

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

The State of North Dakota,)	
)	Supreme Court No. 20060097
Plaintiff and Appellee,)	
)	District Court No. 18-68-K-06149
vs.)	
)	
James Leroy Iverson,)	
)	
Defendant and Appellant.)	

ON APPEAL FROM ORDER DENYING MOTION FOR CREDIT FOR TIME
SERVED
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE KAREN BRAATEN, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

- I. Whether the District Court erred when it denied the Defendant's Motion for Credit for Time Served?

STATEMENT OF THE CASE

[¶1] The Defendant, James Leroy Iverson, appeals from the Grand Forks County District Court decision denying his Motion for Credit for Time Served. The Defendant was previously convicted of First and Second Degree Murder on May 2, 1969. (Appellant's App. at 3). On May 9, 1969, the Defendant was sentenced to life in prison for First Degree Murder and an indeterminate term of twenty-five to thirty years for Second Degree Murder. (Appellee's App. at 3-4) In 1975, the Defendant's sentence was reduced from life to ninety-nine (99) years by the pardons board. (Appellee's App. at 6). By 1990, the North Dakota Board of Pardons had reduced the Defendant's sentence to eighty-six (86) years. (Appellee's App. at 12). The Defendant motioned the District Court on October 28, 2005 to receive credit for the one hundred sixty-four (164) days he served following his arrest but prior to his conviction. Following the denial of his motion the Defendant filed notice of appeal to this Court on March 26, 2006. (Appellant's App. at DD-1).

STATEMENT OF THE FACTS

[¶2] The Defendant, James Leroy Iverson, was arrested and charged on November 27, 1968 for the brutal murders of two young women. (Appellee's App. at 1-2). On the same date the Defendant was incarcerated in the Grand Forks County Jail. On May 2, 1969 the Defendant was convicted of First and Second Degree Murder. (Appellee's App. at 3). On May 9, 1969 the Defendant was sentenced to life in prison for First Degree Murder and to an indeterminate term of twenty-five to thirty years for the Second Degree Murder. (Appellee's App. at 3-4). The sentences were to run concurrently. (Appellee's App. at 3-4).

[¶3] In 1971 the Defendant appealed from his conviction. This Court affirmed his conviction. State v. Iverson, 187 N.W.2d 1 (N.D. 1971). In 1974, the Defendant appealed to this Court from the District Court's decision to deny him post-conviction relief. (Appellee's App. at 5). The District Court's decision was affirmed. State v. Iverson, 225 N.W.2d 48 (N.D. 1974). In 1975, the Defendant's sentence was reduced by the board of pardons to ninety-nine (99) years in prison. (Appellee's App. at 6). By 1990, the North Dakota Board of Pardons had reduced the Defendant's sentence to eighty-six (86) years. (Appellee's App. at 12).

[¶4] On October 28, 2005, the Defendant made a motion to the District Court to grant him credit for the one hundred sixty-four days he served in the Grand Forks County Jail prior to his sentencing based on N.D.C.C. §12.1-32-02(2). This statute, enacted in 1975, mandates credit for time spent in custody as a result of the criminal charge for which the sentence was imposed or the charge was based. N.D.C.C. §12.1-32-02(2) (2006); see also (Appellee's App. at 13-17). However, because the statute was not

enacted until after his sentence and the Defendant had been finally convicted, the District Court denied the Defendant's motion. (Appellant's App. at DD-1).

ARGUMENT

I. The District Court Did Not Err When It Denied The Defendant's Motion For Credit For Time Served.

[¶5] A Defendant who has been “finally convicted” is not entitled to have a statute applied retroactively to lessen his or her sentence despite the beneficial effects of such retroactive application. State v. Cummings, 386 N.W.2d 468, 471 (N.D. 1986). When reviewing whether the District Court properly interpreted a statute, the standard is de novo, as it is a question of law. Wheeler v. Gardner, 2006 ND 24, ¶10, 708 N.W.2d 908.

