

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, BOARD OF
PAROLE COMMISSIONERS,

No. 76024

Electronically Filed
Nov 02 2018 10:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Petitioner,

v.

THE SECOND JUDICIAL
DISTRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE
COUNTY OF WASHOE; AND THE
HONORABLE CONNIE
STEINHEIMER, DISTRICT
JUDGE,

Respondents,

and

MARLIN THOMPSON,

Real Party in Interest.

_____ /

AMENDED BRIEF OF AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE
WASHOE COUNTY DISTRICT ATTORNEY

JENNIFER P. NOBLE
Washoe County District Attorney
Chief Appellate Deputy
Nevada State Bar No. 9446
P.O. Box 11130
Reno, Nevada 89520
(775) 328-3200
Counsel for Amicus Curiae
Washoe County District Attorney

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT 3

 A. NRS 176.033 (2) Prohibits the Board’s Effort to
 Reduce the Life Sentence Decided By the Jury and
 Imposed By the District Court 3

III. CONCLUSION 6

TABLE OF AUTHORITIES

Pages

Cases

Coleman v. State,
130 Nev. 190, 194, 321 P.3d 863 (2014) 6

State v. District Court (Pullin),
124 Nev. 564, 188 P.3d 1079 (2008) 3

Statutes

NRS 176.033.....2-6

NRS 200.030..... 3, 4

NRS 213.1517(1)..... 6

NRS 213.1519(1) 6

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, BOARD OF
PAROLE COMMISSIONERS,

No. 76024

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE; AND THE HONORABLE
CONNIE STEINHEIMER, DISTRICT
JUDGE,

Respondents,

and

MARLIN THOMPSON,

Real Party in Interest.

_____ /

AMENDED BRIEF OF AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE
WASHOE COUNTY DISTRICT ATTORNEY

I. INTRODUCTION

Thompson was convicted of First Degree Murder and Attempted Murder in 1979, after stabbing two men during an argument over a set of car keys. For the First Degree Murder, the jury set Thompson's penalty at a term of life imprisonment, with the opportunity for parole after ten years.

For the attempted murder, Thompson was sentenced to a term of fifteen years, to run to consecutive to the life with the possibility of parole after 10 years. Thompson was paroled from his life sentence in 1990, and in 1992 he released on parole for the remainder of his fifteen year sentence.

Petitioner's Appendix, hereafter PA, 2.

On September 11, 2017, the Board of Parole Commissioners petitioned the district court to modify the sentence. The Washoe County District Attorney, hereafter WCDA, opposed the motion. PA, 69-72. At the Court's direction, the parties provided supplemental briefing. *Id.*, 79-83; 89-90. Ultimately, the district court denied the Board's motion. *Id.*, 92-93.

Marlin Thompson filed a pro se appeal, and this Court dismissed it as untimely. *See* June 15, 2018 Order Dismissing Appeal, Docket No. 75737. The Board also filed its own direct appeal. This Court declined to consider the Board's appeal, finding that while NRS 176.033 (2) authorizes the Board to file a petition for sentence modification, the statute does not authorize the Board to appeal from the denial of such a petition. *See* October 12, 2018 Order Dismissing Appeal, Docket No. 75799.

Subsequently, the Board, through counsel Deputy Attorney General Kathleen Brady, filed a Petition for Writ of Mandamus, which, like the appeal, seeks relief from the district court order. This Court directed the

WCDA to file an answer, noting that the WCDA opposed the petition for sentence modification below. However, Deputy Attorney General Tiffany E. Breinig filed a notice of appearance as counsel for the Second Judicial District Court on October 25, 2018. It is the WCDA's understanding that Ms. Breinig will file the answer ordered by the Court.

However, because the WCDA advocated for the analysis adopted by the district court, the WCDA submits its amicus brief pursuant to NRAP 29 (a) in the hope that it may assist the Court in evaluating the merits of the Board's Petition.

II. ARGUMENT

A. NRS 176.033 (2) Prohibits the Board's Effort to Reduce the Life Sentence Decided By the Jury and Imposed By the District Court

The relevant sentencing statute is the statute in force at the time of the crime. *State v. District Court (Pullin)*, 124 Nev. 564, 188 P.3d 1079 (2008). The statute in effect at the time of the crime, NRS 200.030, allowed for only two sentences for first degree murder. *See* 1977 Statutes of Nevada at 864, 1541, 1627. Both the Board and the WCDA agreed below that in 1977, the year Thompson committed the crime of first degree murder, NRS 200.030 (6) described the penalty as follows:

6. Every person convicted of murder of the first degree shall be punished by imprisonment in state prison for life with or without the possibility of parole. *If the penalty is fixed at life*

imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

NRS 200.030 (1977 Statutes of Nevada, 864) (emphasis added).

