IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD FOSTER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37303

FILED

APR 04 2001

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

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of open and gross lewdness. The district court sentenced appellant to serve one year in the White Pine County Jail.

Appellant's sole contention is that this matter must be remanded to the district court for entry of an amended judgment of conviction because the district court failed to specify whether the sentence is to be concurrent or consecutive to appellant's sentence in a prior case. We agree.

Appellant committed the instant offense while under sentence of imprisonment for robbery with the use of a deadly weapon. The instant offense is a gross misdemeanor.[1] NRS 176.035(3) provides that when a person commits a gross misdemeanor while under sentence of imprisonment, the sentencing court "shall provide expressly whether the sentence subsequently pronounced runs concurrently or consecutively with the one first imposed." In such cases, the presumption set forth in NRS 176.035(1), that the sentences run

[1]See NRS 201.210(1)(a).

concurrently if the court makes no reference to concurrent or consecutive sentences, does not apply.[2]

Here, the judgment of conviction does not expressly provide whether the sentence for the instant offense runs concurrently with or consecutively to the sentence in appellant's prior case. Moreover, at sentencing, the district court did not expressly indicate whether the sentences are concurrent or consecutive. Although the State recommended one year of probation to be served consecutively to the prior prison sentence, the district court decided to follow the recommendation of the Division of Parole and Probation. The Division recommended a one-year jail term, but did not mention whether the sentence should be consecutive or concurrent to the prior sentence. Thus, it is not clear from the proceedings at sentencing whether the district court intended to provide for concurrent or consecutive sentences.[3] We therefore conclude that this matter must be remanded for the district court to enter an amended judgment of conviction specifying whether the sentence is to be concurrent or consecutive. Accordingly, we

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[2]See NRS 176.035(1).

[3]The State suggests that the district court's comment, after imposing the sentence, that "[t]hey can't give you credit there because [of] your other offenses" indicates that the court meant to impose consecutive sentences. In this respect, the State argues that "[h]ad the court intended that the sentence be concurrent, there would be no issue as to whether credit could be given" because "[i]f the sentence were to run concurrent, there is no reason that Appellant could not have received credit for time served." We reject the State's argument for two reasons. First, assuming that the court's comment was a reference to credit for time served, it would be relevant even if the court intended to impose concurrent sentences because appellant was not entitled to credit for time served. See NRS 176.055(2). Second, assuming that the court's comment was a reference to good time credits, it would be relevant even if the court intended to impose concurrent sentences because good time credits are credited to the primary sentence. See Hughes v. State, 112 Nev. 84, 87, 910 P.2d 254, 255 (1996).

ORDER this matter REMANDED to the district court for proceedings consistent with this order.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. Merlyn H. Hoyt, District Judge
Attorney General
White Pine County District Attorney
State Public Defender
White Pine County Clerk