

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MALCOLM GRAY,
Appellant,
vs.
JO GENTRY, WARDEN,
Respondent.

No. 78015-COA

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Appellant,
vs.
JO GENTRY, WARDEN,
Respondent.

No. 78016-COA

FILED

NOV 05 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Malcolm Gray appeals from an order of the district court denying two postconviction petitions for a writ of habeas corpus challenging the computation of time served. The cases were consolidated on appeal. See NRAP 3(b). Eighth Judicial District Court, Clark County; Linda Marie Bell, Chief Judge.

Gray was convicted in district court case number C124036 of second-degree murder with the use of a deadly weapon and was sentenced to consecutive terms of life in prison with the possibility of parole after five years. He was paroled from the murder sentence and began serving the sentence for the deadly weapon enhancement on February 2, 2015.

In his petition in district court case no. A-18-775679-W (Docket No. 78016), filed on May 15, 2018, Gray claimed he was incarcerated five months longer than he should have been because his 2014 parole hearing was delayed five months. He asked that his 2019 parole hearing be

advanced five months. Advancing his parole hearing would not change Gray's parole eligibility date, which is fixed at five years after he began serving the current sentence. And nothing would have allowed Gray a retroactive grant of parole. *See Niergarth v. State*, 105 Nev. 26, 29, 768 P.2d 882, 884 (1989). We therefore conclude the district court did not err by denying this claim.

The petition in district court case no. A-18-773980-W (Docket No. 78015) was filed on May 4, 2018. Gray first claimed the Nevada Department of Corrections (NDOC) failed to apply his 433 days of presentence credit to his deadly weapon enhancement, in violation of *Mays v. Eighth Judicial Dist. Court*, 111 Nev. 1172, 901 P.2d 639 (1995). An offender is entitled to have all of his presentence time served credited toward his ultimate sentence. *See* NRS 176.055(1); *Kuykendall v. State*, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996). *Mays* allows for the possibility that the credit for presentence confinement could be split among two or more consecutive sentences, but it does not mandate it. 111 Nev. at 1176-77, 901 P.2d at 642. The record before this court demonstrates NDOC applied the entirety of Gray's presentence credit to his murder sentence,¹ leaving nothing left to apply to his enhancement sentence. Further, although Gray claimed he was entitled to credits for a prior parole, his bare claim failed to provide any specific facts regarding a prior parole. We therefore conclude the district court did not err by denying this claim. *Cf. Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding no relief was warranted where petitioner failed to raise claims supported by

¹Gray was sentenced on November 20, 1995. NDOC calculated Gray's sentence with a start date of September 13, 1994, which was 433 days before Gray's sentencing date.

specific factual allegations that, if true and not belied by the record, would entitle him to relief).

Gray next claimed the 2007 changes to NRS 193.165 should be applied to him retroactively. This was a challenge to the validity of his sentence and could not be raised in a petition that also challenged the computation of time served. *See* NRS 34.738(3). Moreover, as a separate and independent ground to deny relief, Gray's claim failed as a matter of law. The 2007 changes to NRS 193.165 do not apply retroactively. *See State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008). And the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), do not change that, because those cases addressed situations where a court interpreted a statute or made a constitutional ruling. *See Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65; *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 726. The changes to NRS 193.165 were not the result of a court decision and were not of constitutional dimension. *See Pullin*, 124 Nev. at 565-66, 571, 188 P.3d at 1080, 1084. We therefore conclude the district court did not err by denying this claim.

Finally, Gray claimed NDOC failed to apply statutory credits to his case as required by NRS 209.4465(7)(b). NRS 209.4465 applies to offenses committed on or after July 17, 1997. Gray committed his offense in 1994 and is thus governed by NRS 209.446. To the extent Gray claimed he was entitled to the application of credit to his minimum sentences pursuant to NRS 209.446(6)(b), his claim lacked merit. NRS 209.446(6)(b) provided for the application of credit to parole eligibility "unless the offender was sentenced pursuant to a statute which specifies a minimum sentence which must be served before a person becomes eligible for parole." Gray


was sentenced to life in prison pursuant to NRS 200.030(5), which at the time he committed his offense specified that "eligibility for parole begins when a minimum of 5 years has been served." 1998 Nev. Stat., ch. 631, § 1, at 1451. Accordingly, Gray was not entitled to the application of credit to his minimum sentences. *Cf. Williams v. State Dep't of Corr.*, 133 Nev. 594, 402 P.3d 1260 (2017) (interpreting virtually identical language in NRS 209.4465(7)(b)). We therefore conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Linda Marie Bell, Chief Judge
Malcolm Gray
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk