

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
RONALD EUGENE MIDBY,
Respondent.

No. 72998

FILED

SEP 14 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

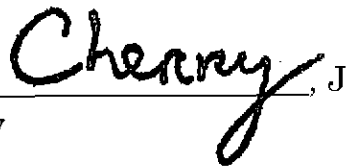
ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a postconviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

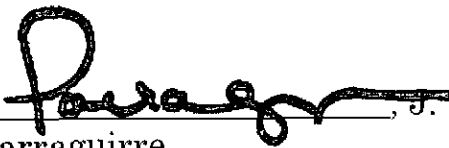
Respondent Ronald Midby filed a petition challenging the Department of Corrections' decision to deny his request to aggregate his consecutive sentences imposed in separate judgments of conviction. The district court granted the petition, determining that the plain language of NRS 213.1212(3) permits an inmate to request that consecutive sentences be aggregated except as provided by NRS 176.035(3), an exception that did not apply in this case. The State appeals that decision and argues that the Department may only aggregate consecutive sentences imposed in a single judgment of conviction. Having reviewed the briefing and documents submitted in this matter, we agree with the reasoning in the attached district court order. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry

 J.

Parraguirre

 J.

Stiglich

 J.

18-35944

cc: Hon. Gary Fairman, District Judge
Attorney General/Carson City
Attorney General/Ely
Gallian Welker & Beckstrom, LC/Las Vegas
White Pine County Clerk

FILED

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DEPUTY

Case No. HC-1608026

Dept. No. 2

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APR 7 2017

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

RONALD MIDBY,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

**ORDER DENYING MOTION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS;
ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS**

PROCEDURAL HISTORY

Petitioner Ronald Midby ("Midby") is an inmate currently incarcerated by the Nevada Department of Corrections ("NDOC") in the Ely State Prison in White Pine County, Nevada. Midby was sentenced in four separate cases arising out of Clark County. The parties do not dispute that Midby had not yet been sentenced at the time Midby committed any of the crimes in the four cases. Midby was first sentenced on April 30, 2009, by Judge Donald Mosely in C252014 ("Case 1") to 5-20 years. Midby was sentenced on May 7, 2009, by Judge Douglas Herndon in C247828 ("Case 2") to 5-20 years, to be served consecutive to Case 1. Midby was sentenced on January 6, 2010, by Judge Douglas Smith in C254735 ("Case 3") to 10-25 years, to be served concurrent to Cases 1 and 2. Midby was sentenced on February 17, 2010, by Judge

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



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1 Douglas Smith in C261607 to 10-25 years, to be served concurrent to Cases 1, 2, and 3. NDOC
2 initially, in 2010, calculated Cases 1, 3, and 4 as a single concurrent 10-25 year sentence. Case 2
3 was to be served consecutive to this as a 5-20 year sentence.

4 In May 2013, the Nevada Legislature passed SB 71, which was made effective on July 1,
5 2014. SB 71 revised NRS 176.035 and required courts imposing consecutive sentences on or
6 after July 1, 2014, to "pronounce the minimum and maximum aggregate terms of imprisonment
7 pursuant to subsection 2." The revised NRS 176.035(2) provides that in cases without a sentence
8 of life imprisonment, "the court must aggregate the minimum terms of imprisonment to
9 determine the minimum aggregate term of imprisonment and must aggregate the maximum terms
10 of imprisonment to determine the maximum aggregate term of imprisonment." SB 71 also added
11 NRS 213.1212, which provides that "[e]xcept as otherwise provided in subsection (3) of NRS
12 176.035, a prisoner who is serving consecutive sentences which have not been aggregated may,
13 by submitting a written request to the Director of the Department of Corrections, make an
14 irrevocable election to have the sentences aggregated. If the prisoner makes such an irrevocable
15 election to have the sentences aggregated . . . the Department of Corrections shall aggregate the
16 sentences in the manner set forth in NRS 176.035."

17 In June 2014, Midby made a written irrevocable request to the NDOC Director to
18 aggregate his sentences. Midby's consecutive sentences were originally aggregated, but this
19 initial decision was overturned on April 30, 2015, on the basis of the Attorney General's opinion
20 that SB 71 did not apply to sentences received in separate cases. Midby filed a petition for writ
21 of habeas corpus ("petition") in the Eighth Judicial District Court on April 6, 2016. On April 15,
22 2016, the State filed a motion to transfer petition for writ of habeas corpus to White Pine County.
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1 Midby filed an opposition and the State filed a reply. Judge Douglas Herndon held a hearing on
2 the issue on April 21, 2016. On May 18, 2016, an order, drafted by the Attorney General, was
3 entered transferring the case to Lincoln County. On August 15, 2016, a stipulation and order to
4 transfer this case to White Pine County was entered. This Court entered an order to respond on
5 August 30, 2016. The State filed a motion to dismiss petition for writ of habeas corpus on
6 October 13, 2016. Midby filed an opposition to motion to dismiss petition for writ of habeas
7 corpus on October 21, 2016. The State filed a request for submission on November 17, 2016.
8 No further briefing or oral argument is required by the court.¹

