

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD DUNHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43311

FILED

OCT 06 2004

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

ORDER OF AFFIRMANCE AND LIMITED REMAND FOR
CORRECTION OF THE JUDGMENT OF CONVICTION

This is an appeal from an order of the district court denying a petition for a writ of mandamus and a writ of prohibition. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On February 26, 1993, appellant was convicted, pursuant to an Alford¹ plea, of one count of sexual assault as charged in Count I of the information. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. The judgment of conviction did not specify the amount of time that appellant would have to serve before he was eligible for parole.

On September 21, 2000, appellant filed a proper person petition for writ of mandamus and prohibition. The district court appointed counsel, and counsel supplemented the petition. The State opposed the petition. On May 3, 2004, the district court denied the petition. This appeal followed.

¹North Carolina v. Alford, 400 U.S. 25 (1970).

Appellant argues that the Parole Board acted beyond its scope of power when it reclassified his crime severity level in the parole likelihood success factor worksheet. Appellant argues that because the Parole Board originally considered appellant for parole after five years that his term for parole eligibility should be considered to be five years. Appellant argues that the Parole Board has since determined that his parole eligibility was in actuality ten years. Appellant argues that this new determination increased his sentence structure and violated his due process rights and constituted an ex post facto violation.²

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion.³ A writ of prohibition is the counterpart of the writ of mandamus.⁴ It serves to arrest "the proceedings of any . . . board . . . exercising judicial functions, when such proceedings are without or in excess of the

²Appellant appears to argue that the 1995 legislative amendments to NRS 200.266 that increased the parole eligibility terms for sexual assault caused the Parole Board to increase his parole eligibility term. See 1995 Nev. Stat., ch. 443, § 58, at 1186-87. There is no support for this argument. Appellant has not demonstrated any causal relationship between the 1995 legislative amendments to NRS 200.366 and the Parole Board's determination that appellant's minimum parole eligibility term was ten years.

³NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁴NRS 34.320.

jurisdiction of such . . . board"⁵ A writ of mandamus and a writ of prohibition may issue only where there is no plain, speedy, and adequate remedy at law.⁶ Petitions for extraordinary writs are addressed to the sound discretion of the court.⁷

In denying appellant's petition, the district court concluded that "there has been no unconstitutional infringement upon [appellant's] rights as alleged." Based upon our review of the documents presented, we conclude that the district court did not abuse its discretion in denying appellant's petition for extraordinary relief. Parole is an act of grace; a prisoner has no constitutional right to parole.⁸ The documents before this court indicate that appellant's parole eligibility term, which appears to have been inadvertently left off of the judgment of conviction, was a term of ten years and not five years as suggested by appellant.⁹ Thus, the

⁵Id.

⁶NRS 34.170; NRS 34.330.

⁷State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983).

⁸See NRS 213. 10705; Niergarth v. Warden, 105 Nev. 26, 768 P.2d 882 (1989).

⁹The fact that appellant appeared before the Parole Board after five years was a mistake made in his favor by the Parole Board. The documents before this court unequivocally demonstrate that appellant entered a plea to a sexual assault, the victim being a child under the age of fourteen years. The documents also demonstrate that appellant entered a plea with the understanding that he was to serve a minimum of ten years before he was eligible for parole. 1977 Nev. Stat., ch. 598, § 1, at
continued on next page . . .

Parole Board correctly determined appellant's crime severity level and did not impermissibly increase his sentence structure. The parole board's application of revised parole guidelines did not violate the Ex Post Facto Clause.¹⁰ The subject of parole is within the legislative authority.¹¹ The parole board properly applied the amended parole guidelines to appellant.¹² Appellant failed to demonstrate that a due process violation or the rule of leniency required extraordinary relief. Therefore, we affirm the district court's order denying extraordinary relief.

NRS 176.105, at the time appellant was convicted, required the judgment of conviction to include, in pertinent part, "a reference to the statute under which the defendant is sentenced and, if necessary to determine parole eligibility for parole, the applicable provision of the statute."¹³ Appellant's judgment of conviction failed to specify the parole

... continued

1627 (providing for a term of life with the possibility of parole after ten years if the victim of the sexual assault was under the age of fourteen). To the extent that appellant is attempting to challenge the validity of his judgment of conviction and sentence, this challenge is improperly raised in the instant petition for a writ of mandamus and prohibition. See NRS 34.724(2)(b); see also NRS 34.170; NRS 34.330.

¹⁰See generally *Vermouth v. Corrothers*, 827 F.2d 599 (9th Cir. 1987) (holding that federal parole guidelines were not laws for ex post facto purposes).

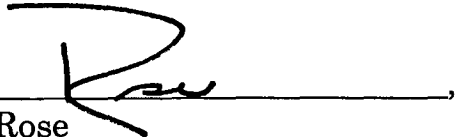
¹¹See *Pinana v. State*, 76 Nev. 274, 283, 352 P.2d 824, 829 (1960).

¹²See NRS 213. 10885(1), (5); NRS 213.1099(2); NAC 213.560(1).

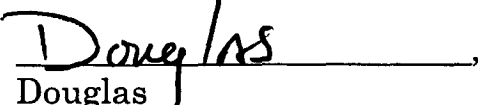
¹³See 1989 Nev. Stat., ch. 438, § 1, at 938.

eligibility term and that failure has caused confusion. Therefore, we direct the district court to enter an amended judgment of conviction which specifically sets forth a parole eligibility term of ten years and the applicable provision of NRS 200.366 under which appellant was convicted. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter for the limited purpose of correcting the judgment of conviction.

 J.
Rose

 J.
Maupin

 J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk