

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMY EARL COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48850

FILED

JUL 20 2007

ORDER OF AFFIRMANCE

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *A. Alvarado*
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 in district court case C134762. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On May 17, 1995, appellant was sentenced in district court case number C126718 to five years in the Nevada State Prison for burglary.¹ The sentence was suspended and appellant was placed on probation for a period not to exceed four years. Appellant's probation was subsequently revoked on November 25, 1996. In revoking probation, the district court executed the original sentence and provided appellant with 261 days of credit for time served.

While he was on probation in district court case number C126718, appellant committed a number of offenses. On February 18, 1997, the district court convicted appellant in district court case number C134762, pursuant to a jury trial, of three counts of burglary while in

¹It appears that the judgment of conviction memorializing this decision was entered on May 24, 1995.

possession of a firearm (counts 1, 4, 17), one count of battery with use of a deadly weapon, victim over the age of sixty-five years (count 2), one count of robbery with a deadly weapon, victim over the age of sixty-five years (count 3), five counts of robbery with the use of a deadly weapon (counts 5, 7, 8, 16, 18), three counts of battery with the use of a deadly weapon (counts 6, 11, 15), three counts of attempted robbery with the use of a deadly weapon (counts 9, 10, 14), one count of burglary (count 12), and one count of robbery (count 13).² The district court sentenced appellant to serve terms totaling approximately fifty to two hundred and twenty-five years in the Nevada State Prison.³ This court dismissed appellant's appeal from his judgment of conviction.⁴ The remittitur issued on April 25, 2000.

On April 25, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in district court case number C134762. The district court appointed post-conviction counsel, and counsel filed a supplemental petition. The State opposed the petition and supplemental petition. The first appointed post-conviction counsel withdrew, and new post-conviction was appointed and filed a second

²An amended judgment of conviction correcting a clerical error was entered on June 17, 1997.

³Notably, for discussion of appellant's claims, the district court imposed a sentence of twenty-six to one hundred and twenty months for count 1 and two consecutive terms of forty to one hundred and eighty months for count 3. The latter terms to run concurrently with the former term.

⁴Collins v. State, Docket No. 30653 (Order Dismissing Appeal, July 7, 1999).

supplemental petition. The State filed an opposition to the second supplemental petition. After conducting an evidentiary hearing, the district court denied all but one of the claims in the petition and determined that trial counsel was ineffective in relation to failing to file a motion to dismiss count 2. On January 3, 2003, the district court entered an amended judgment of conviction vacating count 2 and ordering that count 3 was imposed to run concurrently with count 1. This court affirmed the district court's denial of the remaining claims on appeal.⁵

On August 10, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in district court case number C134762. The State opposed the petition. Appellant filed a response. 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 December 29, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant challenged how the Nevada Department of Corrections [NDOC] calculated his sentence structure as set forth in the judgments of conviction in district court case numbers C126718 and C134762 and how the NDOC applied the credits for time served. Appellant claimed that the NDOC erroneously had him begin serving his sentences in C134762 prior to serving his sentence in district court case number C126718. Appellant claimed that he should receive the 261 days previously credited in district court case number C126718 in district court case number C134762 as well. Appellant claimed that these

⁵Collins v. State, Docket No. 41033 (Order of Affirmance, March 17, 2005).

mistakes have caused him to be deprived of earlier parole hearings and required him to serve beyond the statutory maximum.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition.⁶ By operation of law and pursuant to the judgments of conviction, the five-year sentence imposed in district court case number C126718 runs concurrently with counts 1 and 3 in district court case number C134762 (a term of twenty-six to one hundred and twenty months for count 1 and a term of forty to one hundred and eighty months for the primary offense in count 3).⁷ These sentences constitute the first level of appellant's sentence

⁶Appellant's claim regarding credits was a challenge to the validity of the judgment of conviction and sentence. This court recently held that a claim for presentence credit was a challenge to the validity of the judgment of conviction and sentence, and this challenge must be raised in a post-conviction petition for a writ of habeas corpus in compliance with the requirements of NRS chapter 34 that pertain to a petition that challenges the validity of the judgment of conviction. Griffin v. State, 122 Nev. ___, 137 P.3d 1165 (2006). Although appellant's petition was not in compliance with all of the requirements of NRS chapter 34, we conclude that appellant's claim for credits was properly considered on the merits because this court's holding in Griffin has prospective effect only.

⁷Because the judgment of convictions are silent as to whether district court case number C134762 runs concurrently with district court case number C126718 and because the offenses committed in district court case number C134762 were committed while appellant was on probation, the sentences by default would run concurrently in the instant case. See NRS 176.035(1) (providing that if the court makes no reference regarding concurrent or consecutive sentences, all such subsequent sentences run concurrently); NRS 176.035(2) (providing that when a person is a probationer at the time a subsequent felony is committed, the district court may run the terms concurrently with any prior terms).

structure.⁸ The NDOC has correctly determined that count 3 in district court case number C134762 is the controlling sentence for the first level of appellant's sentence structure because the term of forty months to one hundred and eighty months requires appellant to serve the longest period before being eligible for parole.⁹ Thus, the NDOC has correctly structured the sentences between district court case numbers C126718 and C134762. Consequently, appellant's claim that he was deprived of timely parole hearings as a result of the sentence structure lacked merit. Further, appellant is not entitled to have the credits awarded in district court case number C126718 applied in district court case number C134762 because those credits were pursuant to a judgment of conviction for another offense and appellant committed the offenses in district court case number C134762 while he was on probation in district court case number


⁸In referring to levels of sentence structure, the NDOC determines the level based upon the consecutive and concurrent nature of the sentences. One level would include all those sentences that are concurrent to one another. Additional levels are established with consecutive sentences. Thus, the deadly weapon enhancement for count 3, a term of forty to one hundred and eighty months, is the second level of appellant's sentence structure as the deadly weapon enhancement for count 3 will not begin until appellant expires or is paroled from the sentence for the primary offense in count 3.

⁹See NRS 213.1213 ("If a prisoner is sentenced pursuant to NRS 176.035 to serve two or more concurrent sentences, whether or not the sentences are identical in length or other characteristics, eligibility for parole from any of the concurrent sentences must be based on the sentence which requires the longest period before the prisoner is eligible for parole.").

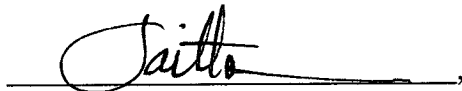
C126718.¹⁰ Appellant failed to demonstrate that he was required to serve beyond his statutory maximum, and therefore, we affirm the order of the district court denying appellant's petition.

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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

¹⁰See NRS 176.055(1) (providing that a defendant is entitled to credit for time spent actually in confinement before conviction unless the confinement was pursuant to a judgment of conviction for another offense); NRS 176.055(2) (providing that a defendant who is convicted of a subsequent offense which was committed while he was on probation from a Nevada conviction is not eligible for any credit on the sentence for the subsequent offense for the time he has spent in confinement which is within the period of the prior sentence).

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Eighth Judicial District Court Dept. 17, District Judge
Sammy Earl Collins
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk