IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
WARDEN, LOVELOCK CORRECTIONAL CENTER, JACK PALMER; AND NDOC DIRECTOR GLEN WHORTON,
Respondents.

No. 48865

FILED

JUL 17 2007

TE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus or alternatively, a writ of mandamus. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

On December 12, 2003, appellant was convicted of one count of indecent exposure and one count of open or gross lewdness in district court case number CR02-0147 in the Second Judicial District Court. The district court sentenced appellant to serve two concurrent terms of twelve to forty-eight months in the Nevada State Prison.

On February 11, 2004, appellant was convicted of one count of aiding and abetting in the commission of attempting to obtain money by false pretenses in district court case number CR02-0148 in the Second Judicial District Court. The district court sentenced appellant to serve a term of twelve to forty-eight months in the Nevada State Prison. The district court ordered that this sentence be imposed consecutively to the

sentence yet to be imposed in district court case number CR03-1263. The judgment of conviction was silent as to how the sentence in district court case number CR02-0148 should run with the sentence in district court case number CR02-0147.

On April 1, 2004, appellant was convicted of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making forgery or counterfeiting of inventory pricing labels in district court case number CR03-1263 in the Second Judicial District Court. The district court sentenced appellant as a habitual criminal and ordered appellant to serve a total of two consecutive terms of life in the Nevada State Prison with the possibility of parole. The sentences in this case were imposed to run consecutively to any other sentence appellant was serving.

On October 18, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the Sixth Judicial District Court. The State opposed the petition, and appellant filed a reply. On January 22, 2007, the district court dismissed the petition. This appeal followed.

In his petition, appellant claimed that the Nevada Department of Corrections (the Department) incorrectly structured his sentences. Specifically, appellant complained that the Department failed to treat his sentences in district court case numbers CR02-0147 and CR02-0148 as running concurrently with one another because the judgments of conviction were silent as to concurrent or consecutive sentences between these cases. Appellant complained that the Department incorrectly determined that the sentence imposed in district court case number CR02-

0148 should begin to run after the sentences in district court case number CR03-1263 because of the language in the judgment of conviction that stated district court case number CR02-0148 was imposed to run consecutively to district court case number CR03-1263.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing appellant's petition as there was no relief available in the Sixth Judicial District Court at the time appellant filed his petition. The Department reasonably attempted to effectuate the specific language in the judgments of conviction.

However, it does appear that there are structural problems inherent in the sentences as imposed in the judgments of conviction. First, the judgments of conviction in district court case numbers CR02-0147 and CR02-0148 are silent as to whether these sentences run concurrently or consecutively to one another. Pursuant to NRS 176.035(1), where a judgment of conviction fails to specify whether a sentence would run concurrently or consecutively, all subsequent sentences run concurrently. Therefore, the sentence imposed in district court case number CR02-0148 should be considered to run concurrently with district court case number CR02-0147.[1] Second, and more

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[1]See NRS 176.035(1); see also Forbes v. State, 96 Nev. 17, 604 P.2d 799 (1980). Contrary to the State's argument below that NRS 176.035(1) only applies to sentences within a single judgment of conviction, the provisions of NRS 176.035(1) relating to subsequent sentences apply to sentences in separate judgments of conviction as well. The State's reliance upon Powell v. State, 113 Nev. 258, 264 n.9, 934 P.2d 224, 228 n.9 (1997) to the contrary is misplaced.

importantly, the confusion regarding the sentence structure appears to reside within the judgment of conviction in district court case number CR02-0148. The language in the judgment of conviction in district court case number CR02-0148 states that this sentence runs consecutively to the sentence imposed in district court case number CR03-1263. However, at the time that the judgment of conviction in district court case number CR02-0148 was entered, there had been no sentence or judgment of conviction in district court case number CR03-1263. Thus, the district court should not have announced in district court case number CR02-0148 that the judgment of conviction was to run consecutively to district court case number CR03-1263 as that was beyond the district court's authority in that case.[2] Because the confusion appears related to a structural problem in district court case number CR02-0148, appellant should properly have sought to clarify the judgment of conviction in district court case number CR02-0148 in a motion filed in the Second Judicial District Court. The Sixth Judicial District Court had no authority to correct or modify the judgment of conviction of another district court and may only act to correct actions of the Department once the confusion in the judgments of conviction has been clarified by the Second Judicial District Court. Therefore, we affirm the order of the district court denying relief.

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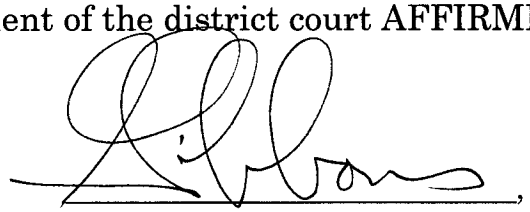
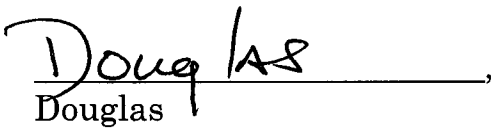
[2]See NRS 176.035(1) (implicitly recognizing that the authority to determine the concurrent or consecutive sentence structure lies with the district court judge who imposes the subsequent sentence).

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.[3] Accordingly, we

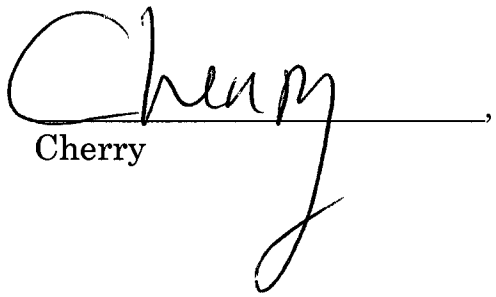
ORDER the judgment of the district court AFFIRMED.[4]



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. Richard Wagner, District Judge
Ferrill Joseph Volpicelli
Attorney General Catherine Cortez Masto/Carson City
Pershing County Clerk

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

[4]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. We specifically deny appellant's request to establish a briefing schedule.