

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUANE WHITMORE,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
BILL DONAT,
Respondent.

No. 51119

FILED

OCT 21 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. First Judicial District Court, Carson City; James Todd Russell, Judge.

On January 18, 1978, the district court convicted appellant, pursuant to a jury verdict, of two counts of robbery with the use of a deadly weapon, one count of first-degree kidnapping with the use of a deadly weapon, and three counts of sexual assault with the use of a deadly weapon (Case No. 38926). The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison with the possibility of parole with additional sentences totaling 100 years. The remaining sentences were imposed concurrently. On February 2, 1978, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary, one count of robbery with the use of a deadly weapon, two counts of sexual assault with the use of a deadly weapon, and two counts of sexual assault (Case No. 38847). The district court sentenced appellant to serve four consecutive terms of life in the Nevada State

Prison with the possibility of parole with additional sentences totaling 100 years. The remaining sentences were imposed concurrently. The district court imposed the sentence in Case No. 38847 concurrently to the sentence imposed in Case No. 38926. Appellant did not appeal the judgments of conviction.

On December 3, 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 February 6, 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. Bowen¹ 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.

¹103 Nev. 477, 745 P.2d 697 (1987).

In Biffath v. Warden² and Director, Prisons v. Biffath,³ this court held that a sentence for a primary offense and an enhancement 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.⁴ In Bowen, we concluded that the primary and enhancement sentences must be treated as separate sentences for all purposes.⁵ 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.”⁶ 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.⁷

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 20-year delay in filing the instant petition and

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

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

⁴103 Nev. 477, 745 P.2d 697.

⁵Id. at 481, 745 P.2d at 699-700.

⁶Id. at 481 n.4, 745 P.2d at 700 n.4.

⁷Stevens v. Warden, 114 Nev. 1217, 1221-23, 969 P.2d 945, 948-49 (1998).

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 factual allegations, which if true, would have entitled him to relief.⁸ Therefore, the district court did not err in denying appellant's claim.

Moreover, we note that appellant's claim is moot. Appellant is now serving time on the life sentences and is required to serve a mandatory minimum sentence for parole eligibility on those sentences; thus, the application of good time credits will not affect his sentence.⁹ Furthermore, because appellant was sentenced to multiple terms of life in prison there is no maximum sentence to which good time credits could be applied.¹⁰ To the extent appellant contended that the application of Bowen to his case was to his detriment because he would have been eligible for parole sooner, we note that this claim is speculative, especially in the instant case, where appellant was previously denied parole.¹¹ Therefore, we conclude that the district court did not err in denying the petition.

⁸Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

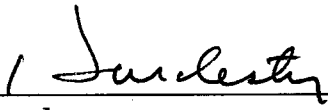
⁹See NRS 209.443.

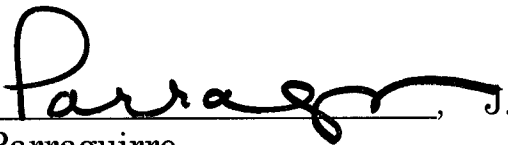
¹⁰See Hunt v. Warden, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995).

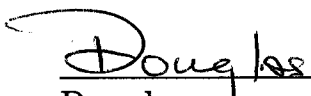
¹¹See Johnson v. Director, Dep't Prisons, 105 Nev. 314, 316 n.3, 774 P.2d 1047, 1049 n.3 (1989).

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. James Todd Russell, District Judge
Duane Whitmore
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).