The jury decided the sentence in case based upon the version of NRS 200.030 in effect at the time of the crime and sentence. However, because that sentence was a life sentence with the possibility of parole, it cannot be properly reduced to less than a life sentence via the Board's petition to modify. However, contrary to the Board's assertion below, it is not the WCDA's position this cannot be done because some older version of NRS 176.033 applies. To the contrary, the WCDA concedes that the current version of NRS 176.033(2) does indeed allow the Board to file a petition to modify a sentence, and provides the district court with the authority to modify certain sentences. However, the final line of NRS 176.033 provides that the maximum term may not be reduced below the minimum allowed by statute for that crime:

176.033. Sentence of imprisonment required or permitted by statute: Definite period for misdemeanor or gross misdemeanor; minimum and maximum term for felony unless definite term required by statute; restitution; modification of sentence

2. At any time after a prisoner has been released on parole and has served one-half of the period of 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. The Board shall give notice of the petition and hearing thereon to the Attorney General or district attorney who had jurisdiction in the original proceedings. *Upon hearing the recommendation of the State Board of Parole Commissioners and good cause appearing, the court may modify the original sentence by reducing the maximum term of imprisonment but shall not make the term less than the minimum term prescribed by the applicable penal statute.*

NRS 176.033 (2) (emphasis added).

In contrast, the Board's position appears to be that the current version of NRS 176.033 does not apply to the petition for modification, and that instead, the 1977 version of that statute applies. Apparently, the 1977 version used the phrase "minimum limit" rather than "minimum term." The Board then reasons that this change in terminology means that "the minimum limit, or 'minimum sentence' in this case is ten years." *Petition for Writ of Mandamus*, p.8. The Court should reject this argument.

Even accepting, *arguendo*, the Board's position that some prior incarnation of NRS 176.033 using the phrase "minimum limit" rather than the phrase "minimum term," the end result should not change. The only two sentences available at the time of Thompson's conviction in 1979 were 1) life with no possibility of parole; and 2) life with parole eligibility after 10 years. The 10 year time frame contemplated before parole eligibility may begin is not the "minimum limit" and it is not the "minimum sentence."

Instead, it is the designated time period that must occur before the Board can consider allowing Thompson to serve the remainder of his sentence outside prison walls on parole.

The Board's position requires this Court disregard the penalty for first degree murder in effect in 1977. The Board is asking this Court to ignore the life sentence decided by the jury and imposed by the district court. Yet parole is not an end to the sentence, only an alternative means of serving it. Indeed, this Court has recognized that a person serving a term of parole or probation is still under a sentence of imprisonment. *Coleman v. State*, 130 Nev. 190, 194, 321 P.3d 863 (2014). "If the parolee violates a condition of parole, he may be imprisoned on the unexpired sentence." *Id.*, citing NRS 213.1517(1); NRS 213.1519(1). It follows, then, that the time frame specified by the Legislature as the amount of time that a convicted person must serve inside the prison before he or she may be paroled cannot be regarded as the "minimum sentence."

III. CONCLUSION

The WCDA agrees with the Board that one serving a life sentence may have that sentence modified via NRS 176.033. The limit, however, is that the court may not impose a sentence that would have been unlawful when the defendant was originally sentenced. The Board urged the district court

to act unlawfully, and the district court properly declined that invitation. This Court should do the same, and hold that where the applicable sentence is life, with parole eligibility beginning after a term of years, the sentence cannot be reduced via petition for sentence modification. While Thompson may be able to obtain some sort of relief from the Pardons Board, a petition filed by the Board of Parole Commissioners is not the proper avenue to eliminate the requirement of parole.

DATED: November 2, 2018.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 29(e), because excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 15 pages.

3. Finally, I hereby certify that I have read this amicus curiae brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

///

///

///

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: November 2, 2018.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: JENNIFER P. NOBLE
Chief Appellate Deputy
Nevada State Bar No. 9446
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 2, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Adam Paul Laxalt
Nevada Attorney General

Kathleen Brady
Deputy Attorney General

Tiffany Breinig
Deputy Attorney General

/s/ Margaret Ford
MARGARET FORD