

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/10/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KEITH LUDWIG,)
) No. 1 CA-HC 11-0002
)
 Appellant,) DEPARTMENT E
)
 v.) MEMORANDUM DECISION
)
 STATE OF ARIZONA,) (Not for Publication -
) Rule 111, Rules of the
 Appellee.) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court in Coconino County

Cause No. CR1992-17242

The Honorable Dan R. Slayton, Judge
The Honorable Richard K. Mangum, Judge (Ret.)

PETITION FOR HABEAS CORPUS DISMISSED

Keith Ludwig Phoenix
In Propria Persona

David Rozema, Coconino County Attorney Flagstaff
by Serena Serassio, Deputy County Attorney
Attorneys for Appellee

H A L L, Judge

¶1 Appellant Keith Ludwig challenges the superior court's
denial of his petition for a writ of habeas corpus, in which he

requested the court to "quash an outstanding detainer currently restraining Ludwig of his liberty." For the foregoing reasons, we dismiss the petition for writ of habeas corpus.

FACTS AND PROCEDURAL BACKGROUND

¶12 The following facts are not disputed. On April 9, 1992, Ludwig was charged by indictment with one count of armed robbery, one count of burglary in the first degree, one count of theft, and two counts of aggravated assault. The State added allegations of dangerousness and alleged that Ludwig was on parole when he committed the offenses. At the time of his indictment, Ludwig was serving a sentence in a federal penitentiary for an unrelated offense.

¶13 Ludwig entered a written plea agreement and pled guilty to armed robbery and an amended count of aggravated assault with a deadly weapon, both dangerous non-repetitive felonies. The parties stipulated that the sentences imposed would be served concurrently, but that the sentencing judge would have discretion to order the sentences served concurrently or consecutively with Ludwig's federal sentences. In exchange for Ludwig's concessions, the State agreed to dismiss the remaining allegations.

¶14 At the sentencing hearing, the superior court found numerous aggravating factors and sentenced Ludwig to an aggravated term of 21 years' imprisonment on the count of armed

robbery and an aggravated term of 15 years' imprisonment on the count of aggravated assault with a deadly weapon. The superior then stated, in relevant part:

Those two terms will be served concurrently with each other, and against them you will have credit for 752 days that you have already served.

As to the federal sentence, which I understand was imposed in Nebraska and was being served in California, I see a pattern here of consistent criminal behavior throughout your life which has gotten worse and more serious as you have gone along. I think that this Arizona sentence therefore should be made consecutive to the federal sentence, and that is my sentence concerning it.

. . . .

[Court ordered restitution]

The sentence that I have imposed shall start to today.

. . . .

[Court advised Ludwig of his right to appeal]

To carry out this sentence, I make the following orders. I have been advised off the record that federal officials want to pick up [Ludwig] at the Coconino County Jail and transport him back to federal custody. I understand that the sentence, the first part, that is, the federal part, will continue to be served in the federal corrections system. After that's done, then, of course, there would be a transfer to the Arizona Department of Corrections.

The sentencing minute entry reflects that the sentence for each of the counts was ordered to be concurrent with the other, and "consecutive to the federal sentence." The sentencing minute entry further states that each sentence commenced on the date of

sentencing, October 23, 1992, and credited Ludwig 752 days' presentence incarceration on each count.

¶15 Ludwig appealed the sentences imposed. His attorney filed a brief complying with *Anders v. California*, 386 U.S. 738 (1967), advising that she was unable to find any arguable grounds for reversal and requesting fundamental error review. Ludwig was granted the opportunity to file a supplemental brief, but he did not do so. On April 13, 1993, this court entered a memorandum decision, finding no error and affirming the superior court's sentence. In the memorandum decision, we expressly noted that the superior court ordered Ludwig to serve his sentences on each count concurrently, but "consecutively with Ludwig's federal sentences." *State v. Ludwig*, 1 CA-CR 92-1692 at 3 (Ariz. App. Apr. 13, 1993) (mem. decision).

¶16 In August 2011, Ludwig filed a petition for writ of habeas corpus requesting the superior court to "quash an outstanding detainer currently restraining [] his liberty." Ludwig asserted that the superior court's "sentence appears to be ambiguous with respect to whether or not it runs concurrent or consecutively to his federal sentence." Specifically, Ludwig pointed out that the superior court's sentencing minute entry states that his sentence for armed robbery "is to date from October 23, 1992. The Defendant is to be given credit for [752] days served prior to sentencing." Likewise, the sentencing

minute entry states that Ludwig's sentence for aggravated assault with a deadly weapon "is to date from October 23, 1992. The Defendant is to be given credit for [752] days served prior to sentencing."

¶17 The superior court denied Ludwig's petition for a writ of habeas corpus, finding "that both the record and the minute entry show the [superior] court's clear intent to sentence the defendant to serve his state sentence consecutive to his federal sentence." This appeal followed.

DISCUSSION

¶18 On appeal, Ludwig contends that the superior court erred by denying his petition for writ of habeas corpus. Specifically, Ludwig asserts that the record "evidences the [sentencing] court's intent to impose a concurrent rather than a consecutive sentence."

¶19 "[T]he purpose of a writ of habeas corpus is to test the legality and correctness of a prisoner's judgment and confinement." *Griswold v. Gomes*, 111 Ariz. 59, 62, 523 P.2d 490, 493 (1974). Pursuant to Arizona Revised Statutes (A.R.S.) section 13-4121 (2010), "[a] person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." "The decision whether to issue a writ of habeas

corpus is entrusted to the sound discretion of the [superior] court, and we will not disturb the [superior] court's decision unless we see an abuse of that discretion." *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶10 The State first argues that Ludwig's petition for habeas corpus is premature because he is still serving his federal sentence and therefore, as yet, is not being unlawfully detained. We agree. As reflected in the record, Ludwig is ineligible for release from federal prison until June 19, 2012. Thus, his claim that the sentencing court in the underlying case intended to sentence him to a concurrent sentence rather than a consecutive sentence is not cognizable until the expiration of his federal sentence and his petition for writ of habeas corpus is therefore premature. See *Brown v. State*, 117 Ariz. 476, 477-78, 573 P.2d 876, 877-78 (1978) (explaining a petitioner is not entitled to habeas corpus relief in the absence of a showing that he is entitled to immediate release from custody); *Goodman v. State*, 96 Ariz. 139, 142, 393 P.2d 148, 150 (1964) ("Relief cannot be granted while petitioner is still lawfully held in custody[.]").¹ Accordingly, we dismiss Ludwig's petition for writ of habeas corpus without prejudice. Upon expiration of his

¹ Even if we construed this appeal as a petition for post-conviction relief, Ludwig would not be entitled to relief. See Ariz. R. Crim. P. 32.1(d) (explaining a petitioner may be entitled to relief if "being held in custody after the sentence imposed has expired").

federal sentence, Ludwig may seek relief by writ of habeas corpus.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MAURICE PORTLEY, Presiding Judge

_/s/_____
DIANE M. JOHNSEN, Judge