IN THE SUPREME COURT OF THE STATE OF NEVADA

LESTER LEE TELLIS,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
BILL DONAT,
Respondent.

No. 51766

FILED

NOV 06 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 a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; William A. Maddox, Judge.

On July 2, 1987, the district court convicted appellant of one count of first-degree kidnapping with the use of a deadly weapon, two counts of robbery with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, one count of battery with the intent to commit a crime, one count of conspiracy to commit kidnapping and/or robbery, and one count of conspiracy to commit battery, robbery and/or murder. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after 5 years for the kidnapping count, two consecutive terms of 14 years for the robbery count, two consecutive terms of 17 years for the attempted murder count, 9 years for the battery count, two consecutive terms of 14 years for the second robbery count, 5 years for the conspiracy to commit kidnapping and/or robbery count, and 5 years for the conspiracy to commit battery, robbery and/or murder count. The district court

ordered all counts to run consecutively and provided appellant with 163 days of credit for time served.

On October 12, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On May 7, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant claimed that the district court had miscalculated his time for parole eligibility purposes. Appellant claimed that his sentences for the kidnapping count (the primary sentence and the deadly weapon enhancement sentence) should have been treated as one continuous sentence and not as separate sentences for purposes of determining parole eligibility. Thus, appellant argued that this court's holding in Nevada Dep't. of Prisons v. Bowen[1] was applied retroactively to his detriment. Appellant claimed that he should be granted immediate parole to his sentences for count 2 and be given credit for 3 years to count 2 based on the improper application of Bowen.

In Biffath v. Warden[2] 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

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[1]103 Nev. 477, 745 P.2d 697 (1987).

[2]95 Nev. 260, 593 P.2d 51 (1979).

[3]97 Nev. 18, 621 P.2d 1113 (1981).

[4]103 Nev. 477, 745 P.2d 697.

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 the district court properly denied appellant's claim for relief. 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.

Although appellant committed his offense and was sentenced four months prior to this court's decision in Bowen, appellant failed to demonstrate that the application of Bowen prejudiced him in the instant case. As the Bowen court noted, the vast majority of prisoners would benefit by the application of the decision in Bowen because for prisoners with multiple consecutive sentences, the decision in Bowen allowed a prisoner the possibility of serving some portion of consecutive sentences concurrently to one another due to the possibility of an institutional parole

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[5]Id. at 481, 745 P.2d at 699-700.

[6]Id. at 481 n.4, 745 P.2d at 700 n.4.

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

from a prior sentence to a subsequent sentence.[8] Appellant is one such prisoner that benefits from the application of Bowen. Appellant noted that he had been to the Parole Board in 1994, 1997, 1999, 2000 and 2003. Each of those was an opportunity for an institutional parole and to serve a portion of his sentence for the primary offense concurrently to the deadly weapon enhancement sentence. The fact that he did not receive parole on those occasions does not negate the benefit he received in the opportunity for parole. Appellant failed to demonstrate that any alleged delay in going before the Parole Board until 1994 was the result of the application of Bowen. Further, there is no statutory or case-law authority that would permit the Parole Board to grant a retroactive parole, and in light of the fact that the Parole Board did not grant appellant parole on those occasions appellant appeared before the Parole Board, the issue of retroactive parole was nothing but naked speculation.[9] Finally, the issue of statutory good time credits is patently without merit in the instant case as appellant's statutory good time credits are determined by NRS 209.446 (providing for a fixed, 10 days, amount of statutory good time credits per month) rather than NRS 209.443 (providing for a graduated scale of statutory good time credits based upon the length of time served).[10] Therefore the district court did not err in denying the petition.

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[8]Bowen, 103 Nev. at 480 n.2, 745 P.2d at 699 n.2.

[9]Niergarth v. Warden, 105 Nev. 26, 29, 768 P.2d 882, 884 (1989). Appellant's belief that he would have received an institutional parole from both of the sentences if combined under Biffath earlier is pure speculation.

[10]Stevens, 114 Nev. at 1223 n.6, 969 P.2d at 949 n.6. Further, we note that while statutory good time credits should be recorded for life

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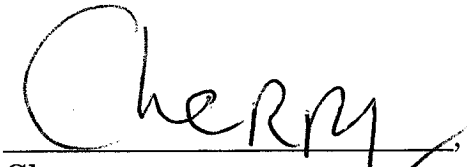
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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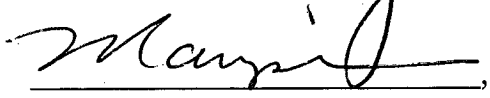

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cc: Hon. William A. Maddox, District Judge
Lester Lee Tellis
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk

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terms, those credits are not applied to life terms. See Hunt v. Warden, 111 Nev. 1284, 903 P.2d 826 (1995).

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