

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL ANGELO DRAKE,
Appellant,
vs.
ELDON KENNEDY MCDANIEL,
INTERIM DIRECTOR; JAMES G. COX,
FORMER DIRECTOR; JAMES E.
DZURENDA, DIRECTOR (NEVADA
DEPARTMENT OF CORRECTIONS);
DWAYNE DEAL, OFFENDER
MANAGEMENT ADMINISTRATOR
(NDOC); AND HAROLD WICKHAM,
WARDEN, WARM SPRINGS
CORRECTIONAL CENTER,
Respondents.

No. 70891

FILED

MAY 17 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *A. Wilcox*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Angelo Drake appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ First Judicial District Court, Carson City; James Todd Russell, Judge.

In his May 9, 2016, petition, Drake claimed the Nevada Department of Corrections erroneously failed to apply his statutory credits toward his minimum term. The district court concluded Drake was not entitled to relief because he was sentenced under a statute that specified the minimum sentence that must be served before a defendant becomes eligible for parole, and therefore, the NDOC may not apply statutory

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

credits to reduce Drake's minimum term.² See 1997 Nev. Stat., ch. 314, § 8, at 1185-85 (former version of NRS 207.010(1)(b)(2)); 1997 Nev. Stat., ch. 641, § 4, 3175 (former version of NRS 209.4465(7)(b)). After a review of the record, we conclude the district court did not err in this regard.

Second, Drake argued failure to apply credits toward his minimum terms violates his equal protection rights. Drake asserted certain inmates with convictions similar to his, have credits applied toward their minimum terms and the disparate treatment of those inmates as compared to him violated his equal protection rights. See 1997 Nev. Stat., ch. 641, § 4, at 3175. "The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). When a classification does not affect fundamental rights, the "legislation at issue will be upheld provided the challenged classification is rationally related to a legitimate governmental interest." *Id.*

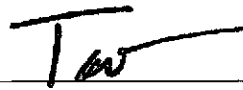
Here, Drake did not demonstrate he and the other inmates were similarly situated given their differing offenses and different statutes governing application of credits for those offenses. Further, Drake did not demonstrate he was a member of a suspect class, or that this issue involved the type of fundamental rights requiring strict scrutiny review. See *id.*; see also *Graziano v. Pataki*, 689 F.3d 110, 117 (2d Cir. 2012) (recognizing prisoners, whether in the aggregate or specified by offense,

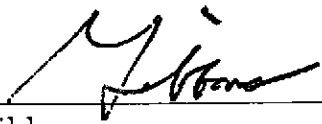
²The record demonstrates Drake was convicted in 1999 of embezzlement and is serving a prison term of life with the possibility of parole in ten years under the large habitual criminal enhancement.

are not a suspect class and rational basis test will apply); *Glauner v. Miller*, 184 F.3d 1053, 1054 (9th Cir. 1999) (recognizing prisoners are not a suspect class and applying rational basis test). And Drake did not demonstrate there was no rational basis for applying credits in a different manner based upon offenses and offense date. Therefore, we conclude the district court did not err in dismissing this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Michael Angelo Drake
Attorney General/Carson City
Carson City Clerk

³Because we conclude Drake is not entitled to relief for the reasons discussed previously, we decline to consider the additional bases upon which the district court denied the petition.