IN THE SUPREME COURT OF THE STATE OF NEVADA

TYERRE LANELL WHITE-HUGHLEY, A/K/A TYERRE LANELL WHITE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80549

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(1), this case is presumptively assigned to the Court of Appeals, as it is an appeal from a judgment of conviction based on a plea of guilty.

STATEMENT OF THE ISSUE

Whether the district court did not err in declining to award Appellant the credit for time serve awarded in Appellant's concurrent case.

STATEMENT OF THE CASE

On July 2, 2019, Tyerre Lanell White-Hughley (hereinafter, "Appellant") was charged by way of Criminal Complaint with one count of INVASION OF THE HOME (Category B Felony – NRS 205.067). Appellant's Appendix ("AA") at 001.

Police records demonstrate that Appellant was arrested pursuant to an arrest warrant for this Count, as well as four counts from a separate case, on October 1, 2019. Id. at 035. On November 7, 2019, pursuant to a Guilty Plea Agreement ("GPA"), Appellant pled guilty to Invasion of the Home, and he and the State stipulated to recommend a sentence of twelve (12) to thirty (30) months in the Nevada Department of Corrections ("NDC"). Id. at 005, 018. As part of the plea negotiations, the State agreed not to oppose a concurrent sentence with Case No. C344122 (Appellant's "concurrent case"). Id. at 018.

On December 9, 2019, Appellant was sentenced in his concurrent case to an aggregate sentence of twelve (12) to thirty-six (36) months in NDC. AA at 006, 032-33. He was also given seventy (70) days credit for time served on that case. Id.

On January 7, 2020, Appellant was sentenced in the instant case to twelve (12) to thirty (30) months in NDC, concurrent with Appellant's concurrent case. AA at 007, 034. Because Appellant had been awarded his credit for time served in his concurrent case, the district court declined to award credit for time served in the instant case. Id. at 007, 041. Appellant's Judgment of Conviction was filed on January 16, 2020. Id. at 034.

Appellant timely noticed his appeal on February 4, 2020. AA at 036. His Opening Brief ("AOB") was filed on June 5, 2020.

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STATEMENT OF THE FACTS

On January 7, 2020, Appellant appeared for sentencing after his plea of guilty to Invasion of the Home. AA at 018, 038. Appellant acknowledged that he had been in custody on another case, C344122, on December 9, 2019, and had received his due credit for time served in that case. Id. at 039-040. The district court explained that its interpretation of Nevada law did not entitle Appellant to receive the same credit for time served twice, explaining, "we don't double dip." Id. at 040, 042.

The State agreed with the district court, but explained that the interpretation of Nevada law regarding credit for time served was based on 14 unpublished opinions that were expressly contrary to Appellant's position. AA at 041. Appellant did not point to any specific case or statute that allowed the district court to award credit for time served a second time. Id. at 040-041.

Thereafter, the district court sentenced Appellant, and declined to award credit for time served a second time, due to Appellant's receipt of that credit on his other case. AA at 041.

SUMMARY OF THE ARGUMENT

The district court properly declined to apply Appellant's presentence credit for time served for a second time in the instant case, as Appellant received that credit towards his concurrent case. Appellant has failed to argue, much less demonstrate, that the district court's determination was an abuse of discretion. Indeed, Appellant

could not do so, as the district court properly relied on the statute and the information available to it in making its sentencing decision. Appellant likewise cannot demonstrate a violation of due process, as he did not have a significant liberty interest that was somehow deprived by the district court's sentencing decision.

However, in the event that this Court determines Appellant was entitled to a second application of his presentence credit for time served, Appellant was only entitled to his time in custody prior to his sentencing in the concurrent case.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DECLINING TO AWARD APPELLANT THE CREDIT FOR TIME SERVED IN APPELLANT'S CONCURRENT CASE

1. Appellant fails to demonstrate the district court abused its discretion

The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions. Allred v. State, 120 Nev. 410, 92 P.2d 1246 (2004). Furthermore, the Nevada Supreme Court has permitted sentencing judges broad discretion in imposing a sentence, explaining that, absence an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)); see, Parrish v. State, 116 Nev. 982, 12 P.3d 952 (2000) (a sentencing determination *will not* be disturbed on appeal absent an abuse of discretion by the district court.

