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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS LEROY PITT,

Petitioner-Appellant,

v.

MARK NOOTH, Superintendent of Snake
River Correctional institution,

Respondent-Appellee.

No. 17-35744

D.C. No. 2:13-cv-01929-BR

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted March 7, 2019
Portland, Oregon

Before: GRABER and BERZON, Circuit Judges, and ROBRENO,** District
Judge.

Petitioner Douglas Pitt timely appeals from the denial of his 28 U.S.C.
§ 2254 petition for a writ of habeas corpus. He argues that the Lane County trial
court's imposition of a sentence enhanced by prior convictions that were later

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eduardo C. Robreno, United States District Judge for the
Eastern District of Pennsylvania, sitting by designation.

overturned violated his due process rights. We review the district court's decision de novo. Hurles v. Ryan, 752 F.3d 768, 777 (9th Cir. 2014). We affirm.

Even assuming there is "clearly established" United States Supreme Court law that supports Petitioner's proposed rule, see 28 U.S.C. § 2254(d)(1), any error was harmless. At the 2007 sentencing, the Lane County trial court considered a multitude of sentencing options and discussed the possibility that the Clatsop County convictions might be overturned. The court then structured the sentence so that if the Clatsop County convictions were upheld, Petitioner would, as a practical matter, be incarcerated for 130 months in addition to what was imposed by the court in Clatsop County. If the Clatsop County convictions were overturned, Petitioner would, as a practical matter, be incarcerated for 205 months.

In 2013, the Clatsop County convictions were in fact overturned. Afterward, Petitioner pleaded no contest to one count of Sexual Abuse in the First Degree. For that Clatsop County conviction, he was sentenced to 75 months to run concurrently with his 2007 convictions in Lane County.

In 2014 and 2016, the Lane County trial court received motions from Petitioner to modify his sentence. These motions disclosed the subsequent developments in his Clatsop County case. However, despite the Clatsop County developments, the Lane County trial court's sentence in 2007 did not automatically

become an illegal sentence or an improperly premised sentence. Rather, even in light of Petitioner's new Clatsop County sentence, the Lane County trial court could have structured a legal sentence to obtain that same 205-month result given at the 2007 sentencing hearing.

The Lane County trial court summarily rejected Petitioner's resentencing motions. Yet summary rejection was not improper because certain facts militated against resentencing Petitioner: first, the Lane County trial court's 2007 sentence already accounted for the possibility that the Clatsop County convictions could be overturned; second, the 2007 Lane County sentence remained lawful. Under these circumstances, the Lane County trial court most likely denied the motion to resentence because the earlier sentence was still appropriate. Any error in failing to hold a formal modification proceeding was harmless. See Jones v. Harrington, 829 F.3d 1128, 1141 (9th Cir. 2016) ("[H]abeas relief is only available if the constitutional error had a 'substantial and injurious effect or influence' on the jury verdict or trial court decision." (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993))).

AFFIRMED.