

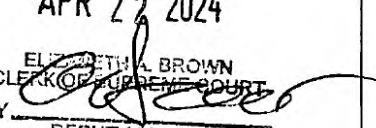
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD LEE GRUBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87180-COA

FILED

APR 22 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Lee Gruber appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus challenging the computation of time served. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

In his petition, filed on August 26, 2020, Gruber claimed the Nevada Department of Corrections (NDOC) failed to apply statutory good-time credits toward the minimum term of his sentence for sexual assault of a minor under the age of 16, which he expired in 2018. Because Gruber had expired that sentence, his claim was moot, *see Johnson v. Dir., Nev. Dep't of Prisons*, 105 Nev. 314, 316 & n.4, 774 P.2d 1047, 1049 & n.4 (1989), and we conclude the district court did not err by denying the claim.

Gruber also claimed NDOC failed to apply statutory good-time credits toward the minimum term of his aggregate sentence pursuant to NRS 209.4465(7)(b). Gruber is serving an aggregate sentence for his convictions of lewdness with a child under the age of 14, a category A felony, and attempted sexual assault of a minor under the age of 16, a category B felony.

Gruber committed the lewdness offense between October 1, 1997, and August 15, 2003. Thus, NRS 209.4465 applied with respect to this offense. See NRS 209.4465(1) (awarding good-time credits to “offender[s] who [are] sentenced to prison for a crime committed on or after July 17, 1997”). Gruber was sentenced pursuant to a statute that provided for “eligibility for parole beginning when a minimum of 10 years has been served.” 1997 Nev. Stat., ch. 455, § 5, at 1722; 1999 Nev. Stat., ch. 105, § 49, at 471-72. Because he was sentenced pursuant to a statute that specified a minimum sentence that must be served before he became eligible for parole, see *Williams v. State Dep’t of Corr.*, 133 Nev. 594, 597-99, 402 P.3d 1260, 1263-64 (2017), Gruber was precluded from the application of credits to his minimum sentence, see NRS 209.4465(7)(b) (providing for application of credits “to eligibility for parole unless the offender was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole”).

Gruber committed the attempted sexual assault offense between July 1, 1995, and October 1, 1997. Thus, NRS 209.446 applied with respect to this offense. See NRS 209.446(1) (awarding good-time credits to “offender[s] who [are] sentenced to prison for a crime committed on or after July 1, 1985, but before July 17, 1997”); see also *High Desert State Prison v. Sanchez*, 135 Nev. 510, 511, 454 P.3d 1270, 1271 (2019) (holding the district court properly applied the version of the statute in effect when the offense was initiated where the offense was not a continuing offense).¹ Gruber was

¹ “[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.*

sentenced pursuant to a statute that provided for “a minimum term of not less than 2 years and a maximum term of not more than 20 years.” 1995 Nev. Stat., ch. 443, § 3 at 1168-69. Because he was sentenced pursuant to a statute that did not specify a minimum sentence that must be served before he became eligible for parole, *see Williams*, 133 Nev. at 597-600, 402 P.3d at 1263-65, Gruber is entitled to the application of credits to his minimum sentence, *see* NRS 209.446(6)(b) (providing for application of credits “to eligibility for parole 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”).

The district court found that Gruber has received 10 days of good-time credits for every month he has abided by the law and prison regulations while he has been incarcerated on his active aggregate sentence. The district court’s finding is supported by the record. Therefore, we conclude Gruber did not demonstrate that NDOC failed to apply the statutory good-time credits to which he is entitled, *see* NRS 209.446(1), and the district court did not err by denying this claim.²

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 193.153(1) (formerly NRS 193.330(1)) (defining attempt) or NRS 200.366(1), (3) (defining sexual assault against a child under the age of 16 years) suggests that attempted sexual assault of a minor under the age of 16 is a continuing offense. *Cf. High Desert State Prison v. Sanchez*, 135 Nev. 510, 512-13, 454 P.3d 1270, 1272-73 (2019) (explaining why attempted lewdness with a child is not a continuing offense).

²Because we hold Gruber did not demonstrate that NDOC failed to apply statutory good-time credits toward the minimum term of his aggregate sentence, we reject Gruber’s claim that the denial of statutory credits violates his due process rights.

On appeal, Gruber challenges the application of labor credits toward his aggregated sentence and contends the denial of statutory credits violates the Ex Post Facto Clause. Gruber did not raise these claims in his petition below, and we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jim C. Shirley, District Judge
Richard Lee Gruber
Attorney General/Carson City
Attorney General/Las Vegas
Pershing County District Attorney
Clerk of the Court/Court Administrator