

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY JOSEPH MILLER,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 47169

TIMOTHY JOSEPH MILLER,
Appellant,


vs.

THE STATE OF NEVADA,
Respondent.

No. 47170

FILED

JUL 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from an order of the district court denying a motion for presentence credit. We elect to consolidate these appeals for disposition.¹ Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On October 8, 2004, the district court convicted appellant, pursuant to a guilty plea, of possession of a credit card without the cardholder's consent in district court case number CR04-0902. The district court sentenced appellant to serve a term of 18 to 48 months in the Nevada State Prison. The district court provided appellant with 81 days of credit for time served. No direct appeal was taken.

On October 8, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of stolen property in

¹See NRAP 3(b).

district court case number CR04-0050. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. This sentence was imposed to run consecutively with the sentence in district court case number CR04-0902. No presentence credit was given. No direct appeal was taken.

On August 25, 2005, appellant filed a proper person motion for presentence credit designating both district court cases. The State opposed the motion. On April 6, 2006, the district court denied the motion. These appeals followed.

In his motion, appellant claimed that he should be provided with 119 days of credit for time spent in Phoenix House, a residential treatment facility, prior to sentencing.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's motion. This court recently held that a claim for presentence credit was a challenge to the validity of the judgment of conviction and sentence, and this challenge must be raised in a post-conviction petition for a writ of habeas corpus in compliance with the requirements of NRS chapter 34 that pertain to a petition that challenges the validity of the judgment of conviction.² Although appellant's motion was not in compliance with all of the requirements of NRS chapter 34, we conclude that appellant's claim was properly considered on the merits because this court's holding in Griffin has prospective effect only.

²Griffin v. State, 122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 63, July 13, 2006).

Appellant failed to demonstrate that he was entitled to additional presentence credit in the instant case. NRS 176.055(1) provides that a defendant is entitled to credit "for the amount of time which the defendant has actually spent in confinement before conviction."³ This court has recognized, however, that a defendant is not entitled to credit for time served in residential confinement because it is time spent "outside of incarceration."⁴ This court has observed that a defendant would only be entitled to credit for time served in a residential treatment facility that so restrains a defendant's liberty that it "is tantamount to incarceration in a county jail."⁵ Appellant failed to demonstrate that his time in the Phoenix House was tantamount to incarceration in county jail.⁶ Therefore, we conclude that the district court did not err in denying appellant's motion.

³Emphasis added. See also Kuykendall v. State, 112 Nev. 1285, 926 P.2d 781 (1996) (holding that purpose of NRS 176.055(1) is to ensure that a criminal defendant receives credit for all time served).

⁴See Webster v. State, 109 Nev. 1084, 1085, 864 P.2d 294, 295 (1993) (discussing residential confinement as a condition of probation).

⁵Grant v. State, 99 Nev. 149, 151, 659 P.2d 878, 879 (1983).

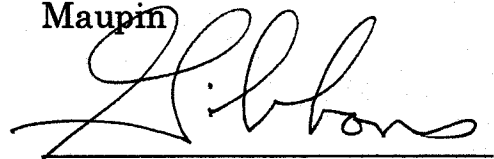
⁶We note that the State represented below that the Phoenix House was not a lockdown facility nor was the facility run or monitored by any law enforcement agency. The mere fact that appellant faced grave consequences, breach of the plea agreement and possible habitual criminal adjudication, if he walked away from the treatment center does not indicate a restraint on his liberty akin to incarceration.

Having reviewed the records on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁷ Accordingly, we

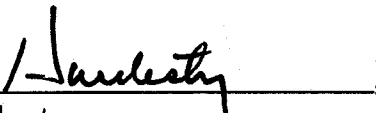
ORDER the judgment of the district court AFFIRMED.⁸

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Steven R. Kosach, District Judge
Timothy Joseph Miller
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁸We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance. We deny as moot appellant's motion to consolidate the appeals.