IN THE SUPREME COURT OF THE STATE OF NEVADA

BAILEY WILLOUGHBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45070

FILED

SEP 13 2005

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On June 20, 1979, the district court convicted appellant, pursuant to a guilty plea, of one count each of attempted sexual assault with the use of a deadly weapon and burglary. The district court sentenced appellant to serve two consecutive terms of twenty years in the Nevada State Prison for the attempted sexual assault conviction and a concurrent term of ten years for the burglary conviction. This court dismissed appellant's appeal from the judgment of conviction and sentence.[1] The remittitur issued on May 19, 1981.

[1]Willoughby v. State, Docket No. 12128 (Order Dismissing Appeal, April 30, 1981).

On October 6, 2004, and December 28, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a supplement to the petition in the district court. The State moved to strike or dismiss the petition. On January 21, 2005, appellant filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. After conducting hearings, on April 12, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the Nevada Department of Prisons (NDOP) failed to calculate his time correctly. Specifically, it appears that appellant argued that the NDOP has improperly treated his two consecutive twenty-year sentences as one forty-year sentence. Appellant further argued that based on his calculations he should have expired his sentence on November 30, 1997.

In Nevada Dep't Prisons v. Bowen, this court held that the penalties for a primary offense and a deadly weapon enhancement are separate and distinct and must be treated as separate sentences for all purposes.[2] Because this holding overruled prior decisions of this court, this court further held that such treatment of the sentences should be "applied retroactively to the extent possible, but in no case shall [it] be

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[2]103 Nev. 477, 481, 745 P.2d 697, 699 (1987).

applied to the detriment of any prisoner sentenced before the date hereof."[3]

Our review of the record on appeal reveals that when Bowen was decided, the NDOP had been treating appellant's sentences as a single forty-year sentence and appellant had already appeared before the parole board seeking parole on the forty-year term. If Bowen was applied to appellant, rather than being eligible for parole on his entire sentence, the next time appellant appeared before the parole board he would have only been eligible for parole on his first twenty-year sentence, and if granted, would have then started to serve his second twenty-year sentence. The NDOP therefore concluded that applying Bowen would have been detrimental to appellant and continued calculating his term as a single forty-year sentence.

Appellant failed to demonstrate that the NDOP's continued treatment of his sentences as a single forty-year sentence worked to his detriment or that he would have benefited by having his sentences calculated as two separate consecutive sentences of twenty years. Accordingly, we conclude that the district court did not err in denying appellant's claim.[4]

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[3]Id. at 481, n.4, 745 P.2d at 700, n.4.

[4]See Niergarth v. Warden, 105 Nev. 26, 768 P.2d 882 (1989).

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.[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[6]

Becker, C.J.
Becker

Rose, J.
Rose

Parraguirre, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Bailey Willoughby
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[6]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.