

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN RAY HOLMES,
Appellant,
vs.
NEVADA DEPARTMENT OF
CORRECTIONS, OFFENDER
MANAGEMENT DIVISION; AND THE
STATE OF NEVADA,
Respondents.

No. 78878-COA

FILED

JUL 28 2020

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

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

Kevin Ray Holmes appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 2, 2019. First Judicial District Court, Carson City; James Todd Russell, Judge.

Holmes argues the district court erred by denying his claim that he is entitled to have statutory credit applied to his minimum terms. Holmes was convicted of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon for crimes he committed in 1995. Holmes was sentenced to life in prison with the possibility of parole for the first-degree murder count and to an equal and consecutive term for the attendant deadly weapon enhancement (DWE). He was also sentenced to serve 20 years in prison for the attempted murder count and to an equal and consecutive term for the attendant DWE.¹ His

¹Holmes is eligible for parole on this count after serving one-third of the sentence. See 1993 Nev. Stat., ch. 84, § 2, at 137 (former NRS 213.120).

attempted murder sentence was imposed concurrently to his murder sentence. Holmes challenges only the application of credit to his DWE minimum sentences. Because the DWE sentence for first-degree murder is the longer sentence, it controls for parole eligibility purposes. *See* NRS 213.1213(1).

The district court determined that, because the controlling sentencing statute required Holmes to serve a minimum term before parole eligibility, *see* 1991 Nev. Stat., ch. 631, § 1, at 1451, pursuant to NRS 209.446(6)(b), he is not entitled to have credit applied to his minimum term for that sentence. *Cf. Williams v. State, Dep't of Corr.*, 133 Nev. 594, 599, 402 P.3d 1260, 1264 (2017) (interpreting virtually identical language in NRS 209.4465(7)(b)). The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.²

Holmes also argues the district court erred by denying his claim that NDOC erred by not running the attempted murder DWE from the date he expired his attempted murder sentence. Holmes claimed he expired his attempted murder sentence in 2008, but NDOC did not begin running his consecutive DWE sentence until 2012, when he was paroled from his first-degree murder sentence to his first-degree murder DWE sentence.

On March 26, 2020, this court ordered the State to respond to this claim. The State argues that the DWE for the first-degree murder count controls parole eligibility for the DWE of the attempted murder count because the DWE for the first-degree murder count is the longer sentence.

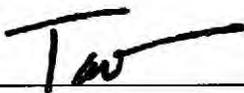
²To the extent the district court applied NRS 213.120(2) to deny relief, we conclude the district court erred. NRS 213.120(2) went into effect after Holmes committed his crimes. However, because the district court correctly denied relief based on NRS 209.446(6)(b), we conclude the district court did not err by denying this claim.

As stated above, we agree with the State with regard to credit toward Holmes' parole eligibility. However, Holmes' claim did not relate to parole eligibility but rather to the fact that Holmes *expired* his attempted murder sentence and should have begun serving the attendant DWE term. While Holmes could not be paroled on the DWE portion of his attempted murder sentence before he was eligible for parole for the DWE portion of his first-degree murder sentence, he was entitled to begin serving the DWE portion of his sentence for the attempted murder and earn credit toward his maximum term. Therefore, we conclude the district court erred by denying this claim.

Accordingly, we reverse and remand this claim to the district court to hold an evidentiary hearing to determine the correct start date for Holmes' sentence for the attempted murder DWE and to determine the correct amount of credit that should apply to the maximum portion of that sentence. Thus, 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.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³On July 24, 2020, Holmes filed a motion for enlargement of time to file a reply brief. We grant that motion and direct the clerk's office to file the reply brief.

cc: Hon. James Todd Russell, District Judge
Kevin Ray Holmes
Attorney General/Carson City
Carson City Clerk