OA 6-6-89

APP

FILED
SID J. WHITE
MAR 17 1989
CLERK, SUPREME COURT
By Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 73,505

MILTON GREEN,

Respondent.

______________________________/

PETITIONER'S BRIEF ON THE MERITS

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STATE OF FLORIDA,

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, Milton Green, appellant in the First District Court of Appeal and defendant in the trial court, will be referred to in this brief as respondent.

STATEMENT OF THE CASE AND FACTS

Respondent pled no contest to two counts of attempted sexual battery and was sentenced to four and one-half years in prison, to be followed by three years on probation. He received 287 days' credit for time served before sentencing. Respondent remained in the custody of the Department of Corrections (DOC) for only 518 days of the four and one-half year sentence due to gain time and was released. Later, his probation was revoked due to violation and he was sentenced to seven years in prison. At resentencing, respondent was given 805 days credit for time served (518 + 287). Defense counsel argued that respondent was entitled to credit for gain time: Because DOC viewed him as having served his four and one-half year sentence, defendant should be given credit for four and one-half years.

Respondent's notice of appeal was filed December 21, 1987, and the First District Court of Appeal filed its opinion on December 28, 1988. The State's Notice to Invoke Discretionary Jurisdiction was timely filed on January 3, 1989. This Court accepted jurisdiction of this case on February 23, 1989.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal's decision in this case, Green v. State, 14 F.L.W. 74 (Fla. 1st DCA 1988), is in express and direct conflict with the Fifth District Court of Appeal's decision in Butler v. State, 530 So.2d 324 (Fla. 5th DCA 1988), rev. denied, No. 73,177 (1988). The First District improperly analogized respondent's revocation of probation to a defendant serving under a void judgment and sentence in reaching the conclusion that respondent, upon resentencing, was entitled to credit for time served and gain time. The Fifth District held that, upon revocation of community service, a defendant is entitled only to credit for time actually spent in jail or in prison, not to gain time.

The state contends that the Fifth District is correct. Gain time exists solely to provide well-behaved prisoners with a mechanism for early release. Once such prisoners have been released early as a result of gain time, they have fully and completely received and used the benefits of gain time. Upon any subsequent resentencing for a revocation of probation, these defendants should not be "doubly benefited" by again receiving credit for gain time. Such a use of gain time is not warranted and is contrary to its stated statutory purposes.

ARGUMENT

ISSUE PRESENTED

WHETHER THE TRIAL COURT WAS CORRECT, UPON RESENTENCING RESPONDENT FOR A VIOLATION OF HIS PROBATION, IN ONLY GIVING HIM CREDIT FOR TIME ACTUALLY SPENT IN JAIL OR PRISON.

The trial court properly denied respondent's credit for accrued gain time upon revocation of his probation. Florida case law indicates that only credit for time served is required upon resentencing for probation revocation, for which the trial court properly credited respondent. Gain time exists for the sole reason of providing prisoners a mechanism for early release. Once early release has been accomplished, gain time has no further purpose, and thus should not again be awarded to a defendant upon resentencing for probation revocation.

Gain time is "allowed by the state to encourage a prisoner to mend his ways, to conduct himself in an orderly fashion while paying his debt to society and by his conduct to earn the privilege of release earlier than the terminal date fixed by his sentence." Nicholas v. Wainwright, 152 So.2d 458, 461 (Fla. 1963). The stated statutory purpose for awards of gain time is "to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services." Fla.Stat. §944.275(1) (1988). Thus, gain time is a

conditional gift from the state to its prisoners, not a vested right of prisoners. Prisoners may be released before their sentences actually expire if they comply with prison regulations and perform the labor required to obtain statutory benefits; if they do not perform the labor and behave, they are "permitted" to serve their entire sentences in prison instead of receiving the benefits of early release. Williams v. State, 370 So.2d 1164 (Fla. 4th DCA 1979).

Although gain time is a gift, the statute directs that the Department of Corrections (DOC) "shall" award gain time to those prisoners who obey the rules and perform their work satisfactorily. Fla.Stat. §944.275(4)(a) (1988). A prisoner is "automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks." Weaver v. Graham, 450 U.S. 24, 35 (1981). Thus, if a prisoner can "stay out of trouble," the conditional "gift" of gain time essentially is converted into a conditionally vested right, and the Department of Corrections must award him gain time. See Annotation, Withdrawal, Forfeiture, Modification or Denial of Good-Time Allowance to Prisoners, 95 A.L.R.2d 1276, §6 (1964) (gain time is "not a vested right but is only contingent until such time arrives that its allowance will end imprisonment, that is, until it has been completely earned, and that the right may be forfeited for misconduct or for other cause occuring prior thereto"); Wolff v. McDonnell, 418 U.S. 539,

581 (1974) (acknowledging gain time's conditionally vested right status in holding that "the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process consideration").

As noted, however, this right to accrue gain time "is not absolute but is conditioned upon satisfactory service of the sentence as required by the statute. Nicholas, 152 So.2d at 461. Gain time is "an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." Mayo v. Lukers, 53 So.2d 916, 917 (Fla. 1951). See Harris v. Wainwright, 376 So.2d 855 (Fla. 1979); Dear v. Mayo, 14 So.2d 267 (Fla. 1943), cert. denied, 320 U.S. 766 (1943). See also Kimmons v. Wainwright, 338 So.2d 239, 240 (Fla. 1st DCA 1976), cert. denied, 434 U.S. 843 (1977) ("along with this bonus [of gain time] goes the responsibility of doing nothing that would cause a gain-time forfeiture"). See Section 944.28, Florida Statutes (1988) (setting out the grounds and procedures for forfeitures of gain time).

In the present case, respondent was sentenced to four and one-half years in state prison, to be followed by three years' probation. Respondent served less than one and one-half years (or 518 days) in prison due to gain time, and was released on probation. His probation was revoked later, and he was sentenced to seven years in prison, but was given credit for 518 days in custody of DOC and for 287 days

served before sentencing. The First District held that respondent was also entitled to four and one-half years' credit on his resentencing, buying respondent's argument that DOC viewed him as having served his full prison term of four and one-half years. In essence, respondent argued for and received a "double benefit": He accrued gain time on his first sentence and was released early because of gain time; according to the First District, he is now able to use this benefit again for credit against his second sentence. This result is untenable, as gain time is "not intended to reward a criminal for his crimes." Duffy v. State, 730 P.2d 754, 757 (Wyo. 1986).

DOC recognized respondent's good behavior, granted him gain time, and released him early. Early release is the focus of gain time, and once a prisoner has accrued it and been released early as a result, that gain time has been used and no longer exists. Not crediting respondent upon resentencing with gain time previously earned and used would not result in the loss of a property right. His right vested, he received the benefit, and he has no further claim to it. After all, "there is a human difference between losing what one has and not getting what one wants." Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1296 (1975).

Credit for time served is a useful analogy. The constitutional guarantee against "multiple punishments for

the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). See State v. Jones, 327 So.2d 18 (Fla. 1976). Thus, a defendant's right to credit for time served "vests" at resentencing, but only exists for the same offense. Likewise, gain time conditionally vests (subject to forfeiture) upon a defendant's good behavior in prison, but only exists for that one prison sentence and early release.

Beyond this point, the analogy admittedly no longer works, due to the inherent vast differences between and purposes behind credit for time served and gain time. The requirement of credit for time served is a judicially construction created to further the constitutional guarantee against double jeopardy, while gain time is a legislative creation, whose responsibility lies solely within the province of DOC. Hall v. State, 493 So.2d 93 (Fla. 2d DCA 1986); Prangler v. State, 470 So.2d 105 (Fla. 2d DCA 1985); Valdes v. State, 469 So.2d 868 (Fla. 3d DCA 1985). In fact, "'the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison,' despite the undoubted impact of such credits on the freedom of inmates." Hewitt v. Helms, 459 U.S. 460, 467-68 (1983) (quoting Wolff, 418 U.S. at 557). Thus, it is understandable that these rights are treated differently and end at different times -- gain time upon early release, and

credit for time served upon the commission of a different offense.

The Fifth District in Butler recognized these principles. There, the trial court sentenced defendant to four years with DOC, to be followed by two years of community control. Defendant later violated community control and the trial court resentenced him to five and one-half years' imprisonment with credit for time served. On appeal, defendant contended that he was entitled to a full four years' credit on his new sentence despite the fact that he may not have served four years because of gain time. The Fifth District responded:

> There is no merit to this contention. He is entitled to credit only for the actual time spent *in jail* or *prison*. *State v. Holmes*, 360 So.2d 380 (Fla. 1978); *Chaitman v. State*, 495 So.2d 1231 (Fla. 5th DCA 1986). *See also Walker v. State*, 506 So.2d 78 (Fla. 1st DCA 1987); *Hutchinson v. State*, 467 So.2d 788 (Fla. 2d DCA 1985). He is not entitled to credit for time spent on probation or community control, *Holmes*, and what he requests would produce that result. Appellant makes no contention that he was not given credit for his actual time in jail or prison, so his sentence is
> **AFFIRMED.**

Butler, 530 So.2d at 325. In so holding, this decision directly and expressly conflicts with the First District's opinion in the present case -- that the trial court erred in "failing to accord the [respondent] the benefit of his earned gain time to apply as credit against the new sentence". Green, 14 F.L.W. at 75.

The First District erroneously analogized respondent's revocation of probation to a defendant serving under a void judgment and sentence. See Milligan v. State, 207 So.2d 24 (Fla. 2d DCA 1968), cert. denied, 212 So.2d 868 (Fla. 1968). Completely different consideration are involved in resentencing after the setting aside of a void judgment and sentence:

> It was not [defendant's] fault that the state's criminal system failed to judge him guilty and sentence him properly in an uninterrupted operation. Under the circumstances of this case it is only fair to give [defendant] full credit for all time he has been in official custody since the time of his first commitment . . . .

