IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL MITCHELL,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, E.K. MCDANIEL,

Respondent.

No. 34611

FILED

JUN 18 2001

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On July 27, 1982, the district court convicted appellant, pursuant to a jury verdict, of one count each of attempted murder with the use of a deadly weapon (count I), robbery with the use of a deadly weapon (count II), attempted robbery with the use of a deadly weapon (count III), and battery with the use of a deadly weapon (count IV). The district court sentenced appellant to serve two consecutive terms of 20 years in prison for count I, two consecutive terms of 15 years in prison for count II, two consecutive terms of 7 1/2 years in prison for count III, and 10 years in prison for count IV. The district court further ordered that all of the sentences be served consecutively and gave appellant credit for 176 days of presentence incarceration.

01-10127

On September 30, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus, challenging the computation of time he had served pursuant to the judgment of conviction and the parole board's decision to deny parole in August 1998. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On June 11, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant argued that: (1) the Department of Prison's failure to apply this court's decision in Nevada Dep't Prisons v. Bowen,[1] and treat his primary and enhancement sentences as separate sentences worked to his detriment; (2) the parole board subjected him to cruel and unusual punishment and violated the Double Jeopardy Clause; and (3) retroactive application of new parole guidelines violated the Ex Post Facto Clause and the Due Process Clause. In a supplement to the petition, appellant apparently changed his first claim and instead argued that the Department of Prisons had applied Bowen to him and that doing so violated the Ex Post Facto Clause. Our review of the record reveals that the district court did not err in denying the petition.

First, we conclude that the district court did not err in rejecting appellant's argument that the Department of

[1]103 Nev. 477, 745 P.2d 697 (1987).

Prisons miscalculated appellant's statutory good-time credits and parole eligibility on his primary and enhancement sentences. In Biffath v. Warden[2] and Director, Prisons v. Biffath,[3] we held that a primary sentence and an enhancement sentence must be treated as one continuous sentence for purposes of computing statutory good-time credits and eligibility for parole. We overruled those decisions in 1987 in Bowen.[4] In Bowen, we held that a primary sentence and enhancement sentence "must be treated as separate sentences for all purposes."[5] Because our decision in Bowen was not foreseeable, we directed that the opinion should be applied retroactively to any prisoner sentenced before the date of the decision unless it would be to that prisoner's detriment.[6]

Appellant was sentenced before this court's decision in Bowen. Pursuant to our directive in Bowen, that decision should only be applied to appellant if it would not be to his detriment.

The record in this case indicates that the Department of Prisons did not apply Bowen to appellant's sentence on count I because it would have been to his

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[2]95 Nev. 260, 593 P.2d 51 (1979) ("Biffath I").

[3]97 Nev. 18, 621 P.2d 1113 (1981) ("Biffath II").

[4]103 Nev. at 477, 745 P.2d at 697.

[5]Id. at 481, 745 P.2d at 699.

[6]Id. at 481 n.4, 745 P.2d at 700 n.4.

detriment. At the time that Bowen was decided, appellant was scheduled to appear before the parole board in 1990 on the continuous 40-year sentence.[7] If the department had applied Bowen, appellant might have been immediately eligible for parole, but only on the primary sentence.[8] Assuming that he was then paroled, he would begin serving the enhancement sentence for count I and would not have been eligible for parole on that sentence until 1991. It thus appears that the department did not err in refusing to apply Bowen to appellant's sentence for count I.[9]

The record further indicates that the department has applied Bowen to appellant's sentence on count II. To the extent that appellant contends that this decision is to his detriment and violates the Ex Post Facto Clause, we disagree. The decision to apply Bowen to the sentence on count II allows appellant to receive an institutional parole from the primary sentence to the enhancement sentence, thus satisfying both

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[7]Appellant had his first parole hearing on count I on October 10, 1990. At that time, the board denied parole for 18 months. At his second parole hearing on April 13, 1992, he received an institutional parole and began serving his primary sentence on count II.

[8]See Niergarth v. Warden, 105 Nev. 26, 768 P.2d 882 (1989).

[9]See Bowen, 103 Nev. at 481 n.4, 745 P.2d at 700 n.4.

sentences concurrently.[10] It appears that this will work to appellant's benefit.

Next, we conclude that the parole board did not subject appellant to cruel and unusual punishment or violate the Double Jeopardy Clause. Appellant's claims seem to be based on the parole board's decision to deny parole for three years on the enhancement sentence for count II, with the result being that appellant will serve more time on the enhancement sentence than he did on the primary sentence. He also argues that the parole board subjected him to cruel and unusual punishment by miscalculating his parole eligibility and misapplying relevant legal authority. We conclude that the board did not subject appellant to cruel and unusual punishment because appellant does not have a right "to be conditionally released before the expiration of a valid sentence"[11] and the board did not increase the sentence that appellant received. Further, as we held in Bowen, the imposition of separate penalties for a primary offense and for the use of a deadly weapon in the commission of the offense does not violate the Double Jeopardy Clause.[12]

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[10]Appellant received an institutional parole to his enhancement sentence on count II on July 6, 1995.

[11]Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979).

[12]103 Nev. at 480-81, 745 P.2d at 698-99.

Finally, we conclude that the parole board did not violate the Ex Post Facto Clause by applying the 1998 parole guidelines when appellant appeared before the board on August 18, 1998. Parole is an act of grace that is within the legislative authority; a prisoner has no constitutional right to parole.[13] NRS 213.10885(1) requires the parole board to adopt guidelines to assist the board in determining whether to grant parole. NRS 213.10885(5) further requires the board to review the guidelines every second year and adopt revised guidelines if any are determined to be ineffective. But NAC 213.560(1) provides that the guidelines do not restrict the parole board's discretion to grant or deny parole, and NRS 213.1099(2) expressly requires the board to consider certain factors other than the guidelines. Thus, the guidelines are not binding and merely serve as a guide to the proper exercise of discretion. As such, the guidelines are not laws for purposes of the Ex Post Facto Clause.[14]

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not

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[13]See NRS 213.10705; Niergarth, 105 Nev. at 28, 768 P.2d at 883; Pinana v. State, 76 Nev. 274, 283, 352 P.2d 824, 829 (1960).

[14]See Wallace v. Christensen, 802 F.2d 1539, 1553-54 (9th Cir. 1986) (holding that federal parole guidelines are not laws for purposes of Ex Post Facto Clause because guidelines are "'procedural guideposts'" that are not binding on the parole commission (quoting Rifai v. United States Parole Comm'n, 586 F.2d 695, 698 (9th Cir. 1978))).

entitled to relief and that briefing and oral argument are unwarranted.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[16]

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Steve L. Dobrescu, District Judge
Attorney General
White Pine County District Attorney
Paul Mitchell
White Pine County Clerk

[15]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[16]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.