IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MAURICE DEAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65624

FILED

OCT 15 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a no contest plea, of battery by strangulation. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Appellant argues that the district court erred by denying him additional presentence credit. Appellant was arrested on February 23, 2013, for burglary and forgery-related offenses. On June 6, 2013, he was released on his own recognizance. Approximately three weeks later, appellant was arrested for the instant offense and incarcerated. On December 26, 2013, he was sentenced for misdemeanor battery stemming from a July 2013 incident in the Elko County Jail. The district court awarded appellant 184 days' presentence credit for time served for the instant offense, accounting for time served between his arrest and the start of his sentence for misdemeanor battery.

Relying on NRS 176.055(2), appellant argues that he is entitled to an additional 103 days' presentence credit for time served while he was incarcerated for the burglary and forgery charges because those charges were dismissed pursuant to plea negotiations in the instant case. Appellant misapprehends the statute. NRS 176.055(2) provides in part

that a defendant convicted of a subsequent offense that is committed while he is "[i]n custody on a prior charge is not eligible for any credit on the sentence for the subsequent offense for time the defendant has spent in confinement on the prior charge, unless the charge was dismissed or the defendant was acquitted." That provision does not apply here because appellant had been released on his own recognizance on the burglary and forgery charges when he committed the instant offense and was therefore not in custody. Consequently, the dismissal of the burglary and forgery charges pursuant to his no contest plea was immaterial to the presentence credit calculation. Appellant's argument that his own-recognizance release constituted constructive custody is unavailing, *see generally*, *State v. Second Judicial District Ct.*, 121 Nev. 413, 418-19, 116 P.3d 834, 837 (2005) (concluding that house arrest does not constitute time "actually spent in confinement" such that duration of sentence may be credited pursuant to NRS 176.055), and he has tendered no relevant authority supporting his contention.

"Only incarceration pursuant to a charge for which sentence is ultimately imposed can be credited against that sentence." *McMichael v. State*, 94 Nev. 184, 194, 577 P.2d 398, 404 (1978), *overruled on other grounds by Meador v. State*, 101 Nev. 765, 711 P.2d 852 (1995) and *abrogated on other grounds by Braunstein v. State*, 118 Nev. 68, 40 P.3d 413 (2002); *see* NRS 176.055(1) (providing in relevant part that "whenever a sentence of imprisonment . . . is imposed, the court may order that credit be allowed against the duration of the sentence, including any minimum term . . . for the amount of time the defendant has actually spent in confinement before conviction"). Because appellant was properly awarded credit attributable to his presentence incarceration for the instant offense,

the district court did not abuse its discretion by denying him additional credit. *See Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998) (observing that this court will not disturb district court's sentencing decision absent abuse of discretion). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Nancy L. Porter, District Judge
Gary D. Woodbury
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk