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Poasa v. State, 135 Nev. Adv. Op. 57 (Nov. 27, 2019)

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CRIMINAL LAW: PRESENTENCE CONFINEMENT

Summary

The Court reaffirmed its holding in *Kuykendall v. State*, interpreting NRS 176.055(1) to require sentencing courts to award credit for time served in presentence confinement.[2]

Background

The State charged Uputaua Diana Posasa with the felony of grand larceny of an automobile, and the gross misdemeanor of the unlawful taking of a motor vehicle. Posada pleaded guilty to both counts, pursuant to a plea agreement.

Following the entry of Poasa's plea, she was released on her own recognizance. Subsequently, she failed to appear at sentencing and was ultimately extradited back to Washoe County and placed in custody prior to sentencing.

At sentencing, the State recommended twelve to thirty months in prison. Alternatively, the State argued that if the district court should decide to give Poasa probation, it should forfeit Poasa's ninety-nine days' credit for time served and order her to serve an additional ninety days in jail.

The district court sentenced Poasa to a suspended sentence of twelve to thirty-four months and placed her on probation. The court forfeited Poasa's ninety-nine days' credit for time served in jail while awaiting sentencing.

Discussion

The Court has interpreted NRS 176.055(1) to mandate credit for time served. NRS 176.055(1) states, in relevant part, that "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 . . . for the amount of time which the defendant has actually spent in confinement before conviction." In *Kuykendall v. State*, the Court held that though the word "may" implies discretion, NRS 176.055(1) mandates credit for time served before sentencing because that was the legislative purpose of the statute.[3] Following its decision in *Kuykendall*, the Court has repeatedly held that NRS 176.055(1) requires sentencing courts to award credit for time served in presentence confinement.[4]

While the State urged the Court to overrule *Kuykendall*, the Court noted that under the doctrine of *stare decisis*, it will not overturn precedent without a compelling reason to do so.[5] Here, the Court had no disagreement with *Kuykendall* and did not find the decision to be clearly erroneous. Instead, the Court found that the reasoning in *Kuykendall* is consistent with its general

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[2] 112 Nev. 1285, 926 P.2d 781 (1996); NEV. REV. STAT. § 176.055(1) (2019).

[3] *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783.

[4] *See e.g.*, Haney v. State, 124 Nev. 408, 413, 185 P.3d 350, 354 (2008); Johnson v. State, 120 Nev. 296, 299, 89 P.3d 669, 671 (2004); Nieto v. State, 119 Nev. 229, 231, 70 P.3d 747, 748 (2003).

[5] Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013).

rule of statutory construction that the word "may" will be construed as permissive unless a different construction is required in order to carry out the clear intent of the Legislature.[6] In *Kuykendall*, the Court determined that the statute's clear intent required that the word "may" be construed as imposing a mandate.[7]

The Legislature has not acted in disagreement with the Court's interpretation of NRS 176.055(1). The Court noted that in the 23 years since *Kuykendall* was decided, the Legislature has not changed the language that the Court interpreted as mandatory. In that time, the Legislature has amended other aspects of the statute while remaining silent on the Court's construction of the word "may," implying that the Legislature approved the Court's interpretation. Further, the Court's construction of the word "may" to be mandatory is fundamentally fair, prevents arbitrary application of the statute, and avoids constitutional concerns of discrimination based on indigent status.

Conclusion

The Court held that there was no compelling reason to overturn its holding in *Kuykendall*, and it remanded the case to the district court to amend the judgment of conviction to give Poasa credit for time served in presentence confinement.

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[6] Ewing v. Fahey, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

[7] *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783.