

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK LICON, AKA GORDON
NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46495

FILED

MAY 19 2006

ORDER OF REVERSAL AND REMAND

JANET M. DILLON
CLERK OF SUPREME COURT
[Signature]
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus filed in district court case numbers C196190 and C196194. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On July 29, 2004, the district court convicted appellant, pursuant to guilty pleas, of one count of possession of a controlled substance in district court case number C196194 and one count of possession of a controlled substance in district court case number C196190. The district court sentenced appellant to serve a term of 12 to 34 months in the Nevada State Prison for the conviction in district court case number C196194, to be served concurrently with the sentence imposed in district court case number C197353. The district court also sentenced appellant to serve a term of 12 to 34 months for the conviction in district court case number C196190, to be served concurrently with the sentence imposed in district court case number C197353 and consecutive to the sentence imposed in district court case number C196194. No credit was given in either district court case. Appellant did not file a direct appeal in either district court case.

On July 20, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in each district court case. Appellant filed a brief in the district court in support of his petitions. The State opposed the petition filed in each case. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 17, 2006, the district court denied appellant's petition in each district court case. This appeal followed.

In his petitions, appellant claimed that his trial counsel was ineffective for failing to effectively prepare for the sentencing hearing. Appellant claimed that his trial counsel's lack of preparation left him unable to cure the district court's misapprehension that the sentences for district court case numbers C196190 and C196194 had to be imposed consecutively when in fact there was no legal requirement that the sentences be imposed consecutively.¹ Appellant claimed that he would have received concurrent sentences absent counsel's deficient performance. Appellant further claimed that his trial counsel was ineffective for failing to ensure that he received the proper amount of presentence credits in each case—46 days in district court case number

¹Compare NRS 176.035(1) (providing that when a person is convicted of two or more offenses and sentence has been pronounced for one sentence, the court may order any subsequent sentence to be served concurrently or consecutively) with NRS 176.035(2) (providing that the district court may not impose a concurrent term for a person who under sentence of imprisonment for a felony commits another crime constituting a felony). It does not appear from the record that appellant was under a sentence of imprisonment when he committed the offenses in the instant cases.

C196190 and 77 days in district court case number C196194.² Finally, appellant claimed that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing hearing.

The district court denied the petition in part. Specifically, the district court found that appellant had failed to demonstrate that he would have been sentenced to concurrent sentences absent trial counsel's alleged deficient performance. However, the district court found that appellant did not receive all the credit for time served prior to March 24, 2004. The district court granted the petition in part and directed the State to determine the correct amount of credit and prepare an amended judgment of conviction. On December 6, 2005, the district court entered an amended judgment of conviction in district court case number C196190.³ Appellant was provided with forty days of credit. It appears from this court's review that no judgment of conviction has been prepared in district court case number C196194.

²Appellant based his claim for credits on the information set forth in the presentence investigation reports prepared in each district court case.

³The December 6, 2005 amended judgment of conviction was replete with sloppy drafting errors. The amended judgment of conviction states that appellant's sentence, which is not specifically set forth in the amended judgment of conviction, was suspended and appellant was granted probation. This is not correct. Further, the amended judgment of conviction in district court case number C196190 indicates that the judgment of conviction was amended pursuant to a hearing on a motion to correct or modify a sentence. This is not correct as the actual proceedings involve a post-conviction petition for a writ of habeas corpus filed pursuant to NRS chapter 34. Although appellant was seeking credit for 46 days in district court case number C196190, the amended judgment of conviction sets forth only 40 days of credit. The State, in its response to the order to show cause, indicates that the correct amount was actually 49 days of credits.

This court's preliminary review of this appeal revealed that the district court may have erred in its resolution of appellant's claims that his counsel was ineffective in failing to correct the district court's misunderstanding of the law and failing to ensure that appellant received the correct amount of credit. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different outcome absent counsel's deficient performance.⁴ Appellant was entitled to an evidentiary hearing if he raised claims that, if true, would entitle him to relief and if his claims were not belied by the record.⁵

Appellant's claim that his trial counsel failed to correct the district court's misapprehension of the law regarding the imposition of concurrent or consecutive sentences was not belied by the record, and thus, this court ordered the State to show cause why an order of remand was not appropriate. In its response, the State concedes that there was no statutory authority requiring the imposition of consecutive sentences in the instant case and that appellant's trial counsel was deficient in failing to correct the district court's misunderstanding that consecutive sentences were required in the instant case. However, the State argues that appellant's ineffective assistance of counsel claim must fail because he failed to demonstrate that he was prejudiced—that there was a reasonable

⁴Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

probability of a different outcome at sentencing if the district court had been informed that consecutive sentences were not required. The State argues that it is not reasonably probable that appellant would have received concurrent sentences because he committed roughly the same crime three times within a six-month period, he was on bail when he committed two of the offenses, and his criminal history revealed failures to appear and more serious offenses.

The district court's finding that the misapprehension of law did not make a difference in the imposition of concurrent or consecutive sentences in the instant case was not supported by an analysis of any facts in the order denying the petition. Although the State has set forth factors that the district court could have considered in sentencing appellant, the district court's order did not adopt any of these factors as the basis for determining that there was no prejudice in the instant case. Rather, the record before this court supports appellant's argument that he was prejudiced and that the district court at the time of sentencing may have imposed concurrent sentences absent its misapprehension that consecutive sentences were required. Judge Joseph Pavlikowski, the sentencing judge, in response to trial counsel's inquiry if the sentences were imposed concurrently stated, "[T]hese two have to run consecutive by law. But these two will run concurrent with Judge Mosley's case." In context, this statement appears to indicate that the district court may have considered concurrent sentences absent its mistaken belief that the law required the imposition of consecutive sentences. The district court did not state at sentencing that it would not consider concurrent sentences because of appellant's criminal record or the facts of the offenses in the instant cases. The district court did impose the instant sentences

concurrently with the sentence from the first conviction when presumably the district court was aware of the same factors that the State now argues would have caused the district court to impose consecutive sentences. Notably, pursuant to the written guilty plea agreement, the State actually agreed to not oppose concurrent sentences in the instant cases and the State's argument on appeal may be read as a potential breach of the plea agreement.⁶ Therefore, we reverse the decision of the district court denying this claim, and we remand this matter to the district court to conduct a new sentencing hearing.⁷

This court further ordered the State to show cause why the ineffective assistance of counsel claim relating to credits should not be remanded to the district court for further proceedings as it appeared that counsel was deficient in failing to ensure that appellant received the correct amount of presentence credit. The State concedes that an order of remand on the issue of credits is warranted. Because the issue of credits was not adequately addressed in the district court's order,⁸ we direct the district court to consider the issue of presentence credits at the new sentencing hearing. The judgments of conviction entered after the new

⁶However, in light of this disposition, no relief is warranted.

⁷The district court shall appoint new counsel to assist appellant at the sentencing hearing.

⁸The district court left the issue of credits to be decided by the State. However, given the confusion over the proper amount of credit, the district court should have decided the proper amount of credit after hearing arguments and reviewing supporting documentation.



sentencing hearing shall accurately set forth the amount of credits appellant was entitled to in each district court case.⁹

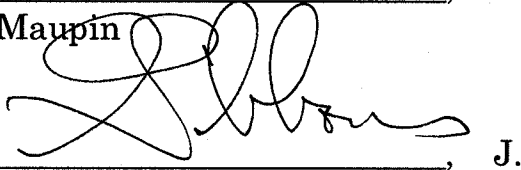
Finally, in light of this court's determination that a new sentencing hearing is required, this court need not address the issue of whether trial counsel was ineffective for failing to present mitigating evidence at the sentencing hearing.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.¹⁰ Accordingly, we

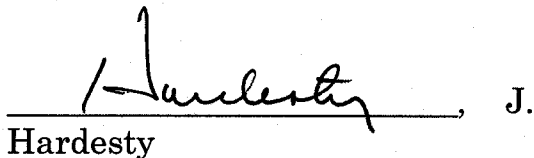
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹¹

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

⁹See NRS 176.055(1); NRS 175.105(1)(d).

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition in this matter. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Nancy M. Saitta, District Judge
Frank Licon
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk