

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD THOMAS DEVINE,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 71310

FILED

JUL 12 2017

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

ORDER OF AFFIRMANCE

Gerald Thomas Devine appeals from an order of the district court dismissing the postconviction petition for a writ of habeas corpus he filed on June 10, 2016.¹ First Judicial District Court, Carson City; James E. Wilson, Judge.

In his petition, Devine claimed the Nevada Department of Corrections (NDOC) improperly declined to apply his statutory credits toward his minimum term. The district court determined Devine was not entitled to relief because Devine is currently serving a prison term for trafficking in a controlled substance, a category A felony, see 1999 Nev. Stat., ch. 517, § 6, at 2639-2640 (former NRS 453.3385(3)), committed in 2008, and, for those reasons, the NDOC may only apply Devine's statutory credits toward his maximum term pursuant to NRS 209.4465(8)(d). Given these circumstances, we conclude the district court did not err in denying this claim.

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).

Second, Devine argued failure to apply credits toward his minimum terms violates his equal protection rights. Devine asserted certain inmates with convictions similar to him, but who committed their crimes prior to the 2007 amendments to NRS 209.4465, have credits applied toward their minimum terms and the disparate treatment of those inmates as compared to him violated his equal protection rights. "The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). When a classification does not affect fundamental rights, the "legislation at issue will be upheld provided the challenged classification is rationally related to a legitimate governmental interest." *Id.*

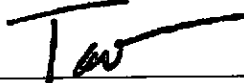
Here, Devine did not demonstrate he and the other inmates were similarly situated given their differing offense dates and different statutes governing application of credits during the different offense dates. Further, Devine did not demonstrate he was a member of a suspect class, or this issue involved the type of fundamental rights requiring strict scrutiny review. *See id*; *see also Graziano v. Pataki*, 689 F.3d 110, 117 (2d Cir. 2012 (recognizing prisoners, whether in the aggregate or specified by offense, are not a suspect class and rational basis test will apply); *Glauner v. Miller*, 184 F.3d 1053, 1054 (9th Cir. 1999) (recognizing prisoners are not a suspect class and applying rational basis test). And Devine did not demonstrate there was no rational basis for applying credits in a different manner based upon offenses and offense date. Therefore, Devine failed to demonstrate an equal protection violation.

Third, Devine argued failure to apply statutory credits toward his minimum term violated the Ex Post Facto Clause. The statutes in

effect at the time of Devine's offense govern. *See Weaver v. Graham*, 450 U.S. 24, 30 (1981); *Goldsworthy v. Hannifin*, 86 Nev. 252, 255, 468 P.2d 350, 352 (1970). The version of NRS 209.4465 in effect when Devine committed the crime did not permit statutory credits to apply toward his minimum term. *See* 2007 Nev. Stat., ch. 525, § 5, at 3176. Devine failed to demonstrate an ex post facto violation.

Having concluded Devine is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
Gerald Thomas Devine
Attorney General/Carson City
Carson City Clerk