

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMIAH J. HOWARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41482

**FILED**

JUN 22 2004

ORDER OF REVERSAL AND REMAND

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Ribad*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a motion to show cause.

Over a period of four months, appellant was convicted in four separate district court cases. In October 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of failing to stop on required signal of police officer in district court case number C175579. The district court sentenced appellant to serve a term of 12 to 48 months in the Nevada State Prison.

In November 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted possession of stolen property (felony) in district court case number C179078. The district court sentenced appellant to serve a term of 19 to 48 months in the Nevada State Prison. This term was imposed to run concurrently with the term imposed in district court case number C175579.

In December 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted robbery in district court case number C179156. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. This term

was imposed to run consecutively with the sentence appellant was currently serving.

Finally, in January 2002, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary in district court case number C171028. The district court sentenced appellant to serve a term of 48 to 120 months in the Nevada State Prison. This term was imposed to run concurrently with district court case numbers C179156 and C175579. The judgment of conviction was silent as to how this sentence would run with district court case number C179078.

On April 9, 2003, appellant filed a motion to show cause in district court case number C171028.<sup>1</sup> The State opposed the motion. On May 14, 2003, the district court denied appellant's motion. This appeal followed.

In his motion, appellant claimed that the Department of Corrections improperly structured his sentences based on the four judgments of conviction. Specifically, appellant claimed that the Department did not recognize that the sentence imposed in district court case number C171028 was imposed to run concurrently with the sentences imposed in district court case numbers C179156 and 175579.

This court's preliminary review of this appeal revealed that the district court may have erroneously denied appellant's motion. It

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<sup>1</sup>Appellant essentially challenged the computation of time served in his motion. Thus, appellant's motion should have been filed as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(c). We conclude that the district court did not err in construing appellant's motion to be a post-conviction petition for a writ of habeas corpus. See Pangallo v. State, 112 Nev. 1533, 930 P.2d 100 (1996).

appeared from this court's review of the documents before it that the Department of Corrections structured appellant's sentences as:

19 – 48 (cc 12 – 48)

CS

48 – 120 (cc 24 – 60)

However, this sentence structure does not appear to accurately reflect the sentences imposed pursuant to the judgments of conviction. Rather, it appeared that the sentence structure should have been:

48 – 120 (cc) [(19 – 48) (cc 12 – 48)]

CS

24 – 60

This sentence structure reflects that the term of 48 to 120 months (C171028) was expressly imposed to run concurrently with the terms of 12 to 48 months (C175579) and 24 to 60 months (C179156). Further, the term of 48 to 120 months should run concurrently with the term of 19 to 48 months (C179078) because silence in a judgment of conviction is to be read as concurrent time.<sup>2</sup> The Department's sentence structure appeared to detrimentally affect appellant's parole eligibility date to the streets and his credits because he did not begin to accrue credits on his consecutive sentences until he began to serve these sentences.

Thus, it appeared from this court's review of the documents before it that appellant's sentences had been improperly structured to appellant's detriment. Accordingly, this court directed the attorney general to show cause why the district court's order should not be reversed

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<sup>2</sup>See NRS 176.035(1) ("[I]f the court makes no order with reference thereto, all such subsequent sentences run concurrently."). It does not appear from the documents before this court that subsections 2 or 3 of NRS 176.035 are applicable in the instant case.

and the matter remanded. On April 20, 2004, this court received and filed a response from the attorney general. The attorney general appeared to acknowledge that the sentence structure was to appellant's detriment in the instant case. The attorney general, however, asked for a bright line rule to assist the Department in implementing consistent sentences in circumstances where multiple concurrent and consecutive sentences are imposed.

Having considered the documents before this court and the attorney general's response, this court concludes that the district court erred in denying appellant's motion. The Department improperly structured appellant's sentences to his detriment. A bright line rule is not possible to articulate because each case is factually distinct. However, there are several principles that have guided this court's determination in the instant appeal. The first is that eligibility for parole must be based on the sentence that requires the longest period before the prisoner is eligible for parole in structuring a sentence involving two or more concurrent sentences.<sup>3</sup> The sentence determined to have the longest term before parole eligibility is the controlling sentence. Second, the sentence structure should not be in actual conflict with the district court's intentions as expressed in the judgments of conviction. Third, there is no authority permitting alteration of the original sentencing structure and the recalculation of a new parole eligibility date absent a change of circumstances occurring after the original sentence structure was

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<sup>3</sup>See NRS 213.1213.

determined.<sup>4</sup> Finally, if a prisoner has been granted parole on the controlling sentence, there is no authority preventing the Parole Board from granting the prisoner simultaneous parole on the lesser sentences that were imposed to run concurrently with the controlling sentence.

In order to effectuate the express intention of the district court, as set forth in the judgments of conviction, the sentence structure should appear as:

48 – 120 (cc) [(19 – 48) (cc 12 – 48)]  
CS  
24 – 60

This sentence structure would permit appellant to appear before the parole board on November 1, 2005.<sup>5</sup> Under the extraordinarily unusual circumstances presented in this case, circumstances that are unlikely to be repeated, we reverse the order of the district court and remand this matter to the district court with instructions to order the Department of Corrections to amend their records to reflect that appellant will be eligible to appear before the parole board on November 1, 2005.<sup>6</sup>

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<sup>4</sup>For example, a change of circumstances that may affect this calculation may be a new conviction after the original sentence structure has been determined. A change of circumstances would not be the expiration of one of the original terms pursuant to the original sentence structure. NRS 213.1213 does not require recalculation after the prison has already determined which term will require the longest period before parole eligibility.

<sup>5</sup>This calculation factors in 77 days of presentence credits awarded in district court case number C171028 (the controlling case under the sentence structure set forth above).

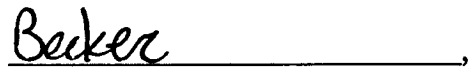
<sup>6</sup>The Department of Corrections should also be instructed to make any corrections necessary in the statutory good time credits in district court case number C171028. The Department should also be instructed to

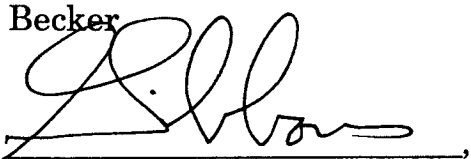
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Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and further briefing are unwarranted in this matter.<sup>7</sup> Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>8</sup>

 C.J.  
Shearing

 J.  
Becker

 J.  
Gibbons

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*... continued*

alter the parole eligibility date set forth above if appellant is permitted to apply those credits to his minimum parole eligibility date.

<sup>7</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>8</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that appellant is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Kathy A. Hardcastle, Chief District Judge  
Eighth Judicial District Court Dept. 11, District Judge  
Jeremiah J. Howard  
Attorney General Brian Sandoval/Las Vegas  
Clark County District Attorney David J. Roger  
Clark County Clerk