission of the offense. An unarmed offender "uses" a deadly weapon and is subject to a sentence enhancement when the unarmed offender is liable as a principal for the offense that is sought to be enhanced. This occurs when another principal to the offense is armed with and uses a deadly weapon in the commission of the offense and the unarmed offender had knowledge of the deadly weapon.

The Court stated that the State presented evidence that Brooks drove the getaway car during the robbery and knew the location of Davis's purse. However, the State did not establish that Brooks had knowledge of the other offender's use of the gun. The Court instructed that the State must prove that Brooks is liable as a principal for the robbery, that another principal to the robbery was armed with and used a deadly weapon in the commission of the robbery, and that Brooks had knowledge of the use of the deadly weapon. The Court then found that the district court's error was not harmless.

#### *B. Conspiracy Instruction*

The Court stated that although the jury was instructed on conspiracy, "[a] positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased "position" or "theory" instruction."<sup>5</sup> Brooks presented the defense theory that he was present at the robbery but did not know a robbery was going to take place and did not conspire to commit it. The Court noted that there was little evidence in the record that Brooks conspired to commit the robbery other than his presence at the scene of the crime. The Court held that Brooks was entitled to the instruction that absent an agreement to cooperate in achieving a criminal purpose, mere knowledge of, acquiescence in, or approval of that purpose does not establish conspiracy. It was accurate statement of law and the evidence presented at trial could support his theory that he only learned of the robbery after it occurred. The Court ruled that this was not harmless error because the jury may not have convicted Brooks of conspiracy to commit robbery if it had heard his proffered instruction.

#### Conclusion

The Court clarified its test for determining when an unarmed offender is subject to a deadly weapon enhancement and overruled the *Anderson* constructive possession test. The Court held that the district court erred in refusing to give Brooks' proffered jury instructions on the deadly weapon sentence enhancement and conspiracy charge. The Court ruled that the district court's errors were not harmless. Accordingly, the Court reversed Brooks judgment of conviction and remanded the matter to the district court for a new trial.

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<sup>5</sup> *Crawford v. State*, 121 Nev. 744, 753 (2005) (quoting *Brooks v. State*, 103 Nev. 611, 614 (1987))