

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEROY COLLINS,  
Appellant,  
vs.  
WARDEN, HIGH DESERT STATE  
PRISON, DWIGHT NEVEN,  
Respondent.

No. 49069

**FILED**

MAY 08 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying appellant Leroy Collins' petition for a writ of habeas corpus or, in the alternative, motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On February 21, 1989, the district court convicted Collins, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and three counts of sexual assault with the use of a deadly weapon.<sup>1</sup> The district court sentenced Collins to serve a term of ten years in the Nevada State Prison for burglary; fifteen years for robbery, plus an equal and consecutive term for the deadly weapon enhancement; and life with the possibility of parole for each count of sexual assault, plus equal

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<sup>1</sup>An amended judgment of conviction was entered on March 27, 1998, that corrected the date on which Collins entered his plea of not guilty.

and consecutive terms for the deadly weapon enhancements. All sentences were imposed to run consecutively. On September 27, 1990, the district court convicted Collins, pursuant to a plea of nolo contendere, of two counts of robbery.<sup>2</sup> The district court sentenced Collins to serve two concurrent terms of ten years, to be served concurrently with the previously imposed sentences.

On August 3, 2006, Collins filed a petition for a writ of habeas corpus or, in the alternative, a motion to correct an illegal sentence in the district court. The State filed an answer to the petition on November 30, 2006. The district court denied the petition on February 27, 2007. This appeal followed.

In his petition, Collins claimed that the Nevada Department of Corrections (NDOC) improperly structured his sentence in violation of his judgments of conviction. Specifically, he stated that when he was granted an institutional parole to his terms in this matter, the NDOC had him start serving his sentence for his first term of sexual assault rather than his term for the burglary and the two concurrent terms of robbery as required by his judgments of conviction. Collins asserted that the

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<sup>2</sup>The record indicates that the district court severed the charges against Collins and ordered three separate trials. Collins was found guilty by a jury on five counts as reflected in the first judgment of conviction. Thereafter, Collins pleaded guilty to two counts of robbery in exchange for the dismissal of the remaining charges and the dismissal of charges in two other cases.

improper application of his sentences has caused him to serve more time before he could be considered for parole in the instant matter.

This court's preliminary review of this appeal revealed that the district court may have erroneously denied Collins' petition without first conducting an evidentiary hearing. A petitioner is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims are not belied by the record.<sup>3</sup> It appeared that Collins' claim that the NDOC improperly structured his sentence was not belied by the record, and may, if true, entitle appellant to relief. Specifically, if the NDOC has caused Collins to serve his sentence for sexual assault prior to serving his sentences for burglary, robbery, and robbery with the use of a deadly weapon, this would violate the express provisions in the judgments of conviction. Collins provided sufficient facts that are unbelied by the record to place the burden on the State as the custodian of the relevant records to provide such records to rebut Collins' allegations.<sup>4</sup> Because the record contained no documentation that clearly indicated how the NDOC has applied Collins' sentences, it appeared that the district court may have erred in failing to hold an evidentiary hearing on this issue. Accordingly, this court ordered the State to show cause why this appeal should not be remanded to the district court for an evidentiary

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<sup>3</sup>See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

<sup>4</sup>Cf. Pangallo v. State, 112 Nev. 1533, 1537, 930 P.2d 100, 103 (1996).

hearing to determine how the NDOC has applied Collins' sentences and whether such application violates the express provisions in the judgments of conviction. The State has responded.

In the response, the State argues that in his petition below, Collins failed to allege facts that demonstrate either real harm or that support a violation of NRS 176.035, and therefore the district court properly denied relief without conducting an evidentiary hearing. The State does not dispute Collins' assertion that the NDOC is requiring Collins to serve his sentence for sexual assault before serving his sentences for burglary and robbery. Rather, the State argues that because all of Collins' sentences were imposed to run consecutively, Collins cannot demonstrate that he will suffer any harm by serving his sentence for sexual assault first. The State also argues that Collins' assertion that the improper application of his sentences will cause him to serve more time before he is eligible for parole is speculative because it is based on Collins' unfounded assumption that he will be granted parole on each of his sentences upon his first application to the Parole Board. Finally, the State argues that Collins' claim is premature because under the sentence structure ordered, Collins will have to serve approximately 45 years before he will be eligible for release to the streets on parole.

We conclude that Collins' claim that the NDOC is improperly applying his sentence is not premature because it challenges the actual application of the sentences he is currently serving and Collins provided sufficient facts in his petition to warrant an evidentiary hearing on this claim.

Pursuant to the judgments of conviction, it appears that Collins' sentences should be structured as follows:

10 years-burglary (cc 10 years-robbery) (cc 10 years-robbery)

CS

15 years-robbery

CS

15 years-deadly weapon enhancement

CS

6 terms of life-3 counts sexual assault with the use of a deadly weapon


Collins is entitled to serve his sentences in the manner they were imposed. If the NDOC is causing Collins to serve his sentence for sexual assault before serving the sentences for burglary, robbery, and robbery with the use of a deadly weapon, this would violate the express provisions in the judgments of conviction. The NDOC does not have authority to apply Collins' sentences in contradiction to the judgments of conviction. Further, we note that under the sentence structure imposed in the judgments of conviction, the district court provided Collins with the possibility of expiring his sentences on the lower counts while serving his sentences for the higher counts.<sup>5</sup> The improper application of Collins' sentences would foreclose this possibility. Therefore, we reverse the district court's denial of Collins' petition, and we remand this appeal to the

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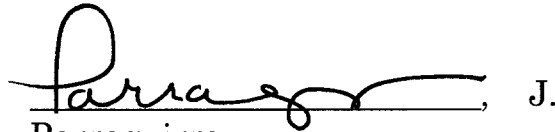
<sup>5</sup>This possibility is dependent upon Collins being granted parole on some or all of the lower counts.

district court for an evidentiary hearing to determine how the NDOC has applied Collins' sentences and whether such application violates the express provisions in the judgments of conviction.<sup>6</sup> Accordingly, we

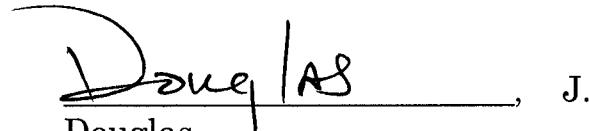
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>7</sup>

  
\_\_\_\_\_, J.

Maupin

  
\_\_\_\_\_, J.

Parraguirre

  
\_\_\_\_\_, J.

Douglas

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<sup>6</sup>In light of this order, we decline to address Collins' claim that he has not been properly scheduled for a parole hearing. If the district court determines that the NDOC has improperly applied Collins' sentences, the district court shall reconsider Collins' parole hearing issue.

<sup>7</sup>We have considered all proper person documents filed or received in this matter. We conclude that Collins is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Eighth Judicial District Court Dept. 6, District Judge  
Leroy Collins  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Las Vegas  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk