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AND NEBRASKA COURT OF APPEALS**
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May 28, 2019

Duane Pope #84196
Penitentiary
PO Box 2500
Lincoln, NE 68542-2500

**IN CASE OF: A-18-000741, Pope v. Frakes
TRIAL COURT/ID: Lancaster County District Court CI17-2580**

**The following filing: Petition Appellant for Further Review
Filed on 04/25/19
Filed by appellant Duane Pope #84196**

Has been reviewed by the court and the following order entered:

Petition of appellant for further review denied.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

APPENDIX A - (One Page)

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

DUANE POPE,

Case No. CI 17-2580

Plaintiff,

v.

PROPOSED ORDER

SCOTT FRAKES,

Defendant.

THIS MATTER came before the Court on June 28, 2018 on the Defendant's Motion for Judgment on the Pleadings. The Defendant was represented by Assistant Attorney General Amie Larson and the Plaintiff appeared *pro se* by telephone. Arguments were made and the Court took the matter under advisement.

The Plaintiff, Duane Pope, an inmate incarcerated at the Nebraska State Penitentiary, filed this declaratory judgment action against the Defendant, Scott Frakes, asking the court to declare his rights under Neb. Rev. Stat. §83-1,106(1). The Defendant then filed a Motion for Judgment on the Pleadings contending that the Defendant is entitled to a judgment as a matter of law.

Neb. Ct. R. Pldg. § 6-1112(c) provides for a motion for judgment on the pleadings. This rule specifically provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given a reasonable opportunity to present material made pertinent to such a motion made by statute.

A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620



(2005). A motion for judgment on the pleadings admits the truth of all well-pled facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. *Id.*

The Plaintiff is currently an inmate incarcerated at the Nebraska State Penitentiary. The Plaintiff was convicted of three counts of murder in both Nebraska state and federal court after he shot and killed three individuals while robbing a bank in Big Springs, Nebraska on June 4, 1965. *State v. Pope*, 190 Neb. 689, 690, 211 N.W. 2d 923, 924 (1973) The Plaintiff was originally sentenced to death in federal court, but this sentence was vacated and he was resentenced to life imprisonment on two counts of murder and 99 years on one count of murder. *Id.*

The Plaintiff was sentenced to death in State court as well, but after an appeal he was resentenced to three life sentences to run consecutively, and all sentences to begin after he had served his federal sentences. *State v. Pope*, 190 Neb. at 691, 211 N.W. 2d at 925. The Plaintiff was paroled from his federal sentence and began serving his state sentence in July of 2016. The Plaintiff did not receive jail credit for time served on his federal sentence when he was sentenced by the State of Nebraska.

ANALYSIS

The Plaintiff filed this action pursuant to Neb.Rev.Stat. §25-21,149 and asked the Court to declare his rights under Neb.Rev.Stat. §83-1,106(1)(Reissue 1971). He stated in his Complaint that even though the language of Neb.Rev.Stat. §1-106(1)(Reissue 1971) is discretionary in terms of receiving jail time credit, he should receive jail time credit for the time he spent in custody under his federal sentence. He alleged that if he is not given this jail time credit, he is subject to double jeopardy.

The Plaintiff was convicted of three counts of murder in federal court and then subsequently convicted of three counts of murder in state court based on events that occurred on June 4, 1965 in

which he shot and killed three people during a bank robbery. *State v. Pope*, 190 Neb. 689, 211 N.W.2d 923 (1973).

The Plaintiff was originally sentenced to death in federal court, but this sentence was vacated and he was resentenced to life imprisonment on two counts of murder and 99 years on one count of murder. *Id.* The Plaintiff was sentenced to death in State court as well, but after an appeal he was resentenced to three life sentences to run consecutively, and all sentences to begin after he had served his federal sentences. *State v. Pope*, 190 Neb. at 691, 211 N.W.2d at 925.

The Plaintiff served part of his federal sentence and was then paroled and placed in state custody where he is currently serving his state sentences. (Complaint, ¶16) He claims that if he does not receive jail credit for the time he spent serving his federal sentence, then he would be subjected to double jeopardy. (Complaint, ¶16)

The Plaintiff's claim is without merit because the Supreme Court of Nebraska has already held that serving his state sentences without receiving jail time credit for his time spent in custody under his federal sentence does not subject him to double jeopardy. *State v. Pope*, 190 Neb. 689, 211 N.W.2d 923 (1973).

