

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEREK ANTHONY COSTANTINO,
Appellant,
vs.
RENEE BAKER, WARDEN, ESP,
Respondent.

No. 70261

FILED

OCT 18 2016

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

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

This is an appeal from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.¹ Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

Appellant Derek Anthony Costantino argues the district court erred in denying his March 11, 2015, petition. In his petition, Costantino asserted the Nevada Department of Corrections (NDOC) had improperly calculated his parole eligibility date. Costantino also argued he should be permitted to withdraw his guilty plea because the State had breached the plea agreement by failing to ensure he received the agreed upon parole eligibility dates. The district court concluded the record demonstrated the NDOC had not miscalculated Costantino's parole eligibility dates and that Costantino's attempt to withdraw his guilty plea was not properly raised in this petition.

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

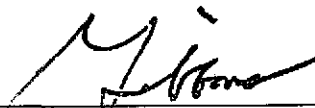
Costantino first argues the district court erred in concluding the NDOC's documents demonstrated that his parole eligibility date was calculated correctly. Our review of this matter reveals Costantino is not entitled to relief. In his informal brief, Costantino states he received a parole hearing on April 4, 2016. Because parole is an act of grace of the State, this renders Costantino's challenge to the calculation of his parole eligibility date moot as the only remedy available would be to order the parole board to conduct a hearing. *See* NRS 213.10705; *see also Niergarth v. Warden*, 105 Nev. 26, 28-29, 768 P.2d 882, 883-84 (1989) (holding that no statutory authority or case law permits a retroactive grant of parole). Therefore, Costantino is not entitled to relief for this claim.

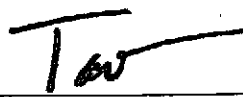
Second, Costantino argues the district court erred by concluding his claim seeking to withdraw his guilty plea was not properly raised in this petition. In his petition, Costantino asserted he should be able to withdraw his guilty plea because his plea agreement had been breached. The district court concluded this claim was not properly raised in this petition and dismissed the claim without prejudice. Costantino asserts the district court should have transferred this portion of the petition to the county in which he was convicted pursuant to NRS 34.738.


A review of the petition reveals the district court correctly concluded Costantino's petition improperly challenged both the validity of his judgment of conviction and the computation of time served in the same petition. *See* NRS 34.738(3). However, NRS 34.738(3) provides that, when a petitioner challenges both the validity of a judgment of conviction and the computation of time served in the same petition, "the district court for the appropriate county shall resolve that portion of the petition that challenges the validity of the judgment of conviction or sentence."

The record reveals Costantino's conviction arose out of Clark County. Therefore, as Costantino's conviction did not arise out of White Pine County, the district court erred in dismissing this claim without prejudice and should have transferred the petition to the district court in Clark County for that court to address Costantino's challenge to the judgment of conviction. See NRS 34.738(2), (3). Accordingly, we remand for the district court to direct the petition be transferred to the clerk of the Eighth Judicial District Court for consideration of Costantino's challenge to his judgment of conviction. Accordingly, 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.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Gary Fairman, District Judge
Derek Anthony Costantino
Attorney General/Carson City
White Pine County District Attorney
Attorney General/Ely
White Pine County Clerk