IN THE SUPREME COURT OF THE STATE OF NEVADA

LEROY COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57780

FILED

JUN 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus, or alternatively, a motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

In his petition and motion filed on August 3, 2006, appellant claimed that the Nevada Department of Corrections improperly structured the sentences imposed in district court case number C82510, requiring him to serve a life sentence for count 3 prior to serving consecutive terms totaling forty years for counts 1 and 2. The district court denied relief, appellant appealed, and this court remanded for an evidentiary hearing as the record lacked information about the Department's structuring of his sentences—a necessary and critical piece of information in resolving his claim. Collins v. State, Docket No. 49069 (Order of Reversal and Remand, May 8, 2008). The district court appointed counsel to assist appellant. The State conceded at a hearing on November 17, 2010, that the Department had structured the sentences to require count 3 to be served first, but argued that this was required by a second judgment of conviction entered on September 27, 1990, and NRS 213.1213. The district court,

hearing this concession, declined to conduct an evidentiary hearing and denied the petition.

The parties agree that the Department has not structured the sentences in order of the counts imposed, but disagree as to the prejudice appellant may have suffered and the remedy available, and whether the Department was permitted to structure the sentences out of order. We agree with the parties that the Department structured the sentences out of order, but our agreement with the parties at the broad premise.

It is clear from the documents presented to this court that the Department improperly calculated the sentence structure and that it is the two separate judgments of conviction entered in district court case number C82510 that has engendered the confusion in this case. In order to remove any confusion, we address below the pertinent procedural history as it informs the relationship between the two separate judgments of conviction in this case.

On February 25, 1988, a criminal information was filed charging appellant with 13 counts:

> Count 1: Robbery (December 26, 1987; J. Garrett)
>
> Count 2: Robbery (December 26, 1987; C.V. Jones)
>
> Count 3: Burglary (December 28, 1987; M. Walker)
>
> Count 4: Attempt Robbery (December 28, 1987; M. Walker)
>
> Count 5: First-Degree Kidnapping (December 28, 1987; M. Walker)
>
> Count 6: Burglary (December 31, 1987; R. Wilson)
>
> Count 7: Robbery with use of a Deadly Weapon (December 31, 1987; R. Wilson)
>
> Count 8: Sexual Assault with use of a Deadly Weapon (December 31, 1987; N. Wilson)

Count 9: Sexual Assault with use of a Deadly Weapon (December 31, 1987; N. Wilson)

Count 10: Sexual Assault with use of a Deadly Weapon (December 31, 1987; L. Kline)

Count 11: First-Degree Kidnapping with use of a Deadly Weapon (December 31, 1987; R. Wilson)

Count 12: First-Degree Kidnapping with use of a Deadly Weapon (December 31, 1987; N. Wilson)

Count 13: Sexual Assault with use of a Deadly Weapon (December 31, 1987; N. Wilson).

On April 27, 1988, the district court dismissed counts 5 and 10 pursuant to relief sought in a pretrial petition for a writ of habeas corpus. The district court also granted a motion to sever on that same date and ordered three separate trials: (1) Counts 1 and 2, involving J. Garrett and C.V. Jones; (2) Counts 3 and 4, involving M. Walker; and (3) Counts 6, 7, 8, 9, and 13, involving R. Wilson and N. Wilson.[1] The trial involving the latter counts, 6-9 and 13 proceeded first and an amended information was entered on December 12, 1988, renumbering these counts:

Count 1 (formerly Count 6): Burglary (December 31, 1987; R. Wilson)

Count 2 (formerly Count 7): Robbery with use of a Deadly Weapon (December 31, 1987; R. Wilson)

Count 3 (formerly Count 8): Sexual Assault with use of a Deadly Weapon (December 31, 1987; N. Wilson)

Count 4 (formerly Count 9): Sexual Assault with use of a Deadly Weapon (December 31, 1987; N. Wilson)

[1]On December 9, 1988, the district court dismissed counts 11 and 12.

