IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY DEAN FUTCH,

Appellant,

vs.

WARDEN, LOVELOCK CORRECTIONAL CENTER, ROBERT LIPPOLD,

Respondent.

No. 35337

FILED

JUN 13 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On October 23, 1981, the district court convicted appellant of three counts of robbery with the use of a deadly weapon and one count of conspiracy to commit robbery. The district court sentenced appellant to serve two consecutive terms of 15 years in the Nevada State Prison for each of the three counts of robbery with the use of a deadly weapon. The district court also sentenced appellant to serve a prison term of four years on the conspiracy count, and ordered the sentences on each count to be served concurrently.

Appellant's direct appeal from his conviction was dismissed by this court. Hill v. State, Docket No. 13888 (Order Dismissing Appeal, August 31, 1983).[1] On February 1, 1996, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. On November 25, 1996, the district court denied appellant's petition, based on laches, without appointing counsel or holding an evidentiary hearing. On appeal, this court concluded the district court erred in finding that laches barred consideration of appellant's petition and remanded the matter for further proceedings. Futch v. Warden, Docket No. 29779 (Order of Remand, March 3, 1999). On August 26, 1999, and September 9, 1999, the district court conducted proceedings in which it considered the affidavit of a

[1]Appellant is also known as "Jimmy Hill," and was initially charged under that name.

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prison official and the arguments of counsel. On November 18, 1999, the district court entered an order denying appellant's petition. This appeal followed.

First, appellant contends the district court erred by failing to hold an evidentiary hearing. We disagree. The district court conducted proceedings sufficient to adduce facts demonstrating appellant was neither entitled to a full evidentiary hearing, nor to the relief requested in his petition.

Second, appellant contends the district court erred by failing to make required findings of fact and conclusions of law in denying his petition. See NRS 34.830(1). Appellant's contention is without merit. The district court's detailed four-page order denying the petition makes findings of fact and conclusions of law sufficient to satisfy NRS 34.830(1).

Third, appellant contends the district court erred in rejecting his contention that treating his fifteen-year sentences separately would be to his benefit rather than his detriment. See Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987). Appellant also contends NRS 213.1215 is a "mandatory release" provision and under that provision he would be entitled to release at an earlier date if his sentences were calculated as separate consecutive terms. We disagree.

Based on an affidavit from the custodian of records at the Nevada Department of Prisons, the district court found appellant had become eligible for parole to the streets at an earlier date because his sentences were treated by prison officials as one thirty-year combined sentence. Appellant had already become eligible for parole to the streets on his combined sentence before the Bowen decision was issued, and it would have been to appellant's detriment to recalculate the combined sentences as separate consecutive sentences.

In Bowen, we noted:

> [T]he prison officials and parole board have been treating the primary sentence and the enhanced sentence as one continuous sentence. Therefore,

> prisoners who have had their sentences enhanced pursuant to NRS 193.165 have not been granted institutional paroles. The result of converting these prisoners' sentences from a single sentence to separate consecutive sentences pursuant to this opinion might be to lengthen the actual time these prisoners will spend in prison because they did not receive the benefit of an institutional parole which would have allowed them to serve the bulk of their sentences concurrently. Because this opinion is not foreseeable based on our prior opinions, we conclude that it would be unfair to apply this decision retroactively to the detriment of any prisoner. Accordingly, this opinion shall 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.

Bowen, 103 Nev. at 481 n.4, 745 P.2d at 700 n.4. We further conclude the district court correctly rejected appellant's claim that NRS 213.1215 is a "mandatory release" provision.

As the district court correctly found, because appellant was already eligible for parole at the time we issued Bowen, applying Bowen retroactively would have been to appellant's detriment.[2] See also Niergarth v. Warden, 105 Nev. 26, 768 P.2d 882 (1989). Having concluded appellant's contentions are without merit, we

ORDER this appeal dismissed.[3]

Maupin, J.

Shearing, J.

Becker, J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
James Alan Wagner
Clark County Clerk

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[2]It appears appellant is currently incarcerated on a parole revocation and a sentence on another subsequent conviction. Further, we note appellant has been paroled in 1991, has violated his parole four times, and has had his parole revoked twice.

[3]We deny as moot counsel's motion of March 6, 2000, to withdraw as appellant's counsel.