

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 10 1989
CLERK, SUPREME COURT
By: *[Signature]*
Deputy Clerk

STATE OF FLORIDA, :
 :
 Petitioner, :
 :
 v. :
 :
 MILTON GREEN, :
 :
 Respondent. :
 :
 _____ :

CASE NO. 73,505

RESPONDENT'S BRIEF ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
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ATTORNEY FOR RESPONDENT

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III SUMMARY OF ARGUMENT

The precise issue herein is whether a defendant is entitled to credit for gain-time earned during his first term of imprisonment, when he is resentenced to prison a second time on the same offense because he violated probation.

Green and Butler are the only two Florida cases which have directly addressed the issue of credit for gain-time, and they reached different results. There are two main lines of attack on the issue of granting credit for gain-time.

The first, employed by the Fifth District in Butler, is to characterize any time the defendant was not physically incarcerated as time he was on probation, cite the principle that no credit is given for time served on probation, and thus, avoid the issue completely. The second method is to focus on the fact North Carolina v. Pearce involved a void sentence, and to seize on that as a meaningful distinction, when it is nothing of the sort, because the granting of gain-time is dependent solely on an inmate's behavior in prison, and has nothing to do with how he got to prison.

Respondent is entitled to credit for gain-time earned during his previous term of incarceration, and the decision of the First District Court was correct.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL BELOW WAS CORRECT, AND THIS COURT SHOULD DECLINE REVIEW.

The state alleges the decision of the First District Court below, Green v. State, ____ So.2d ____, 14 FLW 74 (Fla. 1st DCA Dec. 28, 1988), conflicts with the holding of the Fifth District in Butler v. State, 530 So.2d 324 (Fla. 5th DCA 1988). This court has already denied review in Butler (no. 73,177, review denied Dec. 13, 1988).

The precise issue in the instant case is whether a defendant is entitled to credit for gain-time earned during his first term of imprisonment, when he is resentenced to prison a second time on the same offense because he violated probation. The granting of credit for the time a prisoner is physically incarcerated is not disputed. State v. Holmes, 360 So.2d 380 (Fla. 1978); Walker v. State, 506 So.2d 78 (Fla. 1st DCA 1987). Nor, apparently, is there any dispute that, where a prisoner is resentenced after his original conviction and sentence were reversed (and thus made void), he is entitled to credit for all time served and for all gain-time earned. See North Carolina v. Pearce, 395 U.S. 711, 719 n.13, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), in which the Supreme Court said:

Such credit must, of course, include the time credited during service of the first prison sentence for good behavior, etc.

Green and Butler are the only two Florida cases which have directly addressed the issue of credit for gain-time, and they

reached different results. There are two main lines of attack on the issue of granting credit for gain-time.

The first, employed by the Fifth District in Butler, is to characterize any time the defendant was not physically incarcerated as time spent on probation, then cite State v. Holmes, supra, et al., for the principle that prisoners are not entitled to credit for time served on probation. By employing the simple device of this characterization, or mischaracterization, the Fifth District succeeded in avoiding the issue completely. None of the cases cited in Butler addressed the issue of credit for gain-time and, thus, are inapposite here.

The second angle of attack, employed by the state in the instant case, is to distinguish Green's situation from North Carolina v. Pearce, supra, and Stearns v. State, 498 So.2d 982 (Fla. 2d DCA 1986), because Pearce involved credit for a sentence which was later voided and Stearns involved credit for a prison term based on a revocation of probation which was later reversed. Respondent agrees it is even more outrageous to deny full credit on a void sentence, but he, and every prisoner, has earned his gain-time no less than a defendant whose sentence was subsequently voided, and all of them are entitled to credit for gain-time.

By law, gain-time is entirely a creature of the Department of Corrections, the purpose of which is to:

... encourage satisfactory prisoner behavior, to provide incentives for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services.

Sec. 944.275(1), Fla. Stat. No trial court has the authority to grant or withhold gain-time. See sec. 944.28, Fla. Stat. (forfeiture of gain-time).

Gain-time is dependent solely on an inmate's behavior in prison; it has nothing to do with how he got to prison, so the void sentence distinction is irrelevant and meaningless. The granting of gain-time is not dependent upon the successful completion of a subsequent term of probation. To the contrary, the purpose of and procedure for granting gain-time indicates that gain-time decisions fulfill their purpose, and the right to gain-time vests (as it were) during the current term of incarceration.

The state argued respondent has not forfeited any gain-time, apparently because he was released early from his first prison term, but did absolutely nothing to explain this theory. For when he was returned to prison to serve a longer sentence without the benefit of credit for the gain-time he previously earned, respondent de facto forfeited that gain-time previously earned on the same conviction, but for which he received no credit.

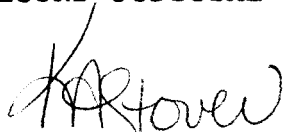
Respondent is entitled to credit for gain-time earned during his previous term of incarceration, and the decision of the First District Court was correct.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner urges this Court to decline review on the merits, or in the alternative, to approve or affirm the decision below.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

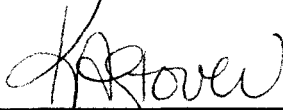


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Gypsy Bailey, Certified Legal Intern, Office of the Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Milton Green, inmate no. A-098708, Hamilton Correctional Institution, P.O. Box 1360, Florida, 32052, this 10 day of January, 1989.



KATHLEEN STOVER