

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK DE PALMA,
Appellant,
vs.
JAMES DZURENDA, DIRECTOR; AND
HAROLD WICKHAM, WARDEN,
Respondents.

No. 71322

FILED

JUL 12 2017

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

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

Frank De Palma appeals from an order of the district court dismissing the postconviction petition for a writ of habeas corpus he filed on June 24, 2016.¹ First Judicial District Court, Carson City; James Todd Russell, Judge.

In his petition, De Palma claimed the Nevada Department of Corrections (NDOC) improperly declined to apply his statutory credits toward his minimum term pursuant to NRS 209.4465 for district court case number CR-9704032. The district court determined De Palma was not entitled to relief because De Palma committed his crime in April of


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).

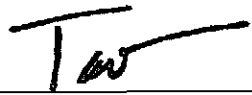
1997, prior to NRS 209.4465 being enacted. Therefore, the district court concluded NRS 209.4465 did not apply to De Palma. The district court also concluded, to the extent NDOC was not applying credits to his minimum term and the NDOC should have been applying credits to his minimum term pursuant to NRS 209.446(6)(b), the claim was moot because De Palma previously received a parole hearing for his sentence in CR-9704032. A parole hearing was the only relief available to De Palma and no statutory authority or case law permits a retroactive grant of parole. *See Niergarth v. Warden*, 105 Nev. 26, 29, 768 P.2d 882, 884 (1989). Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.

DePalma also claimed he was not receiving or would not receive credits towards his minimum parole eligibility in district court case number CR-9806035. We conclude the district court erred by denying this claim without addressing it on the merits.² Upon remand, the district court shall consider whether DePalma is entitled, pursuant to NRS 209.4465(7)(b), as it existed at the time of his crime, to the application of statutory credits toward his parole eligibility for case number CR-9806035. Accordingly, we

²While DePalma had not yet begun serving the sentence in CR-9806035, we conclude the issue was ripe. DePalma's "harm need not already have been suffered"; it just need to "be probable." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006). Given the NDOC's current practice and the State's position that NRS 213.120(2) precludes relief, the alleged harm is not only probable, it is a near certainty.

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.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Frank De Palma
Attorney General/Carson City
Carson City Clerk