Tilghman v. Culver, 99 So.2d 282, 285-86 (Fla. 1957), cert. denied, 356 U.S. 953 (1958). With revocation of probation, however, concerns about what the criminal justice system has done to a defendant are no longer at issue. Rather, a defendant's probation is revoked because of something he has done contrary to the criminal justice system.

The First District relied heavily upon Stearns v. State, 498 So.2d 982 (Fla. 2d DCA 1986) in reaching its decision. In Stearns, defendant pled guilty to grand theft and received five years on probation. The trial court subsequently revoked his probation and sentenced him to five years in prison. This revocation order was later reversed, and defendant was reinstated on probation. The trial court revoked this second probation and placed defendant on

community control. The trial court subsequently revoked the community control, and sentenced defendant to five years with credit for 81 days already served. Defendant also pled guilty to aggravated assault and carrying a concealed firearm and received a concurrent five year sentence. Defendant moved the court for credit for time served, claiming he was entitled to 13 months in prison following the first revocation order, 8-1/2 months of gain time, and six weeks in county jail. The trial court denied this motion, holding that defendant was not entitled to the credit because of his second probation violation.

The Second District found that the trial was laboring under a misconception, and cited to Milligan. Milligan, however, is significant only in its restatement of the general rule that, when a defendant serves under a void judgment and sentence, he should receive credit for time served under that sentence along with any earned gain time. Finding Milligan persuasive, the Stearns court remanded the case for a new sentencing order "reflecting proper credit for time served and any accrued gain time." 498 So.2d at 984.

In citing Milligan, the Stearns court implicitly followed Pearce, in which the judgments were later set aside. There, the Supreme Court held that credit at resentencing "must, of course, include the time credited during the service of the first prison sentence for good

behavior, etc." Pearce, 395 U.S. at 719 n.13. See Tilghman; Perry v. Mayo, 72 So.2d 382 (Fla. 1954); Harvey v. Mayo, 72 So.2d 385 (Fla. 1954), cert. denied, 349 U.S. 965 (1955), reh'g denied, 350 U.S. 856 (1956). Again, the considerations involved upon resentencing after the reversal of a void judgment and sentence are completely different from those involved at resentencing after a defendant violates his probation. When a court fails to properly adjudicate and sentence a defendant, he should not be penalized for an error over which he had no control and shoud not only be given credit for time served, but gain time as well. But where a defendant violates his probation, he has done something willful and intentional against the criminal justice system, a course of action over which he had full control. See Hines v. State, 358 So.2d 183 (Fla. 1978).

Apparently, the First District found similar between a violation of probation and a void judgment and sentence the fact that the subsequent sentencing is, in essence, a new sentence. When a void judgment and sentence are set aside, "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." Pearce, 395 U.S. at 721; Herring v. State, 411 So.2d 966 (Fla. 1982). This is not so with a violation of probation. While a defendant is sentenced anew for his violation of probation, the original conviction still exists.

The First District also devoted much attention to a totally tangential issue -- forfeiture of statutory gain time under Fla.Stat. §944.28 (1988). This is not at issue, as the trial court forfeited no gain time. Respondent accrued gain time for which he was released early. The trial court declared no forfeiture, but simply denied respondent a "double benefit" by refusing to credit defendant at resentencing with previously accrued and used gain time.

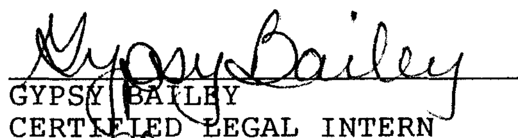
Finally, the First District cited Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988) and Poore v. State, 13 F.L.W. 571 (Fla. 1988) as supporting its holding regarding gain time. However, both Poore and Franklin support the state's contentions that, upon resentencing, courts must give full credit for prior incarceration. Incarceration refers only to time actually spent in prison, not to time awarded as an incentive for good behavior. See Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980); Richards v. State, 521 So.2d 292 (Fla. 1st DCA 1988); Walker v. State, 506 So.2d 78 (Fla. 1st DCA 1987); Sapp v. State, 445 So.2d 1088 (Fla. 1st DCA 1984); State v. Holmes, 360 So.2d 380 (Fla. 1978); State v. Jones, 327 So.2d 18 (Fla. 1976); Hollingshead v. State, 292 So.2d 617 (Fla. 1st DCA 1974).

CONCLUSION

For the reasons stated above, the state requests this Court to reverse the decision of the First District and affirm the judgment of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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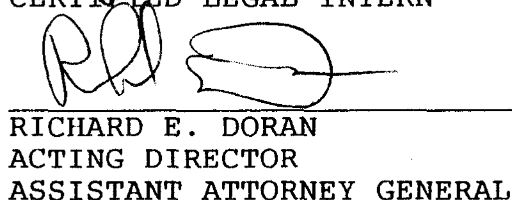

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Kathleen Stover, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 17TH day of March, 1988.

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