IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC ZESSMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41942

FILED

DEC 10 2003

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Eric Zessman's motion to amend the judgment of conviction.[1]

Zessman was convicted, pursuant to an Alford plea[2] and a guilty plea, of one count each of robbery and conspiracy to commit robbery.[3] The district court sentenced Zessman to serve concurrent prison terms of 24-75 months for the robbery and 12-30 months for the conspiracy, and ordered him to pay $1,574,795.00 in restitution. This court affirmed the judgment of conviction on direct appeal.[4]

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[1]Zessman should have raised his arguments in a post-conviction petition for a writ of habeas corpus in the district court. In this case, however, we conclude that the procedural label is not of critical importance. See NRS 34.724(2)(c); Nieto v. State, 119 Nev. ___, ___ n.1, 70 P.3d 747, 747 n.1 (2003) (citing Pangallo v. State, 112 Nev. 1533, 1535, 930 P.2d 100, 102 (1996), limited in part on other grounds by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000)).

[2]North Carolina v. Alford, 400 U.S. 25 (1970).

[3]Zessman entered an Alford plea to the robbery and a guilty plea to the conspiracy.

[4]Zessman v. State, Docket No. 41490 (Order of Affirmance, September 24, 2003).

On July 24, 2003, Zessman filed a motion to amend the judgment of conviction to include jail time credits in the district court. The State opposed the motion. On August 8, 2003, the district court entered an order denying Zessman's motion. This appeal followed.

Zessman contends that the district court erred in denying his motion for additional credit of 332 days based on pretrial confinement. Citing to NRS 176.055(1), Anglin v. State,[5] and Nieto v. State[6] for support, Zessman argues that "this court has shown a tendency to grant credit to a defendant who is in custody awaiting trial in their case." Zessman admits that he was on parole when he committed the instant offense,[7] but argues that because the underlying offense resulted in a life sentence, crediting the 332 days towards the life sentence rather than to the sentence for the robbery is meaningless and amounts to "dead time." Zessman also argues that the "disparity between how parolees serving a finite term are treated versus those parolees who are serving a life term implicates the equal protection clause of the 14th Amendment to the United State Constitution." We disagree with Zessman's contention.

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[5]90 Nev. 287, 525 P.2d 34 (1974) (holding that defendant is entitled to credit against sentence for pretrial confinement when confinement is based on the defendant being financially unable to post bail).

[6]119 Nev. ___, 70 P.3d 747 (2003) (holding that defendant is entitled to credit against sentence for pretrial confinement in foreign jurisdiction when confinement was solely pursuant to the charges for which the defendant was ultimately convicted).

[7]See Zessman v. State, 94 Nev. 28, 573 P.2d 1174 (1978) (modifying conviction of first-degree murder to second-degree murder and ordering resentencing).

A sentencing determination will not be disturbed on appeal absent an abuse of discretion by the district court.[8] NRS 176.055(1) states: "whenever a sentence of imprisonment . . . is imposed, the court may order that credit be allowed against the duration of the sentence . . . for the amount of time which the defendant has actually spent in confinement before conviction . . . ." This court has stated, however, that "[t]he plain and unequivocal language of NRS 176.055(2)(b) prohibits a district court from crediting a parolee or probationer for time served on a subsequent offense if such offense was committed while on probation or parole,"[9] regardless of whether the term of probation or parole has been revoked.

We conclude that the district court did not err in denying Zessman's motion to amend the judgment of conviction. Pursuant to NRS 176.055(2)(b), the district court properly failed to credit Zessman's sentence for the time spent in pretrial confinement in the instant case because the offense occurred while he was out of custody and paroled from his life sentence. Additionally, we conclude that Zessman's equal protection argument is without merit because he is not being treated any differently than a parolee with a finite term. NRS 176.033(2) provides:

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[8]Parrish v. State, 116 Nev. 982, 12 P.3d 953 (2000).

[9]Gaines v. State, 116 Nev. 359, 364, 998 P.2d 166, 169 (2000). NRS 176.055(2)(b) states: "A defendant who is convicted of a subsequent offense which was committed while he was . . . . (b) Imprisoned in a county jail or state prison or on probation or parole from a Nevada conviction is not eligible for any credit on the sentence for the subsequent offense for the time he has spent in confinement which is within the period of the prior sentence, regardless of whether any probation or parole has been formally revoked." (Emphasis added.)

> At any time after a prisoner has been released on parole and has served one-half of the period of his parole, or 10 consecutive years on parole in the case of a prisoner sentenced to life imprisonment, the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence.

(Emphasis added.) Based on this statute, Zessman's sentence may later be modified to a finite term, and in that situation his credit for time served would be applied to the modified sentence.[10] Therefore, Zessman's contention that the 332 days credit for time served is "dead time" is without merit.

Accordingly, having considered Zessman's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[10]Cf. Hunt v. Warden, 111 Nev. 1284, 903 P.2d 826 (1995).