Appellant does not acknowledge the standard for arguing that the district court erred in its sentencing determination, much less demonstrate that the district court abused its discretion. See, AOB at 5-12. Instead, Appellant relies on the misguided assertion that "there is no statute nor case law that supports the district court's decision." Id. at 8. At this juncture, it is not the district court's burden to justify anything – it is Appellant's burden to demonstrate an abuse of discretion, which Appellant simply has not done. See, Parrish, 116 Nev. 982, 12 P.3d 952.

2. Appellant is not entitled to double the credit for his time served

The Nevada Supreme Court has explained, "[w]hen a statute is facially clear, this court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent." Sonia F. v. Eighth Judicial Dist. Court, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009). Reviewing courts, then, must interpret statutes "without rendering words or phrases superfluous or rendering a provision nugatory." Haney v. State, 124 Nev. 408, 411-12, 185 P.3d 350, 353 (2008).

Pursuant to NRS 176.055(1):

> Except as otherwise provided in subsection 2, whenever a sentence of imprisonment in the county jail or state prison is imposed, the court may order that credit be allowed against the duration of the sentence including any minimum term thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement before conviction, *unless his confinement was pursuant to a judgment of conviction for another offense*.

(Emphasis added).

Pursuant to NRS 176.055(2)(a), a defendant convicted of an offense subsequent to an earlier offense for which he was in custody "is not eligible for any credit on the sentence for the subsequent offense for the time he has spent in confinement on the prior charge, unless the charge was dismissed or he was acquitted."

The Nevada Supreme Court has determined that the purpose of NRS 176.055 is to ensure defendants receive credit for all time served in confinement. Kuykendall v. State, 112 Nev. 1285, 1286, 926 P.2d 781, 782 (1996). Comparatively, the federal Sentencing Reform Act of 1984, 18 U.S.C. § 3551, follows a similar line to NRS 176.055 and provides for defendants to receive credit for time served in detention prior to the date their sentence commenced, so long as they had not received credit for that time in another sentence. Also relevant to the issue at hand is NRS 176.035 which, while authorizing district courts to run sentences concurrently, does not require that concurrent sentences be identical with respect to time served. Gaines v. State, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000).

Appellant argues that he should have received the same credit that he received in his concurrent case, as well as credit for the time after his sentencing in that case until he was sentenced in the instant case. AOB at 9. Appellant does not contend that he did not receive any credit for his confinement prior to his sentencing in the

concurrent case. Id. at 4. Therefore, the cases to which Appellant cites do not further his argument, as they are not directly applicable here. Id. at 7-12.

In Kuykendall, the Nevada Supreme Court handled a situation where the district court "specifically refuse[d] to grant credit for any [] presentence confinement." 112 Nev. at 1286, 926 P.2d at 782. In Johnson v. State, 120 Nev. 296, 89 P.3d 669 (2004) the Nevada Supreme Court treated the awarding of credit for time served toward separate counts sentenced to run concurrently within the same judgment of conviction. Neither applies to the instant case, where the district court recognized Appellant's credit towards his concurrent case, with its own judgment of conviction, then relied on what guidance it did have to explain, "I know about 11 unpublished opinions that basically say we don't double dip, that basically even though you get picked up simultaneously, one case or the other, it gets credited to one. You don't get to split." AA at 042.[1]

[1] The State, while not citing these cases for their persuasive value (NRAP 36(c)(2)-(3)), includes the reference to the following unpublished cases to demonstrate their apparent similarity to the case at hand and, therefore, the district court's reasonable reliance thereon:

- Lawver v. State, 125 Nev. 1055, 281 P.3d 1194 (Table), 2009 WL 1456996, Docket Nos. 51703, 51704 (Nev. S.Ct. April 14, 2009) (unpublished disposition) ("Johnson relates to concurrent sentences within a single judgment of conviction and not concurrent sentences between separate judgments of conviction.")
- Rowell v. State, 125 Nev. 1074, 281 P.3d 1215 (Table), 2009 WL 3191525, Docket No. 51789 (Nev. S.Ct. September 9, 2009) (unpublished disposition) ("Kuykendall does not address appointment of jail credit where time spent in jail is pursuant to two separate judgments of conviction.")

- Downs v. State, 125 Nev. 1032, 281 P.3d 1168 (Table), 2009 WL 3190367, Docket No. 53290 (Nev. S.Ct. September 25, 2009) (unpublished disposition) ("Johnson dealt with the applicability of presentence credits to concurrent sentences in a single judgment of conviction not the applicability of presentence credits between judgments of conviction imposed to run concurrently with one another.")
- Walker v. State, 127 Nev. 1184, 373 P.3d 971 (Table), 2011 WL 2750663, Docket No. 56902 (Nev. S.Ct. July 14, 2011) (unpublished disposition) ("Here, the record reveals that Walker served 120 days in presentence confinement pursuant to charges in two separate cases, C255480 and the instant case. He received 120 days of credit in C255480 and therefore is not entitled to receive this credit in the instant case.")
- Melton v. State, 127 Nev. 1159, 373 P.3d 942 (Table), 2011 WL 2750707, Docket No. 56955 (Nev. S.Ct. July 14, 2011) (unpublished disposition) ("Johnson addresses concurrent sentences imposed in a single judgment of conviction and not concurrent sentences imposed in separate judgments of conviction.")
- Roberts v. State, 127 Nev. 1170, 373 P.3d 956 (Table), 2011 WL 4636558, Docket No. 56132 (Nev. S.Ct. October 5, 2011) (unpublished disposition) ("Johnson relates to concurrent sentences within a single judgment of conviction and not concurrent sentences between separate judgments of conviction.")
- McCormick v. State, 127 Nev. 1158, 373 P.3d 940 (Table), 2011 WL 6140526, Docket No. 57725 (Nev. S.Ct. December 7, 2011) (unpublished disposition) ("Johnson related to concurrent sentences within a single judgment of conviction and not concurrent sentences between separate judgments of conviction.")
- Andrews v. State, 128 Nev. 879, 381 P.3d 589 (Table), 2012 WL 6554390, Docket No. 59781 (Nev. S.Ct. December 13, 2012) (unpublished disposition) ("although Andrews was taken into custody for the instant offense and burglary at the same time and charged with both counts in the same charging document, two separate judgments of conviction were entered…Because Andrews was confined for other offenses in addition to the instant offense and the additional credit he is seeking was credited to him in his other offenses, he is not entitled to the additional credit.")
- Giordano v. State, 130 Nev. 1181, 2014 WL 5317787, Docket No. 65425 (Nev. S.Ct. October 16, 2014) (unpublished disposition) ("Johnson addressed concurrent sentences imposed in a single judgment of conviction and not concurrent sentences imposed in separate judgments of conviction.")

Appellant's reference to Poasa v. State, 135 Nev. 426, 453 P.3d 387 (2019) is equally inapplicable. AOB at 7. The Poasa Court dealt with a district court's refusal to credit a defendant's time in presentence confinement towards her ultimate sentence in a single case. 135 Nev. at 429, 453 P.3d at 390. That case did not deal with concurrent sentences, nor separate cases. Furthermore, the dicta cited by Appellant belies his instant assertion, as NRS 176.055(1) is clearly "an express

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- Krause v. State, 2016 WL 757116, Docket No. 68856 (Nev. Ct. App. February 17, 2016) (unpublished disposition) ("Johnson addressed concurrent sentences in a single judgment of conviction and not concurrent sentences imposed in separate judgments of conviction.")
- Sandefur v. State, 2016 WL 1700531, Docket Nos. 69446, 69447 (Nev. Ct. App. April 22, 2016) (unpublished disposition) ("Johnson does not mandate presentence credit be given for concurrent terms that are imposed in separate judgments of conviction.")
- Williams v. State, 2018 WL 1040118, Docket No. 72386 (Nev. Ct. App. February 13, 2018) (unpublished disposition) ("Johnson relates to concurrent sentences within a single judgment of conviction and not concurrent sentences between separate judgments of conviction. Williams was not entitled to have credit that was applied in his other case also applied to the instant case.")
- Simpson v. State, 2018 WL 3217501, Docket No. 72865 (Nev. Ct. App. June 13, 2018) (unpublished disposition) ("Johnson relates to concurrent sentences within a single judgment of conviction and not to concurrent sentences imposed in separate judgments of conviction.")
- Baker v. State, 2018 WL 3232997, Docket No. 74626 (Nev. Ct. App. June 13, 2018) (unpublished disposition) ("Johnson relates to concurrent sentences within a single judgment of conviction and not to concurrent sentences imposed in separate judgments of conviction.")
- Larsen v. State, 2020 WL 3412710, Docket No. 79852 (Nev. Ct. App. June 19, 2020) (unpublished disposition) ("Johnson relates to concurrent sentences within a single judgment of conviction and not to concurrent sentences imposed in separate judgments of conviction.")

statutory provision making the defendant ineligible for that credit." See, AOB at 7 (quoting Poasa, 135 Nev. at 426, 453 P.3d at 388); see also, NRS 176.055(1) ("*unless the defendant's confinements was pursuant to a judgment of conviction for another offense*." (Emphasis added)). Accord. Jones v. State, 96 Nev. 240, 242 n.2, 607 P.2d 116, 117 n.2 (1980) ("NRS 176.055 does not allow credit from time spent in custody when such confinement was pursuant to a judgment of conviction for another offense." (Interior quotation omitted)).

Finally, Appellant's "due process" argument must fail. The Nevada Supreme Court has explained that "due process protections apply only 'when government action deprives a person of liberty or property.'" State, ex. rel. Bd. of Parole Com'rs v. Morrow, 127 Nev. 265, 271, 255 P.3d 224, 227 (2011). Appellant cannot demonstrate that he had any liberty interest that was denied him by the district court's denial of additional credit for time served when (1) Appellant had already received credit for that time served, and (2) when Appellant was already serving a term of imprisonment for his concurrent case at the time he was sentenced on the instant case. See, e.g., id. at 272, 255 P.3d at 228 (holding a parole petitioner did not have a sufficient liberty interest to afford any guaranteed due process protections); see also, AOB at 11 ("It's not as if Mr. White [had not] been sentenced to prison on December 9, 2019 on his other case he would have been out and about and enjoying the perks of freedom on this case. Quite to the contrary, he would have remained

locked up at CCDC."). Because Appellant had no cognizable liberty interest that was deprived at the time he was denied additional credit for time served, Appellant cannot demonstrate that he was denied due process.

3. Appellant is not entitled to any credit for time served after he was sentenced on the concurrent case

As stated *supra*., Appellant is only entitled to credit for time served in confinement on the instant case. NRS 176.055(1) specifically precludes the award of any credit for time served "pursuant to a judgment of conviction for another offense." Appellant does not contend that he was sentenced on December 9, 2019, for the offenses in the concurrent case. AOB at 4; AA at 032-33. Therefore, as of that date, Appellant began serving time pursuant to that offense, and the time between that sentence and Appellant's sentencing in the instant case is statutorily precluded from being credited towards Appellant's instant sentence. NRS 176.055(1).

Therefore, in the event this Court determines that Appellant is entitled to apply credit for time served in each of the two separate cases at issue, Appellant could only receive a maximum of seventy (70) days credit for time served in the instant case.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM Appellant's judgment of conviction. In the alternative, the State

respectfully requests that this Court determine that Appellant could receive a maximum of seventy (70) days credit for time served in the instant case.

Dated this 24th day of June, 2020.

Respectfully submitted,

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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 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 2,779 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate 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 this 24th day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 24, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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