Count 5 (formerly Count 13): Sexual Assault with Use of a Deadly Weapon (December 31, 1987; N. Wilson).

Guilty verdicts for each of these counts were returned by the jury and appellant was sentenced in a judgment of conviction entered on February 21, 1989:

Count 1: Burglary—10 years

Count 2: Robbery with use of a Deadly Weapon—15 years + 15 years, to be served consecutively to Count 1

Count 3: Sexual Assault with use of a Deadly Weapon—Life with the possibility of parole + Life with the possibility of parole, to be served consecutively to Count 2

Count 4: Sexual Assault with use of a Deadly Weapon—Life with the possibility of parole + Life with the possibility of parole, to be served consecutively to Count 3

Count 5: Sexual Assault with use of a Deadly Weapon—Life with the possibility of parole + Life with the possibility of parole, to be served consecutively to Count 4.[2]

This sentence was further imposed to run consecutively to his sentence in district court case number C36811.[3]

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[2]The minimum term to be served for purposes of parole eligibility for the sexual assault counts was 5 years. 1977 Nev. Stat., ch. 598, § 3, at 1626-27.

[3]An amended judgment of conviction was entered on March 27, 1998, correcting a typographical error. Notably, the sentences remained the same as set forth in the February 21, 1989, judgment of conviction.

After entry of that judgment of conviction, four counts remained unresolved from the original information (Counts 1 thru 4). In 1990, appellant entered a plea of no contest to Counts 1 and 2 of the original information—robbery counts involving J. Garrett and C.V. Jones. In exchange for his plea, the remaining counts (Counts 3 and 4, involving M. Walker), would be dismissed, as would cases C82173 and C82619. Appellant was sentenced as follows in a second judgment of conviction entered on September 27, 1990:

> Count 1: Robbery—10 years
>
> Count 2: Robbery—10 years, to be served concurrently with Count 1.

These sentences were ordered to run concurrently with the sentences previously imposed in this case (Counts 6-9 and 13 of the original information, which had been renumbered Counts 1 thru 5 in the first amended information) and Counts 3 and 4 from the original information were dismissed.

Contrary to the argument of the Attorney General below, which was accepted by the district court, Counts 1 and 2 from the September 27, 1990, judgment of conviction did not take the place of Counts 1 and 2 in the February 21, 1989, judgment of conviction. Counts 1 and 2 from the September 27, 1990, judgment of conviction were the counts set forth as Counts 1 and 2 in the original information. The confusion in this case seems to have arisen from the severance of the counts in the original information into three separate trials, the fact that counts 6-9 and 13 went to trial first, and the renumbering of counts 6-9 and 13 as Counts 1 thru 5 before that trial.

This confusion has caused the Department to eliminate Counts 1 and 2 from the February 21, 1989, judgment of conviction from

the sentence structure. This error is to appellant's benefit as it has eliminated 40 years from his sentence structure. Correcting the error made by the Department at this late date will cause significant detriment to appellant.[4] Under the unique circumstances in this case, given that the error was created by the Department and the State acquiesced to the sentence structure as made clear by the arguments made by the Attorney General's Office over the years, we decline to disturb the district court's determination to deny the relief sought in the petition. Appellant has not demonstrated that he is entitled to any relief based on the sentence structure calculated by the Department. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Saitta, J.

Saitta

Pickering, J.

Pickering

Hardesty, J.

Hardesty

cc: Hon. Doug Smith, District Judge
The Law Office of Dan M. Winder, P.C.
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

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[4]Correcting this error would require the Department to recalculate his sentence structure beginning with the omitted counts (Counts 1 and 2 from the 1989 judgment of conviction). Because retroactive parole dates are not authorized, appellant would have to expire each of these terms, minus any credits earned during these periods. It is possible that appellant would only be beginning his first life term if the sentences are restructured as imposed in the judgments of conviction.