

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN RAY HOLMES,  
Appellant,  
vs.  
NEVADA DEPARTMENT OF  
CORRECTIONS, OFFENDER  
MANAGEMENT DIVISION; AND THE  
STATE OF NEVADA,  
Respondents.

No. 81955-COA

FILED

JUN 07 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *Elizabeth A. Brown*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kevin Ray Holmes appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 2, 2019. First Judicial District Court, Carson City; James Todd Russell, Judge.

First, Holmes contends the district court acted beyond what this court previously ordered when it reversed in part the district court's denial of Holmes' petition. *See Holmes v. Nev. Dep't of Corrections*, Docket No. 78878-COA (Order Affirming in Part, Reversing in Part and Remanding, July 28, 2020). Holmes was convicted of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon for crimes he committed in June 1995. He was sentenced to 10 years to life in prison for the murder count and to an equal and consecutive term for the associated deadly weapon enhancement (DWE). He was further sentenced to 20 years for the attempted murder count and to an equal and consecutive term for the associated DWE. The two counts were ordered to run concurrently.

Holmes' petition challenged the computation of time served. Among other claims, Holmes argued that he expired the attempted murder sentence in 2008, but instead of immediately beginning the associated DWE sentence, the Nevada Department of Corrections (NDOC) essentially held the sentence in abeyance for four years until Holmes was paroled from his murder sentence to its associated DWE in 2012, leaving a four-year gap in his sentence for attempted murder with the use of a deadly weapon. The district court denied Holmes' petition in its entirety.

On appeal, this court largely affirmed the district court's order but reversed its conclusion that NDOC did not err when it failed to run the attempted murder DWE sentence beginning from when Holmes expired his attempted murder sentence. This court remanded Holmes' case to the district court to conduct an evidentiary hearing to determine the correct start date for the attempted murder DWE sentence. *See id.* The district court conducted a telephonic evidentiary hearing and concluded that Holmes expired his attempted murder sentence on June 20, 2008, and the attendant DWE sentence should begin on June 21, 2008.<sup>1</sup> Holmes has not demonstrated that the district court exceeded this court's previous order. We therefore conclude he is not entitled to relief on this claim.

Second, Holmes claims the district court's order following remand entered a new sentence structure beyond that pronounced in Holmes' judgment of conviction, it changed his sentences and increased the amount of punishment, and the district court did so without ensuring Holmes was represented by counsel or was physically present. The district court's order following remand merely brought NDOC's structure of Holmes'

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<sup>1</sup>Notably, Holmes does not challenge these findings.

sentences in line with the sentences pronounced in Holmes' judgment of conviction. It did not alter the sentences imposed in the judgment of conviction or increase his punishment. Further, Holmes was not entitled to counsel at such a proceeding. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (“[T]here is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings. . .”).<sup>2</sup> And Holmes does not demonstrate that holding the hearing telephonically was error or, if it was, that it affected his substantial rights, *see* NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). We therefore conclude he is not entitled to relief on this claim.

Third, Holmes contends his constitutional rights were violated when the district court failed to adjust the start date of his murder DWE sentence to match that of the attempted murder DWE sentence. Holmes was not paroled from his murder sentence to its attendant DWE sentence until 2012. Accordingly, the DWE sentence could not have started in 2008. *See* 1991 Nev. Stat., ch. 403, § 6, at 1059 (providing a deadly weapon enhancement runs consecutively to the sentence imposed for the substantive offense). We therefore conclude he is not entitled to relief on this claim.<sup>3</sup>

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<sup>2</sup>Contrary to Holmes' assertion, nothing in *Gebbers v. State*, 118 Nev. 500, 50 P.3d 1092 (2002), mandates the appointment of postconviction counsel for an evidentiary hearing.

<sup>3</sup>To the extent Holmes challenges the application of his presentence credit to his time served, he did not raise this claim below, and we decline to consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Fourth, Holmes contends the attempted murder DWE sentence is the controlling sentence because he has spent more time serving that sentence than he has spent serving the murder DWE sentence. This court previously held that the murder sentence is controlling, *see Holmes v. Nev. Dep't of Corrections*, Docket No. 78878-COA (Order Affirming in Part, Reversing in Part and Remanding, July 28, 2020), and that holding is the law of the case. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." (quotation marks omitted)). We therefore conclude he is not entitled to relief on this claim.

Finally, Holmes contends he has been denied requested documents necessary to the crafting of a meaningful appeal. Holmes does not identify the documents he requested and was denied, and he does not explain how those documents prevented a meaningful appeal. Further, he does not specify any relief he is seeking. We therefore conclude Holmes is not entitled to relief on this claim, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. James Todd Russell, District Judge  
Kevin Ray Holmes  
Attorney General/Carson City  
Carson City Clerk