IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL MARTIN CASTRO,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 56688

FILED

MAR 17 2011

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

In his petition, filed on September 4, 2007, appellant claimed that the Nevada Department of Corrections (NDOC) improperly calculated his good time credits for his primary offenses and their attendant deadly-weapon enhancements based on separate sentences rather than one sentence, thereby applying this court's holding in Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987), retroactively and to his detriment. In Bowen, this court overruled Biffath v. Warden, 95 Nev. 260,

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

593 P.2d 51 (1979), and Director, Prisons v. Biffath, 97 Nev. 18, 621 P.2d 1113 (1981), and held that primary and enhancement sentences must be treated as separate sentences for all purposes. Bowen, 103 Nev. at 481, 745 P.2d at 699-700. This court further held that, because the decision was not foreseeable, Bowen should be applied retroactively but only in cases where doing so would not be to the detriment of the prisoner. Id. at 481 n.4, 745 P.2d at 700 n.4

Insofar as it relates to sentences from which he is already paroled or has already served, appellant's claim is barred by the equitable doctrine of laches. See Hart v. State, 116 Nev. 558, 563-64, 1 P.3d 969, 972 (2000). Appellant received a document in 2003 that indicated a change in the way that his sentence was being calculated. Appellant failed to explain his four-year delay in filing the instant petition to challenge that change, and the delay implied his acquiescence in how his sentences were being calculated. Moreover, even if appellant's claims were not equitably barred, no relief can be granted on past sentences as no statutory authority or case law permits a retroactive grant of parole. Niergarth v. Warden, 105 Nev. 26, 29, 768 P.2d 882, 884 (1989). Accordingly, we conclude the district court did not err in determining that no relief was warranted to the extent that past sentences were calculated pursuant to Bowen.[2]

Upon being paroled from his current sentence, appellant must serve one more sentence for robbery with use of a deadly weapon. As to

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[2]Appellant has already been before the Parole Board for the sentence he is currently serving, and it is therefore to his benefit not to change how his current sentence is calculated.

that sentence, the district court concluded that appellant's credits were being calculated pursuant to Bowen but that it was not to his detriment. The district court made no findings of fact on which it based its no-detriment conclusion, and the record on appeal contains no evidence to support it.[3] We therefore cannot affirm the district court's decision at this time. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). The district court exerted tremendous effort over a period of 17 months to obtain calculations from the State to support the decision to retroactively apply Bowen in appellant's case.[4] If after remand the State is unable to expeditiously provide the district court with a detailed, numeric analysis to support its decision, appellant shall be given the choice of which method, Biffath or Bowen, will be used to calculate his final sentence.

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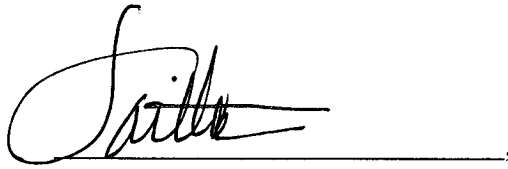
[3]In an attempt to justify its decision, an NDOC employee stated in an affidavit that it would be to appellant's benefit because he would parole faster from a 15-year robbery sentence to a consecutive 15-year deadly-weapon enhancement under Bowen than he would parole from a 30-year single, combined sentence pursuant to the Biffath decisions. As an inmate becomes eligible for parole after serving one-third of his sentence, NRS 213.120(1), and as one-third of one-half of a sentence will always be less than one-third of an entire sentence, NDOC's rationale is a mere tautology and does not necessarily demonstrate any benefit to appellant.

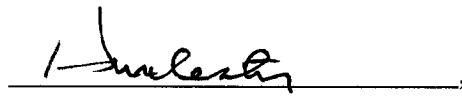
[4]It is generally appellant's burden to provide proof that applying Bowen is to his detriment. However, the record contains indications that appellant has tried to obtain the necessary documentation from NDOC to no avail. We note that, despite orders by the district court and the State's being in exclusive possession of the necessary data, the State has yet to provide any detailed analysis to demonstrate how applying Bowen would not be to appellant's detriment. Under these unique circumstances, we conclude that the burden of providing the evidence has been properly placed on the State.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Saitta



_____, J.
Hardesty

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Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
Miguel Angel Castro a/k/a Miguel Martin Castro
Attorney General/Ely
White Pine County Clerk