

IN THE SUPREME COURT OF THE STATE OF NEVADA

MILO CASPER DERIJK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58179

FILED

SEP 14 2011

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

ORDER AFFIRMING AND VACATING IN PART
AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a no contest plea, of battery with the intent to commit a crime and being an ex-felon in possession of a firearm. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

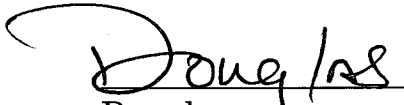
First, appellant Milo Casper Derijk contends that the district court erred by ordering the sentence imposed in the instant case to run consecutively to a sentence yet to be imposed in district court case number CR10-5768. We agree. In CR10-5768, Derijk pleaded guilty to a gross misdemeanor but sentencing was still pending at the time of sentencing in the instant case. We conclude that the district court abused its discretion by ordering the sentence imposed in the instant case to run consecutively to a sentence that did not yet exist. See Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000) (this court will not disturb a district court's sentencing determination absent an abuse of discretion). Therefore, on remand, we instruct the district court to vacate the portion of the judgment of conviction ordering the sentence to run consecutively to the sentence in CR10-5768.

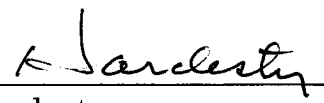
Second, Derijk contends that the district court erred by failing to award him credit for time served in presentence confinement. We agree. The judgment of conviction states that "credit for time served shall

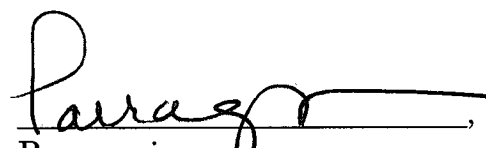
apply to the sentence in Case No. CR10-5768.” At the time Derijk committed the instant offense, however, he was not imprisoned or a probationer or parolee; and, prior to sentencing, he was not in custody pursuant to a conviction in CR10-5768 or any other case. In other words, Derijk was in custody solely because of the instant charges. As a result, we conclude that the district court abused its discretion by not awarding him credit for time served in this case from the date he was taken into custody until sentencing. See NRS 176.055(1); State v. Dist. Ct. (Jackson), 121 Nev. 413, 416, 116 P.3d 834, 836 (2005) (“[D]espite its discretionary language, the purpose of NRS 176.055 is to ‘ensure that all time served is credited towards a defendant’s ultimate sentence.’” (quoting Kuykendall v. State, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996))); see also NRS 176.055(2)(b); Parrish, 116 Nev. at 989, 12 P.3d at 957.

The presentence investigation report states that Derijk was taken into custody on August 19, 2010. Derijk’s sentencing hearing was held on April 4, 2011. Therefore, on remand, we instruct the district court to amend the judgment of conviction and award Derijk 228 days’ credit for time served. Accordingly, we

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

 _____, J.
Douglas

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk