OA 6-6-89

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 73,505

MILTON GREEN,

Appellee.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
VS.	:	CASE NO. 73,505
MILTON GREEN,	:	
Respondent.	:	
	:	

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This court granted review of the district court opinion, Green v. State, ____ So.2d ____, 14 FLW 74 (Fla. 1st DCA Dec. 28, 1988), on the ground of conflict with the Fifth District in Butler v. State, 530 So.2d 324 (Fla. 5th DCA), review den. ____ So.2d ____, No. 73,177 (Fla. Dec. 13, 1988).

Respondent appealed the trial court's denial of credit for gain-time earned during his first term of incarceration, when he was resentenced to prison a second time on the same charge because he violated the probation portion of a split sentence. On rehearing, the district court reversed. In response, the state filed a notice to invoke discretionary review, which this court granted.

The transcript and record on appeal will be referred to as "R."

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate.

III SUMMARY OF THE ARGUMENT

Credit for time served constitutionally must include credit for gain-time earned, and the trial court erred in not granting respondent credit for all time served. North Carolina v. Pearce, infra. Further, the trial court's failure to grant respondent credit for the gain-time earned during his previous term of incarceration was, inescapably, a retroactive forfeiture of gain-time, without due process, and without authority to do so.

IV ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN NOT GIVING RESPONDENT CREDIT FOR GAIN-TIME EARNED DURING HIS FIRST TERM OF INCARCERATION, WHEN HE WAS RESENTENCED TO PRISON A SECOND TIME ON THE SAME OFFENSE BECAUSE HE VIOLATED PROBATION.

This court granted review of the district court opinion, Green v. State, ____ So.2d ____, 14 FLW 74 (Fla. 1st DCA Dec. 28, 1988), on the ground of conflict with the Fifth District in Butler v. State, 530 So.2d 324 (Fla. 5th DCA), review den. ____ So.2d ____, No. 73,177 (Fla. Dec. 13, 1988).

At the outset, it should be made clear that the issue herein, whether to grant credit for gain-time, arises only when a defendant has already served a term of incarceration and is being sentenced to a second term of incarceration on the same offense. In other words, the issue arises only when a defendant is given a split sentence - prison followed by probation - then violates the probation portion, and is sent to prison a second time as a result.

Respondent was originally sentenced to 4-1/2 years imprisonment followed by three years probation. He received credit for 287 days spent in jail prior to sentencing (R-73). When he had served actual time and earned sufficient gain-time credits to total 4-1/2 years, he was released from prison. He was in the actual custody of the Department of Corrections (DOC) from July 22, 1985 to December 22, 1986 (518 days). After release from prison, respondent violated probation and was sentenced to seven years imprisonment. At resentencing, he was given credit

for 805 (287 + 518) days. Respondent requested, but was denied, credit for gain-time previously earned.

This was error. The trial court's denial of credit for the gain-time respondent earned during his previous term of incarceration was, inescapably, a retroactive forfeiture of gain-time, without authority to do so, and without due process. Respondent was entitled to credit for his actual days served and his earned (or, in DOC parlance, "unforfeited") gain-time.

There are two grounds on which respondent is entitled to credit for gain-time. The first is constitutional; the second, statutory.

All criminal defendants, including probation violators, are entitled to credit for all time served on a conviction. Sec. 921.161, Fla. Stat.; see, e.g., Villery v. Florida Parole and Probation Comm'n, 396 So.2d 1107 (Fla. 1981); State v. Jones, 327 So.2d 18 (Fla. 1976), overruled on other grounds, Villery, supra; Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988)(en banc)(question certified). As to gain-time, while there is no constitutional right to receive gain-time, meaning that states are not obliged to give gain-time to any prisoner, once a state grants gain-time, it also creates in prisoners a substantive constitutional right to have the statute applied fairly. U.S. Const. Am. XIV; Fla. Const., Art. I, Sec. 9; Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Of credit for gain-time, the United States Supreme Court has said:

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

North Carolina v. Pearce, 395 U.S. 711, 719, N. 13, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Florida courts have reached results consistent with Pearce in Stearns v. State, 498 So.2d 982 (Fla. 2d DCA 1986) and Milligan v. State, 207 So.2d 24 (Fla. 2d DCA 1968), review den. 212 So.2d 868 (Fla. 1968).

In its brief herein, the state seized upon an irrelevant distinction in an attempt to evade the holding of Pearce. It is true that Pearce, Stearns and Milligan:

> ... follow the rule that any time a defendant serves a void judgment and sentence, he should receive credit for the time he served under the void sentence, along with any gain-time which he earned while incarcerated.

Green, supra. In contrast, resentencing in the instant case resulted from a probation violation, not a void sentence. This distinction, however, is irrelevant to the issue of granting credit for gain-time previously earned.

In Pearce, the cause of resentencing (new trial vs. probation violation) was not cited as any consideration, let alone the dispositive factor, in granting credit for gain-time. When it argued that Pearce was intended to apply only when the original sentence was held void, the state was inferring too much from silence. Since it did not mention any resentencing scenario where a defendant would be denied credit for gain-time, Pearce is reasonably read as meaning that, whenever credit for

time served is granted, such credit would naturally include credit for gain-time earned.

The distinction between resentencing after new trial and on violation of probation is irrelevant as it applies to credit for gain-time previously and unconditionally earned. A defendant sentenced to incarceration a second time on a violation of probation has no less earned his prior gain-time than one resentenced after new trial. Gain-time is not dependent on how one got to prison; it is conditional only upon behavior in prison. It has never been conditional upon the satisfactory completion of a subsequent term of probation. Nor does any court have the authority to order that gain-time be granted, denied or forfeited; only DOC has such authority. Sec. 944.28, Fla. Stat.

The other ground which entitles respondent to relief is statutory. Criminal statutes are to be strictly construed in favor of the person against whom a penalty is to be imposed. Reino v. State, 352 So.2d 853 (Fla. 1977). See also State v. Waters, 436 So.2d 66 (Fla. 1983); Ferguson v. State, 377 So.2d 709 (Fla. 1979); Earnest v. State, 351 So.2d 957 (Fla. 1977).

Gain-time is a creature of statute, and the authority to grant, deny and forfeit gain-time resides exclusively with DOC. Sec. 944.28, Fla. Stat. There is no authority for forfeiting gain-time based on a subsequent violation of probation, nor is there authority in any court to initiate the forfeiture of gain-time, any more than a court could demand that DOC award or withhold gain-time as the court prescribed. Sec. 944.28, Fla.

Stat; Hall v. State, 493 So.2d 93 (Fla. 2d DCA 1986). The failure of the trial court herein to grant respondent credit for the gain-time earned during his previous term of incarceration was, inescapably, a retroactive forfeiture of gain-time, without authority to do so, and without due process.

Prisoners released under gain-time provisions have served their sentences. Section 944.291, Florida Statutes (1987), provides:

> A prisoner who has served his term or terms, less allowable statutory gain-time deductions and extra good-time allowances, as provided by law, shall not, upon release, be under further supervision and control of the department and shall not be subject to any statute relating to parole.

The meaning of this statute becomes especially clear when compared to the language of its predecessor, which was changed to its present form in 1981:

> A prisoner who has served his term or terms, less allowable statutory gain time deductions and extra good time allowances as provided by law, shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was actually sentenced or such lesser time as may be determined by the Florida parole and probation commission...

Sec. 944.291, Fla. Stat. Ann. (West 1985).

Gain-time is within the exclusive power of DOC to grant and to forfeit, although forfeitures must conform to specified due process requirements. Section 944.275, Florida Statutes, prescribes how and how much gain-time can be earned. The purpose of gain-time 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. Gain-time can be forfeited only when certain crimes are committed or a prisoner disobeys prison rules. Sec. 944.28, Fla. Stat. Gain-time is not conditional upon the successful completion of a subsequent term of probation. To the contrary, the purpose and procedures of gain-time indicate decisions regarding gain-time fulfill their purpose, and the right to gain-time vests, as it were, during the current term of incarceration.