In the *Pope* appeal decided in 1973, the Plaintiff appealed his state sentence to the Nebraska Supreme Court and argued that because he had been convicted in federal court and was serving a federal sentence, subsequently being convicted and sentenced in state court subjected him to double jeopardy. *Id.* at 691. The Supreme Court cited their opinion in a previous appeal filed by the Plaintiff which can be found at *Pope v. State*, 186 Neb. 489, 184 N.W.2d 395 (1971), and held that the successive prosecution by federal and state government with concurrent jurisdiction is not prohibited by the double jeopardy clause. *Id.* The Court further stated that Nebraska is allowed to set higher standards by statute or judicial decision. *Id.* at 692.

The Supreme Court also discussed how allowing the state to sentence a defendant may be necessary for public policy, as the state should be able to ensure the desired sentence is executed to its fullest degree. *Id.* at 694. In his appeal decided in 1973, the Plaintiff specifically argued that because his death sentences had been vacated and the only sentences available to him in both federal and state court were life sentences, public policy did not require that he be subsequently convicted in state court. *Id.* at 692. To support his argument he cited Neb.Rev.Stat. §83-1,106(1)(Reissue 1971) which allowed discretion on whether to give an offender jail credit for time spent in custody under a prior sentence if he is later prosecuted and resentenced for the same offense. *Id.*

The Nebraska Supreme Court pointed out, in their 1973 decision, that this statute does follow common law principles expressed in *Marshall v. State*, 6 Neb. 120, 1877 WL 3555 (1877) which contemplated that if two governmental powers have jurisdiction, in order to bar one from trying a defendant, the first must have executed a sentence to its fullest extent, otherwise it would violate public policy of the first. *State v. Pope*, 190 Neb. at 693, 211 N.W. 2d at 926. The Court reasoned that when this principle was applied to the Plaintiff's case, in order to satisfy the public policy of Nebraska, the federal sentence must have been executed to its fullest extent. *Id.* Because the federal sentences were not executed to their fullest extent, the Court held that public policy requires the State to be able to execute life sentences. *Id.* The Court then affirmed the Plaintiff's life sentences. *State v. Pope*, 190 Neb. 689, 694.

In the Plaintiff's current case before the Court, he claims that an amendment to Neb.Rev.Stat. §83-1,106(1) subsequent to his sentencing proves that the 1971 version of the statute subjects him to double jeopardy. (Complaint, ¶12) The 1971 version of Neb.Rev.Stat. §83-1,106 states that credit for time spent in custody as a result of the conduct on which the charge is based *may* be given. The amended version of this statute states that credit *shall* be given for time spent in custody as a result of the conduct on which the charge is based.

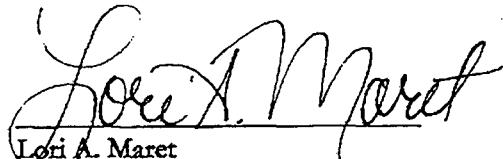
The Plaintiff's claim is without merit. The Supreme Court of Nebraska has already reviewed the Plaintiff's state sentences and commented on the fact that the language in Neb.Rev.Stat. §83-1,106(1) was discretionary and held that public policy required that the state be able to carry out its sentence. The fact that the statute was later amended does not override the Supreme Court's decision.

Res judicata, or claim preclusion, bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if, (1) The former judgment as rendered by a court of competent jurisdiction; (2) The former judgment as a final judgment; (3) The former judgment was on the merits; and (4) The same parties or their privies were involved in both actions. *Han v. Reibert*, 287 Neb. 577, 580; 843 N.W.2d 812, 816 (2014). Although the Plaintiff changed his argument slightly, the basis of this claim is the same as the one he brought in *State v. Pope*, 190 Neb. 689 and the Supreme Court has already concluded that his state conviction and sentence does not subject him to double jeopardy.

IT IS HEREBY ORDERED, based on the reasons discussed in this Order, that the Defendant's Motion for Judgment on the Pleadings is granted and this matter is dismissed.

Dated this 29 day of June, 2018.

BY THE COURT:


Lori A. Maret
District Court Judge