

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SMITH,
Appellant,
vs.
WARDEN, SOUTHERN DESERT
CORRECTIONAL CENTER, BRIAN
WILLIAMS,
Respondent.

No. 51107

FILED

SEP 25 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On July 16, 1987, the district court convicted appellant, pursuant to a jury verdict, of four counts of robbery with the use of a deadly weapon, one count of battery with the use of a deadly weapon, one count of battery, one count of conspiracy to commit robbery with the use of a deadly weapon and one count of burglary. The district court sentenced appellant to serve terms totaling 140 years in the Nevada State Prison.

¹On March 21, 2008, the Attorney General filed a motion to consolidate this case with appeals in Hoang v. Warden, Docket No. 50177; Dunckhurst v. Warden, Docket No. 50307; Player v. Warden, Docket No. 50402; Wesley v. Warden, Docket No. 50273; and Douglas v. Warden, Docket No. 50520. This court denies the State's motion to consolidate these appeals.

This court affirmed the judgment of conviction on appeal.² The remittitur issued on July 12, 1988.

On October 13, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 14, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the Nevada Department of Corrections improperly calculated his good time credits for the primary offenses and the deadly weapon enhancements based on separate sentences rather than one sentence, thereby applying this court's holding in Nevada Dep't Prisons v. Bowen³ retroactively and to his detriment. Appellant appeared to contend that prison officials should consider his sentence for the primary offense and his sentence for the deadly weapon enhancement as a single sentence for the purpose of computing good time credits.

In Biffath v. Warden⁴ and Director, Prisons v. Biffath,⁵ this court held that a sentence for a primary offense and an enhancement

²Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988).

³103 Nev. 477, 745 P.2d 697 (1987).

⁴95 Nev. 260, 593 P.2d 51 (1979), overruled by Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987).

⁵97 Nev. 18, 621 P.2d 1113 (1981), overruled by Bowen, 103 Nev. 477, 745 P.2d 697.

sentence must be treated as one continuous sentence for the purposes of computing good time credits and parole eligibility. In 1987, those decisions were overruled in Bowen.⁶ In Bowen, we concluded that the primary and enhancement sentences must be treated as separate sentences for all purposes.⁷ Because our decision in Bowen was not foreseeable, we directed that the opinion “be applied retroactively to the extent possible, but in no case shall this opinion be applied to the detriment of any prisoner sentenced before the date hereof.”⁸ In Stevens v. Warden, this court reaffirmed the principle that Bowen should not be applied retroactively to the detriment of a prisoner who committed his or her offense prior to this court’s decision in Bowen.⁹

Our review of the record on appeal reveals that appellant’s claim lacked merit. Preliminarily, we note that appellant failed to provide any explanation for his approximately 20 year delay in filing the instant petition and appears to have acquiesced to the Department’s treatment of his sentences. More importantly, appellant failed to establish that he was prejudiced by the application of Bowen to his case or that Bowen had even been applied. Appellant simply failed to provide any facts in his petition to indicate whether or not the application of Bowen would be to his detriment. Thus, appellant failed to support his claim with sufficient

⁶103 Nev. 477, 745 P.2d 697.

⁷Id. at 481, 745 P.2d at 699-700.

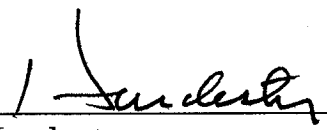
⁸Id. at 481 n.4, 745 P.2d at 700 n.4.

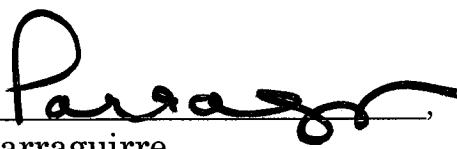
⁹Stevens v. Warden, 114 Nev. 1217, 1221-23, 969 P.2d 945, 948-49 (1998).

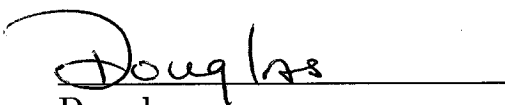
factual allegations which, if true, would have entitled him to relief.¹⁰ Therefore, the district court did not err in denying appellant's claim.

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.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Michael Smith
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Eighth District Court Clerk

¹⁰Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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