[¶6] In Cummings, the defendant was sentenced to fifteen days in jail for a Driving Under Suspension (DUS) conviction pursuant to the statute that was in effect at the time of his arrest. State v. Cummings, 386 N.W.2d 468, 471 (N.D. 1986). Following his conviction the DUS statute was amended to reduce the mandatory minimum sentence to four days in jail. Id. In Cummings, the Court noted the purpose for preventing retroactive application of statutes was generally to prevent harsher penalties from being imposed on individuals for actions already taken. Id. However, the Cummings Court distinguished that case due to the beneficial effects upon the defendant by the retroactive application of the statute and determined that the amended statute should be applied. Id.

Although §1-02-10 of the N.D.C.C. stated that no part of the code is retroactive unless it is expressly declared to be so, the Court determined that the legislature, when enacting the amended DUS statute with the reduced mandatory minimum sentence, must have intended an exception to apply to the bar against retroactive application in the case of

ameliorating penal legislation. Id. at 472. Notably, however, the Court stated that this exception should not apply when the defendant has been “finally convicted” of the offense. Id. The reasoning behind the exception to the ameliorating penal legislation rule is that permitting legislation that reduces punishment to apply to final convictions would constitute an invalid exercise by the legislature of the executive pardoning power. Id. at n.2. According to the Court in Cummings, one has been finally convicted when a direct appeal from a judgment of conviction and sentence has been ruled on by the Court. Id.

[¶7] In the case at hand, the Defendant claims that the District Court erred when denying his Motion for Credit for Time Served. The Defendant claims that although N.D.C.C. §12.1-32-02(2) was not enacted at the time of his original sentence, the statute was enacted in 1973 after the District Court allegedly reimposed his original life sentence in 1974. This argument is without merit for several reasons. First, the statute was introduced in the Senate in 1973, however its effective date was not until 1975, clearly after the Defendant’s original sentence, denial of post-conviction relief, and appeal to this Court. N.D.C.C. §12.1-32-02(2) (2006); see also (Appellee’s App. at 13-17). Secondly, the District Court did not enter a new sentence in 1974. Rather, the District Court denied the Defendant’s Motion for Post-Conviction Relief in 1974 thereby reaffirming the original sentence. (Appellee’s App. at 5). This reaffirmation does not change the date of the Defendant’s original sentence, which was May 9, 1969. (Appellee’s App. at 3-4). Additionally the reduction of his sentence by the Parole Board in no way changes the date of his original sentencing. In fact, the documents the State was able to obtain regarding

the reduction by the North Dakota Board of Pardons explicitly reflect the Defendant's sentencing date was May 9, 1969. (Appellee's App. at 6-12).

[¶8] As in Cummings, the Defendant in this case is arguing that N.D.C.C. §12.1-32-02(2) be applied retroactively in order to grant him credit for one hundred and sixty four (164) days of time served prior to being sentenced. If the facts of this case were similar to Cummings then the Defendant may have an argument that the statute is ameliorating penal legislation and should be retroactively applied to his case. However, contrasted from Cummings, the Defendant has been finally convicted in this case. In 1971, this Court affirmed the Defendant's conviction and in 1974 affirmed the District Court's decision to deny the Defendant's motion for post-conviction relief. State v. Iverson, 187 N.W.2d 1 (N.D. 1971); State v. Iverson, 225 N.W.2d 48 (N.D. 1974). In Cummings, this Court was very explicit when stating that legislation may not retroactively apply to a Defendant who has been finally convicted, which includes a ruling on direct appeal from his sentence and conviction. Therefore, in the case at hand, the Defendant is not entitled to credit for time serve. The District Court properly denied the Defendant's motion because to grant the Defendant such credit would be an invalid exercise by the legislature of the executive pardoning power.

CONCLUSION

[¶9] Based on the foregoing law and discussion, the State respectfully requests that this Court deny the Defendant's appeal.

Dated this 30 day of May, 2006.


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