11 DISCUSSION

12 A petition for writ of habeas corpus is the appropriate and exclusive vehicle for an inmate
13 "to challenge the computation of time that the person has served pursuant to a judgment of
14 conviction."² When courts are asked to interpret the meaning of statutes, "[i]t is well settled in
15 Nevada that the words in a statute should be given their plain meaning unless this violates the
16 spirit of the act."³ "Where a statute is clear on its face, a court may not go beyond the language
17 of the statute in determining the legislature's intent."⁴

18 Although the State tries to contort NRS 176.035 and NRS 213.1212 into something
19 confusing enough to require legislative interpretation, both statutes are facially clear. NRS
20 213.1212 permits any inmate serving consecutive sentences to aggregate them in the manner set
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24 ¹ 7JDCR 7(t1).

² NRS 34.724(2)(c).

³ *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 433, 441 (1986) (citing *Application of Filippini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949)).

⁴ *Id.* (citing *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, 99 Nev. 443, 664 P.2d 957 (1983)).



1 forth in NRS 176.035. The only exception is when a person commits another felony while
2 "under sentence of imprisonment for committing a felony," in which case the new felony may
3 not be aggregated with the prior felony.⁵ The NRS 176.035(3) exception is not relevant to this
4 case because Midby had not yet been sentenced at the time he committed the crimes. Nevada
5 law is clear that the dates of sentencing are irrelevant because merely being in custody or on
6 release for pending felonies does not fall within the meaning of "under sentence of
7 imprisonment."⁶

8
9 The State advances two arguments in support of its contention that aggregation does not
10 apply to consecutive sentences in separate cases. First, the State argues that the legislative
11 history of SB 71 shows a legislative intent to not apply the statute to "sentences for offenses
12 which are entered at different times."⁷ Even if, arguendo, SB 71 was not clear on its face and
13 required legislative interpretation, the State's quote from the Legislative Counsel's Digest is
14 included in the context of the subsection (3) exception.⁸ The State presents no other evidence
15 that the legislature intended to include an additional exception for cases like Midby's, where a
16 defendant is sentenced on multiple occasions for crimes not committed while under a sentence of
17 imprisonment, and, even if it did, the clear language of the statute contradicts any such intention.

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19 The State also argues the language "in the manner set forth in NRS 176.035" shows that
20 separate judgements of conviction cannot be aggregated because a court acting under NRS
21 176.035 would not have jurisdiction to aggregate its consecutive sentence with the prior
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24 ⁵ NRS 176.035(3).

25 ⁶ *Forbes v. State*, 96 Nev. 17, 604 P.2d 799 (1980).

26 ⁷ Resp't mot. to dismiss at 6.

⁸ The full quote is: "Sections 1 and 11 provide that sentences for offenses which are entered at different times may not be aggregated. For example, a sentence for a felony that is committed while serving a sentence for another felony may not be aggregated with the earlier sentence." Petitioner's Ex. 7.



1 sentence.⁹ This Court does not need to address the jurisdiction argument because “in the manner
2 set forth in NRS 176.035” refers to NRS 176.035’s provisions describing how to aggregate
3 different types of sentences. For example, subsection (a) describes how to aggregate life
4 sentences and subsection (b) describes how to aggregate sentences with minimum and maximum
5 terms of imprisonment. Even if a subsequent court did not have jurisdiction to aggregate the
6 sentences itself, there is nothing to suggest that NRS 213.1212 would not provide inmates the
7 option of electing to aggregate the separate sentences. Accordingly, the court finds that the
8 Attorney General’s interpretation of NRS 176.035 and NRS 213.1212 is erroneous and that
9 NDOC is required to honor inmates’ election to aggregate consecutive sentences unless NRS
10 176.035(3) applies. Thus, NDOC must aggregate Midby’s sentences in Cases 1 and 2.

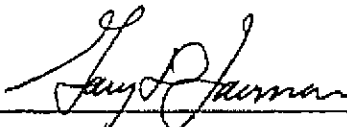
11 Good cause appearing.

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14 **IT IS HEREBY ORDERED** that the State’s motion to dismiss is **DENIED**.

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16 **IT IS HEREBY FURTHER ORDERED** that Midby’s petition for writ of habeas
17 corpus is **GRANTED**.

18 **IT IS HEREBY FURTHER ORDERED** that the State aggregate Midby’s consecutive
19 sentences in cases C252014 and C247828.

20
21 DATED this 4th day of April, 2017.

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24 _____
25 DISTRICT JUDGE

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⁹ See resp’t mot. to dismiss at 7–8.