

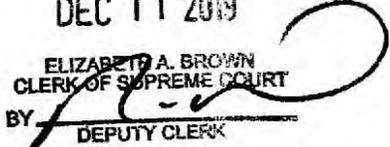
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE GUADALUPE TELLO,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 78263-COA

FILED

DEC 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING*

Jose Guadalupe Tello appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on September 27, 2018. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Tello claims the district court erred by denying his petition because his crimes were committed in 2003, he was entitled to have statutory credits he had earned applied to his minimum sentences pursuant to *Williams v. State Department of Corrections*, 133 Nev. 594, 402 P.3d 1260 (2017), and any ambiguity in NRS 207.4465 must be construed in his favor pursuant to the rule of lenity.¹

¹Tello also claimed below that the Nevada Department of Corrections had violated his constitutional rights by failing to act on claims challenging the time served and then asserting that the recalculation claim was moot if the sentence has expired or the inmate had already appeared before the Nevada Board of Parole Commissioners. The district court found this claim was not ripe. We agree and affirm the district court's resolution of this claim.

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The district court found that Tello had been convicted of attempted sexual assault on a minor under the age of 14 and attempted battery with the intent to commit sexual assault, both of his offenses were category B felonies, and the offenses were committed between June 3, 2003, and August 1, 2008. The district court determined that because Tello's felonies were continuing offenses, the August 1, 2008, date controlled for purposes of determining the date of the offenses. And the district court concluded that the application of statutory credits was governed by NRS 209.4465, as amended in 2007, and that NRS 209.4465(8) precluded the application of statutory credits to Tello's minimum sentence.

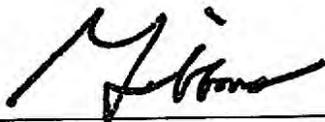
We conclude the district court erred by determining Tello's offenses were continuing offenses. "[A]n offense [is] a continuing offense only when 'the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one.'" *Rimer v. State*, 131 Nev. 307, 319, 351 P.3d 697, 706 (2015) (quoting *Toussie v. United States*, 397 U.S. 112, 115 (1970)). Nothing in NRS 193.330(1) (defining attempt), NRS 200.400(1)(a) (defining battery), or NRS 200.366(1)(b) (defining sexual assault on a child) suggests that attempted sexual assault on a child and attempted battery with the intent to commit sexual assault are continuing offenses.

Attempted sexual assault on a child and attempted battery with the intent to commit sexual assault are specific acts, not patterns of behavior. The fact that the charging document sets forth a time frame during which the offenses were committed does not mean that the offenses are continuing offenses. *See Wilson v. State*, 121 Nev. 345, 368-69, 114 P.3d

285, 301 (2005) (recognizing the State is not required to allege an exact date unless time is an element of the charge).

We conclude Tello is entitled to have his statutory credits applied to his minimum sentence pursuant to NRS 209.4465(7)(b) and *Williams*, 133 Nev. at 597, 402 P.3d at 1262, because nothing in the record indicates whether the offenses were committed before or after the effective date of the 2007 amendments to NRS 209.4465 and, therefore, any attempt to separate the time frame during which the offenses occurred would run afoul of the Ex Post Facto Clause. *See Weaver v. Graham*, 450 U.S. 24, 33-34 (1981). Consequently, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jim C. Shirley, District Judge
Jose Guadalupe Tello
Attorney General/Carson City
Pershing County Clerk