The state argued the Butler case was correctly decided. In Butler, the Fifth District characterized any time the defendant was not physically incarcerated as time he was on probation, then cited State v. Holmes, 360 So.2d 380 (Fla. 1978), for the principle that defendants 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 of whether to grant credit for gain-time. None of the cases cited in Butler addressed the issue of credit for gain-time, and they are inapposite here.

Cases cannot be dispositive of issues they do not reach, and the state again inferred too much from silence. The state cited several cases for the proposition that "incarceration refers only to time actually spent in [sic] prison, not to time awarded as an incentive for good behavior" (State's Merit Brief

(SMB), p. 13). Villery v. Florida Parole and Probation Comm'n, supra; 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. Jones, supra; Hollingshead v. State, 292 So.2d 617 (Fla. 1st DCA 1974). All of these cases say something along the line of "a defendant is entitled to credit for time served in jail." Every one is silent on the issue of gain-time, and can hardly be considered dispositive of an issue they do not mention.

The state profoundly misunderstands or mischaracterizes gain-time. The state asserts "gain time exists for the sole reason of providing prisoners a mechanism for early release" (SMB-4). This is neither the purpose nor the effect of gain-time. The purpose of gain-time is to coerce and/or reward good behavior by inmates; the effect of gain-time is to shorten, absolutely, the length of the sentence. Gain-time is not conditional upon the successful completion of a subsequent term of probation. What the state has described - a mechanism which provides the benefit of early release, but which benefit is conditional upon subsequent conduct, and can be revoked for unworthy subsequent conduct - is parole, not gain-time. They are not the same.

It follows quite naturally from this misconception of gain-time that, according to the state, once a prisoner is released early, gain-time has been used for its intended purpose and disappears. Thus, to grant him credit when he is resentenced a second time on the same offense, is to grant him

a double benefit. In reality, there is no double benefit. The defendant earned the gain-time, which resulted in his early release from the initial incarceration, but which he no less earned and is still no less entitled to, should he be reincarcerated on the same charge.

Without reciting them, many cases cited by the state having to do with the nature of and a prisoner's interest in and right to gain-time predate Weaver v. Graham, supra, the leading U.S. Supreme Court case on the issue. Any case which conflicts with Weaver's holding, that once granted, prisoners have a substantive constitutional right to gain-time, has been overruled.

The state cited a Wyoming case, Duffy v. State, 730 P.2d 754, 757 (Wyo. 1986), for the proposition:

> ... gain time is "not intended to reward a criminal for his crimes."

(SMB-7). This quote was taken out of context and egregiously misstated the case holding. Duffy was serving a prison sentence in Colorado, when he allegedly committed, from prison, certain conspiracy and aiding and abetting offenses in Wyoming. He was later convicted of the Wyoming offenses. He made a claim for credit for time served on the Wyoming offenses which concerned time he was incarcerated in Colorado. The Wyoming court denied this claim, saying:

> ... the Interstate Agreement on Detainers is not intended to reward a criminal for committing his crimes from prison.

Id.

North Carolina v. Pearce is on point. Credit for time served in prison constitutionally must include credit for gain-time earned. Further, the authority to grant, withhold, or forfeit gain-time is within the exclusive province of DOC, and no court has authority to retroactively forfeit gain-time. Respondent is entitled to credit for gain-time previously earned.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court order that he be granted credit for the gain-time earned during his first term of incarceration.

Respectfully submitted,
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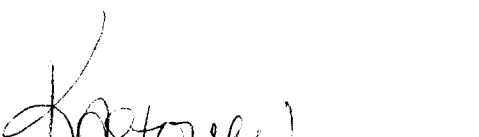
CERTIFICATE OF SERVICE

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 Mr. Milton Green, inmate no. 098708, Hamilton Correctional Institution, P.O. Box 1360, Jasper, Florida 32052, this 7 day of April, 1989.



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