

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN LYNN DRIVER,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 68782

FILED

FEB 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

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

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus challenging the computation of time served.¹ First Judicial District Court, Carson City; James Todd Russell, Judge.

In his petition filed on June 8, 2015, appellant John Driver claimed he has been denied statutory work and meritorious credit. He also asserted the Nevada Department of Corrections (NDOC) is not properly applying NRS 209.4465 to calculate his expiration date. Driver attached exhibits to his petition which identified the specific time periods for which he believed the NDOC did not provide him proper credit, the amount of credit he sought, and the basis for seeking the credit.

The State filed an answer in which it alleged Driver had received all credit he is entitled to. The exhibits attached to the answer

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

included a sworn declaration from the NDOC Correctional Case Records Manager, a copy of Driver's merit credit history, copies of Driver's credit history by sentence, a copy of Driver's historical bed assignments, and a copy of Driver's case notes.

In his reply, Driver conceded he was not entitled to 60 days of work credit he had initially identified in his petition, but argued he was entitled to the other work and meritorious credit sought. He specifically asserted that for some of the work credit he sought the dates listed in the case notes were computer entry dates and did not accurately reflect the date he was hired or the date he was transferred to a work unit. Driver also asserted the State's own exhibits demonstrated he did not receive some of the work credit he sought and he did not receive meritorious credit for three of the classes he listed or for several months of special housing.

On August 28, 2015, the district court denied the petition without conducting an evidentiary hearing. The district court found the declaration from the NDOC Correctional Case Records Manager indicated the NDOC had reviewed Driver's work credit history and confirmed that it was accurate, and Driver's claims to the contrary were based solely on his own assertions and he presented no evidence in support of them. The district court also found, based on a comparison of Driver's claims with his credit history, housing history, and case notes, his work credit claims were not credible and were belied by the record. With respect to Driver's meritorious credit claims, the district court noted that the declaration from the NDOC Correctional Case Records Manager indicated Driver had received all of the meritorious credit he was entitled to. The district court found Driver received the credit he sought for a class completed in 2013 and, because he received the maximum credits permitted by statute in

2014, he could not have received any additional credits in 2014. Finally, the district court denied Driver's claim the NDOC is misapplying the credits statute. Driver appealed.

We conclude the district court did not err by denying Driver's claim the NDOC is misapplying NRS 209.4465, and we affirm the denial of that claim. However, as to Driver's claims for work and meritorious credit that he did not concede in his reply, we conclude the district court erred by denying them without first conducting an evidentiary hearing.

A petitioner is entitled to an "evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). "A claim is not 'belied by the record' just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings." *Id.* "[I]t is improper for the district court to resolve a factual dispute created by affidavits without conducting an evidentiary hearing." *Id.* at 356, 46 P.3d at 1231.


Here, Driver supported his claims with specific facts, which, if true, would have entitled him to relief. To warrant an evidentiary hearing, Driver was not required to present evidence proving his claims. Although some of Driver's claims were belied by the documents attached to the State's response,² many of Driver's other claims for credit were not and the State's answer did not even address some of Driver's claims for credit. The fact the documents attached to the State's answer were inconsistent with many of Driver's claims did not render his claims "belied

²Driver conceded he was not entitled to these credits in his reply.

by the record." Rather, here, where Driver asserted the entry dates on the records relied upon by the State did not accurately reflect the dates things occurred, the inconsistencies demonstrated there was a factual dispute at issue. The district court abused its discretion by relying on the declaration and resolving the factual dispute without an evidentiary hearing. *See id.*; *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974). Therefore, 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.
Silver

cc: Hon. James Todd Russell, District Judge
John Lynn Driver
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

³We have considered all documents Driver has submitted in this matter and we conclude Driver is only entitled to the relief described herein.