IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS J. HOPKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37529

FILED

MAY 08 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for jail credit.

On January 28, 1999, the district court convicted appellant, pursuant to a guilty plea, of attempted accessory to taking property from the person of another under circumstances not amounting to a robbery. The district court sentenced appellant to serve one year in the Elko County Jail, suspended execution of the sentence and placed appellant on probation for two years. The district court gave appellant credit for 11 days of presentence incarceration.

On August 2, 2000, appellant pleaded guilty to sexual abuse of a child in Utah County, Utah. On October 25, 2000, the Utah court sentenced appellant to serve 1 to 15 years in prison, suspended execution of the sentence, and placed appellant on probation for 3 years. As a condition of probation, the court ordered appellant to serve a period of time in the county jail.

On October 31, 2000, the Nevada Division of Parole and Probation filed a violation report in district court. The Division alleged that appellant had violated the conditions of his Nevada probation by committing the Utah offense.

On December 18, 2000, appellant appeared in district court in Elko County on the violation report. Appellant

apparently had already completed the jail time required as a condition of his Utah probation; he was not in custody when he appeared in district court in Nevada. Appellant denied the violation and the district court scheduled an evidentiary hearing for January 11, 2001. Appellant remained out of custody.

However, sometime between December 18, 2000, and January 11, 2001, appellant was arrested in Washoe County on a domestic battery charge. The Division placed a probation violation hold on appellant effective January 1, 2001.

On January 11, 2001, the district court conducted an evidentiary hearing on the violation report. At the conclusion of the hearing, the district court revoked appellant's probation, ordered that the original sentence be executed, and gave appellant credit for 21 days of time previously served. The district court also gave appellant ten days to file a motion addressing his request for additional credit for time served in Utah.

On January 22, 2001, appellant filed a motion for credit.[1] Appellant argued that he was entitled to credit for time served in jail as a condition of his Utah probation. The State opposed the motion. On March 2, 2001, the district court denied the motion. This appeal followed.

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[1]We note that NRS 34.724(2)(c) specifically provides that a post-conviction petition for a writ of habeas corpus is "the only remedy available to an incarcerated person to challenge the computation of time that he has served pursuant to a judgment of conviction." Appellant's request for jail time credits is a challenge to the computation of time he has served. See Pangallo v. State, 112 Nev. 1533, 1535, 930 P.2d 100, 102 (1996), clarified on other grounds by Hart v. State, 116 Nev. ___, 1 P.3d 969 (2000). Accordingly, appellant should have filed a post-conviction petition for a writ of habeas corpus, not a motion for credit. Id. However, because the district court instructed appellant to file a motion and the motion is supported by sufficient factual allegations, we conclude that the procedural label is not critical in this case.

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Appellant contends that the district court erred in denying his motion for credit. In particular, appellant argues that because the Utah court failed to specify whether the Utah sentence is to be served concurrently with or consecutively to the Nevada sentence, the sentences must be served concurrently. Based on this reasoning, appellant argues that he is entitled to credit for the time he served in jail as a condition of his Utah probation. We disagree.

Appellant's basic premise, that the sentences are to be served concurrently, is flawed. Appellant is correct that Utah subscribes to the general rule that where a court has discretion to impose consecutive or concurrent sentences and fails to specifically state that the sentences are consecutive, the sentences will run concurrently. Utah Code Annotated § 76-3-401(1) states: "Sentences for state offenses shall run concurrently unless the court states in the sentence that they shall run consecutively."[2] However, the Utah Supreme Court has explained that this provision only applies to sentences imposed by Utah courts and that the general rule is that sentences imposed by two independent sovereigns "should run consecutively unless the sentencing court expressly directs otherwise."[3] Accordingly, the Utah and Nevada sentences are not concurrent. Moreover, even if the sentences were to be served concurrently, that does not

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[2]Accord NRS 176.035(1).

[3]State v. Reed, 709 P.2d 391, 392 (Utah 1985); accord NRS 176.045(4) (providing that if the sentencing court fails to specify whether a Nevada sentence is to be served concurrently or consecutively to a sentence previously imposed by another jurisdiction, "the sentence imposed in this state shall not begin until the expiration of all prior sentences imposed by other jurisdictions").

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require that the sentences be identical with respect to time served.[4]

Moreover, we conclude that appellant has failed to demonstrate that he is entitled to credit against his Nevada sentence for time served as a condition of probation on his Utah sentence. The time appellant served in jail in Utah was the result of his Utah conviction; he was not being held because of the violation report filed in Nevada. This situation is analogous to NRS 176.055(1), which precludes credit for presentence confinement where that "confinement was pursuant to a judgment of conviction for another offense." Under the circumstances, we conclude that appellant is not entitled to credit for the time served in Utah prior to revocation of his Nevada probation. Accordingly, we conclude that the district court did not err in denying appellant's motion for credit and we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Elko County Public Defender
Elko County Clerk

[4]See Gaines v. State, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000), cert. denied, 121 S. Ct. 138 (2000).

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