

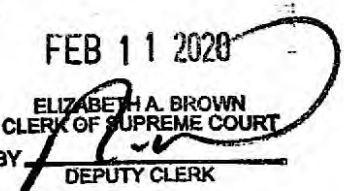
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DALE RUESCH,  
Appellant,  
vs.  
BRIAN WILLIAMS, WARDEN;  
OFFENDER MANAGEMENT  
DIVISION; AND THE STATE OF  
NEVADA,  
Respondents.

No. 78204-COA

**FILED**

FEB 11 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

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

Dale Ruesch appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 26, 2018, that challenged the computation of time served. Eighth Judicial District Court, Clark County; Linda Marie Bell, Chief Judge.

First, Ruesch claims the district court erred by denying his claim that the Nevada Department of Corrections (NDOC) is not properly calculating his good time credit or applying it to his minimum term.

The district court found that Ruesch is currently serving two concurrent sentences of life with the possibility of parole after a minimum term of 20 years has been served for convictions for sexual assault with a minor. The district court also found Ruesch committed the offenses in 2002 or 2003. The district court concluded that, because Ruesch was sentenced pursuant to a statute that required him to serve a mandatory minimum term before he is eligible for parole, pursuant to NRS 209.4465(7)(b), NDOC may not apply credit to Ruesch's minimum term. *See Williams v. State Dep't of Corr.*, 133 Nev. 594, 596-974, 402 P.3d 1260, 1262 (2017). Therefore, the district court denied this claim. The record supports the district court's

findings, and we conclude the district court did not err by denying this claim.

Second, Ruesch claims the district court erred by rejecting his claim that application of NRS 209.4465(8) to deny him application of credit to his minimum term violates the Ex Post Facto Clause. The district court concluded there is no ex post facto violation because NRS 209.4465(8) is not being applied to Ruesch and denied the claim. We conclude the district court did not err by denying this claim.

Third, Ruesch claims the district court erred by granting the State an extension of time to respond to his petition. He asserts he was unduly prejudiced by the extension of time because he should have had a parole hearing in 2015. The district court entered an order on August 7, 2018, directing the State to file a response within 45 days and ordering the matter to be placed on calendar on December 11, 2018. Although the record does not indicate the district court granted an extension of time to file the response, the State did not file its response until approximately 20 days after the date ordered by the district court. Nevertheless, because the response was filed two months before the date the matter was to be considered by the district court, we conclude Ruesch failed to demonstrate he was prejudiced by the delay in filing the response. Therefore, we conclude Ruesch is not entitled to relief for this claim.

Fourth, Ruesch claims that not allowing him to have credit applied to his minimum term is the equivalent of flat time sentencing, which he asserts the Nevada Supreme Court held in *Haney v. State*, 124 Nev. 408, 185 P.3d 350 (2008), contradicted the Legislature's intent for inmates to earn credit for early release. This claim was not raised in Ruesch's petition below, and we decline to consider it on appeal in the first

instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Fifth, Ruesch claims the district court erred by denying his claim that NDOC is failing to properly calculate, and keep accurate records of, the statutory credit he is entitled to under NRS 209.4465(1). The district court denied this claim after finding that NDOC correctly recorded the amount of good time credits for each month Ruesch has been incarcerated, and Ruesch is not entitled to any additional good time credit.

On appeal, Ruesch acknowledges that, because his maximum term is life, he is not entitled to have good time credit earned applied to his maximum term. He asserts, however, that NDOC is still required to record and keep accurate records of the good time credit he earns because there is a slight chance his sentence could be modified in the future. *See Hunt v. Warden, Nev. State Prison*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995). He asserts that the district court erred by denying his claim because the credit histories demonstrate NDOC has only given him credit for 10 days of statutory good time credit per month, even though under NRS 209.4465(1) he is entitled to 20 days of statutory good time credit per month.

We directed the State to file a response to this claim. In the response, the State informs this court that, due to an inadvertent error, outdated credit history reports were attached to the response the State filed in the district court. The State has now provided this court with copies of the correct, updated credit history reports that should have been attached to the response filed in the district court, along with current credit history reports. The State asserts that these credit history reports show that NDOC is correctly calculating and recording Ruesch's good time credits, and

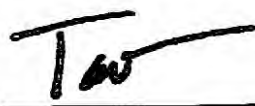
the State urges this court to affirm the district court's determination that Ruesch is not entitled to any additional good time credit.

Although the credit history reports provided to this court by the State indicate that Ruesch's credit history reports were corrected and updated to reflect that Ruesch has received 20 days of statutory good time credit beginning in July of 2007, these documents were not filed in, or considered by, the district court below. Therefore, these documents are not properly before this court and this court cannot consider them when resolving this appeal. *See* NRAP 10; *A Minor v. State*, 85 Nev. 182, 190, 454 P.2d 895, 896 (1969) ("In determining cases, an appellate court must confine its consideration to the facts reflected in the record and the necessary and reasonable inferences that may be drawn therefrom."). Because the record that is properly before this court does not support the district court's determination that NDOC has correctly recorded the amount of statutory credit Ruesch is entitled to under NRS 209.4465(1), we are constrained to reverse and remand for the district court to reconsider this claim.

Having concluded Ruesch is only entitled to the relief described herein, 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. Linda Marie Bell, Chief Judge  
Dale Ruesch  
Attorney General/Carson City  
Attorney General/Las Vegas  
Eighth District Court Clerk