

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK LICON A/K/A GORDON
NELSON,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, THE HONORABLE NANCY M.
SAITTA, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 47976

FILED

OCT 18 2006

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

ORDER GRANTING PETITION AND DIRECTING
DISTRICT COURT TO FILE RESPONSE EXPLAINING
DELAY IN COMPLYING WITH PRIOR ORDER OF THIS COURT

This is a proper person petition for a writ of mandamus.
Petitioner Frank Licon seeks an order directing the district court to

comply with this court's prior directives contained in an Order of Reversal and Remand entered by this court on May 19, 2006, in Docket No. 46495.¹

On July 29, 2004, the district court convicted Licon, pursuant to pleas of guilty, of one count of possession of a controlled substance in district court case no. C196190 and of one count of the same offense in district court case no. C196194. Senior Judge Pavlikowski presided over those proceedings and sentenced Licon to serve consecutive terms of 12 to 34 months in each case. Judge Pavlikowski ordered each consecutive term to be served concurrently with a separate sentence imposed against Licon in another criminal proceeding in district court case no. C197353.

Licon did not pursue direct appeals. On July 20, 2005, however, he filed proper person post-conviction petitions for writs of habeas corpus below alleging, among other things, that his counsel had rendered ineffective assistance during the sentencing proceedings in case nos. C196190 and C196194. Specifically, Licon alleged that his counsel had rendered ineffective assistance at the sentencing hearing by failing to correct Judge Pavlikowski's misapprehension that the sentences for case nos. C196109 and C196194 had to be served consecutively as a matter of law and by failing to ensure that Licon received the correct amount of credit for time served. District Judge Nancy Saitta presided over the post-

¹Licon v. State, Docket No. 46495 (Order of Reversal and Remand, May 19, 2006). We have appended a copy of that Order of Reversal and Remand to this order.

conviction proceedings and entered an order denying the petitions. Licon timely appealed Judge Saitta's order denying the petitions to this court.

On May 19, 2006, this court entered an order concluding that "the record before this court supports [Licon's] argument that he was prejudiced and that [Judge Pavlikowski] may have imposed concurrent sentences absent [his] misapprehension that consecutive sentences were required." Accordingly, this court reversed Judge Saitta's order denying Licon's post-conviction petition and remanded the matter to Judge Saitta for a new sentencing hearing.² This court further directed Judge Saitta to appoint counsel to represent Licon and to resolve any residual issues pertaining to presentence confinement credits at the new sentencing hearing.

On June 23, 2006, Licon filed a motion in the district court seeking the appointment of counsel for the new sentencing hearing in case nos. C196190 and C196194. In requesting the appointment of counsel for sentencing, Licon explained that this court's Order of Reversal and Remand of May 19, 2006, had specifically directed that "[t]he district court shall appoint new counsel to assist appellant at the [new] sentencing hearing." The documents presently before this court indicate that the State did not oppose Licon's motion. Nonetheless, the district court minutes indicate that on August 9, 2006, without Licon's presence, Judge

²Id.

Saitta denied Licon's motion on the ground that "there is no basis to appoint counsel."³

On September 5, 2006, Licon filed the instant petition for a writ of mandamus seeking an order of this court directing the district court to comply with our prior order of May 19, 2006. Licon complains that the district court has neither scheduled a new sentencing hearing, nor appointed counsel to represent him at that hearing.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion.⁴ A writ of mandamus will not issue, however, if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.⁵

In reviewing the documents presented to this court, it appeared that Licon presented an issue of arguable merit and that he may have no adequate remedy in the ordinary course of the law. Specifically, this court had previously reversed Judge Saitta's decision denying Licon's post-conviction habeas petitions in case nos. C196190 and C196194, and had directed Judge Saitta to conduct a new sentencing hearing and

³August 9, 2006, District Court Minutes.

⁴NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁵NRS 34.170.

appoint counsel to assist petitioner at that hearing. It does not appear that the district court has appointed counsel. Nor does it appear that Judge Saitta has scheduled a sentencing hearing. Notably, if the district court had conducted a timely sentencing hearing as directed in this court's order of May 19, 2006, and had resentenced Licon as he requested, *i.e.*, to serve concurrent rather than consecutive terms, Licon likely would have already discharged his sentences.⁶

Thus, on September 19, 2006, this court directed the State to file a response informing this court whether any action has been taken by the district court to comply with the Order of Reversal and Remand entered by this court on May 19, 2006, in Supreme Court Docket No. 46465, and if not, why this court should not issue a writ of mandamus compelling the district court to comply with that order. The State subsequently filed a timely response representing that no action had been taken pursuant to this court's Order of Reversal and Remand and that the State does not oppose issuance of a writ of mandamus in the instant case.


Based on the foregoing, we grant this petition. The clerk of this court shall forthwith issue a writ of mandamus directing District Judge Nancy M. Saitta: (1) to appoint counsel on or before October 30, 2006, to represent Licon at a new sentencing hearing; and (2) to schedule

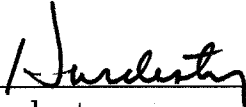
⁶We note that the concurrent terms as requested by Licon are not required but neither are they precluded by law.

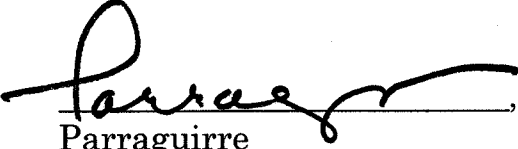
the new sentencing hearing to be conducted on or before November 30, 2006.

Additionally, based on the facts presently before this court, we are disturbed that apparently no action has been taken in the proceedings below to comply with the directives contained in this court's May 19, 2006, Order of Reversal of Remand. Accordingly, this court requests Judge Saitta to personally file a response in this court within 15 days of the date of this order recounting what facts and circumstances may explain the delay in the enforcement of this court's prior directives in this matter and to recommend steps to remedy and foreclose similar noncompliance in the future.

It is so ORDERED.


_____, C.J.
Rose


_____, J.
Hardesty


_____, J.
Parraguirre

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

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

Nancy M. Saitta
NANCY M. SAITTA
CLERK OF THE SUPREME COURT
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

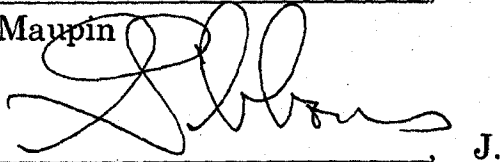
Finally, in light of this court's determination that a new sentencing hearing is required, this court need not address the issue of whether trial counsel was ineffective for failing to present mitigating evidence at the sentencing hearing.

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

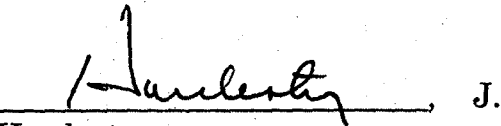
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹¹



Maupin



Gibbons



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