

047

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

By _____
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WILLIE C. HENRY,
Petitioner,

v.

Case No. 77,028

RICHARD L. DUGGER, Secretary,
Department of Corrections,

Respondent.

RESPONDENT'S ANSWER BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, Willie C. Henry, is an inmate in the Florida prison system presently incarcerated at Charlotte Correctional Institution in Punta Gorda, Florida. Petitioner Henry brought a petition for writ of mandamus in the circuit court in Leon County, challenging the Department of Corrections' denial of administrative gain time under Section 944.276, Florida Statutes (1987), based upon a sexual battery conviction, which constituted one component of Henry's present overall commitment. In his initial petition, Henry appeared to contend that he previously had been convicted of sexual battery on two counts in 1977, but that his sentences had expired and he had been released from these sentences in 1978 from the Broward County Courthouse. (See Appendix A to Respondent's Brief on Jurisdiction.) The only case cited by Henry was Mayo v. Dugger, 535 So.2d 300 (Fla. 1st DCA 1988). In response to the petition, the Department filed documentation to show that Henry was received by the Department on May 31, 1977, having been sentenced to consecutive terms of 5 years and 15 years for False Imprisonment and Sexual Battery, respectively, in Case No. 76-4619 and to 10 years for Sexual Battery in Case No. 76-4213. (See Appendix B to Respondent's Brief on Jurisdiction.) The 10-year term in Case No. 76-4213 was to be served concurrently with the consecutive terms imposed in Case No. 75-4619. (Id.)

On June 23, 1978, Henry was returned to Broward County for a court appearance in Case No. 76-4619. (Id.) At the hearing, the Broward County state attorney announced a nolle prosequi of

Case No. 76-4619 and the circuit court discharged Henry from that case. (Id.) In error, Broward County officials released Henry, although his state prison sentence for the Sexual Battery offense in Case No. 76-4213 remained active. (Id.) On November 2, 1978, Henry was rearrested on new charges of Kidnapping and Robbery. (Id.) Henry was convicted of these new offenses and received a total of 65 years, to be served consecutively to his earlier conviction for Sexual Battery in Case No. 76-4213.

As it appeared from the petition that Henry believed that he was being denied administrative gaintime on the basis of the sexual battery conviction in Case No. 76-4619, which had been nolle prossed, the Respondent merely pointed to the continued viability of the second sexual battery conviction in Case No. 76-4213 as a component of Henry's active overall commitment as the "present" sexual battery conviction upon which the Department relied in denying Henry administrative gaintime. (Id.)

Although the show cause order of the circuit court did not permit a reply to the response, Henry nevertheless filed a reply in which he raised for the first time the possible applicability of Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA 1989), review denied, 547 So.2d 1209 (Fla. 1989). (See Appendix C to Respondent's Brief on Jurisdiction.) Henry contended that his sexual battery conviction had expired and was, therefore, a prior conviction which could not be used to bar him from receiving administrative gaintime, in light of the opinion in Miller, supra. (Id.) The circuit court subsequently denied Henry's petition for

mandamus relief, and Henry appealed.

On appeal, Henry reasserted his belated argument that the case of Dugger v. Miller was applicable when considering the sexual battery conviction which comprised the first component of Henry's overall active commitment. The Respondent reasserted the argument presented below, which, in essence, is that for the purposes of consideration of the award of administrative gaintime under Section 944.276, Henry's sexual battery conviction is a "present" rather than "prior" conviction, regardless of its placement in the overall commitment.

After briefing, the district court issued an order to the Respondent Appellee to clarify certain matters regarding Henry's sexual battery convictions and directed the Respondent Appellee to supplement the record with documentation from the Department of Corrections regarding Henry's sentences -- specifically, the Respondent/Appellee was directed to supply the district court with information regarding when each portion of the sentences imposed in Henry's cases was served, i.e., when the five-year false imprisonment sentence was served, when the consecutive fifteen-year sexual battery sentence was served, and when the concurrent ten-year sexual battery sentence was served. (See Appendix D to Respondent's Brief on Jurisdiction.) When it became apparent that the district court was going to consider Henry's argument under Miller, and in light of the district court's directive to clarify and to supplement the record with certain information, the Respondent/Appellee requested permission to supplement the record

on appeal with additional factual information which would demonstrate the inapplicability of the Miller holding to the instant cause. (See Appendix E to Respondent's Brief on Jurisdiction.)

On August 8, 1990, the First District Court of Appeal issued its initial opinion, in which the district court made a factual determination that similar to the defendant in Miller, Henry had fully served his sentence for his sexual battery conviction. (See Appendix F to Respondent's Brief on Jurisdiction.) The district court went on to affirm the decision of the circuit court on different grounds -- that is, the district court concluded that the repeal of Section 944.276(1)(c) and its replacement with Section 944.277(1)(c) which excluded from the award of early release credits any inmate who "[i]s convicted, or has been previously convicted, of committing or attempting to commit sexual battery . . ." was sufficient to deny Henry the administrative gain time to which he would otherwise have been entitled. (Id.)

Both parties requested rehearing. The district court subsequently denied both rehearing motions on September 25, 1990, and denied the motion to supplement the record previously filed by the Respondent/Appellee. (See Appendix G to Respondent's Brief on Jurisdiction.) Additionally, the district court returned documents filed by the Respondent/Appellee in response to the district court's order to supplement the record, indicating that the district court's order requiring supplementation of the record was

not intended to include documents outside the original record below. (Id.)

On November 6, 1990, without further request of the parties, the district court withdrew its order of September 25, and to a limited extent, granted Appellee's motion for rehearing by withdrawing its opinion dated August 8, 1990, and replacing it with a revised opinion which added a footnote at page 2 of the opinion. (See Appendix H to Respondent's Brief on Jurisdiction.)

On December 3, 1990, Henry filed his Notice to Invoke Discretionary Jurisdiction and this proceeding ensued. The Court accepted jurisdiction of this cause on June 26, 1991.

SUMMARY OF THE ARGUMENT

In disposing of this case below, the First District Court of Appeal relied on the decision in Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990). This Court took jurisdiction of this cause based upon the conflict between the decision of this Court in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), the First District's decision in Miller v. Dugger, supra, and the decision of the Second District Court of Appeal in Rodrnick v. State, 567 So.2d 906 (Fla. 2d DCA 1990).

Before applying the decision in Miller v. Dugger, supra, the First District Court found as a matter of law that Henry was entitled to administrative gaintime under Section 944.276. The district court based that underlying conclusion on its previous decision in Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989), in which the First District had concluded that a fully-satisfied, prior conviction for a sexual offense could not be used to deny the award of administrative gaintime under Section 944.276(1)(c). In spite of its conclusion that Henry was eligible for administrative gaintime, the First District affirmed the decision of the trial court denying the petition for relief on the grounds that the exclusions of the later early release statute found in Section 944.277(1)(c) which barred Henry from receiving provisional credits retroactively operated to bar Henry from receiving the prior administrative gaintime awards. Respondent believes this to be a misapplication of the decision in Miller v. Dugger, as the issue is not one of ex post facto

restrictions but of vested rights. However, since this Court has accepted jurisdiction to resolve the conflict issue, it may correct any errors which may have occurred during the course of the appellate proceedings. Respondent contends that Petitioner Henry was not similarly situated to the petitioner in Dugger v. Miller, in that Henry's sexual battery conviction is a part of his present overall commitment, along with convictions for kidnapping and robbery. Under the language of Chapter 917, Henry is thus subject to classification and treatment under that chapter, and the prohibitions of Section 944.276(1)(c) do apply. Thus, since Henry's sexual battery conviction was not a prior conviction as contemplated under Dugger v. Miller or Chapter 917, this Court, as a matter of law, should correct the error of the district court in reaching that conclusion. In so doing, the issue presented by the application of the decision in Miller v. Dugger is rendered moot.

ARGUMENT

The facts and law of this case are not complex. Petitioner Henry contends that the Department of Corrections improperly denied him administrative gaintime. Henry asserts he was "previously" convicted of a sexual offense and not in service of that sentence at the time that administrative gaintime was awarded. Thus, Henry claims he is not excluded from receiving administrative gaintime under Florida Statutes § 944.276(1)(c).¹

There is essentially no dispute that Henry has been convicted of a sexual offense. (See Appendix B to Respondent's Brief on Jurisdiction.) There is also no dispute that the sentence for sexual battery is part of the overall commitment for which Henry is presently in custody. (Id.; see also, Amended Opinion of

¹ Florida Statute Section 944.276(1)(c) provides:

(1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates:

* * *

(c) Were convicted of sexual battery or any sexual offense specified in s. 917.012(1) and have not successfully completed a program of treatment pursuant to s. 917.012

In Dugger v. Miller, supra, the First District Court determined that Section 944.276(1)(c) could only apply to "persons convicted and sentenced for sex offenses who would be subject to treatment pursuant to section 917.012." Miller, 538 So.2d at 1288 (emphasis added).

district court at p. 3, n. 3.)² Relying on its previous decision in Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989), the district court concluded that Henry would have been entitled to administrative gain time. In Dugger v. Miller, the First District held that Section 944.276(1)(c) applied only to "persons convicted and sentenced for sex offenses who would be subject to treatment pursuant to section 917.012." Id. at 1288 (emphasis added). The petitioner in Dugger v. Miller was presently serving a sentence for robbery, but had a prior record of sexual convictions. In the instant case, the petitioner is not similarly situated to the petitioner in Dugger v. Miller. Unlike the petitioner in the Miller case, Henry's sexual offense is a part of his overall present commitment, along with convictions for kidnapping and robbery. Although the district court concluded that under these circumstances Henry would not be subject to treatment under Chapter 917, there is absolutely no evidence in the record that Henry would not be subject to treatment pursuant to section 917.012.³ In fact, the Department's mandate under Chapter 917 to

² On the basis of the information in the existing record, the district court concluded that the sexual battery portion of the sentence had been satisfied by December 18, 1986. (Amended Opinion at 3.)

³ Because Henry presented his argument that Miller was applicable to his case in a reply to the Department's response, there was no opportunity for the Department to fully develop a record as to this issue. While the Department was unable to submit any evidence that an offender with a sexual offense contained within an overall present commitment established under Florida Statute § 944.275(2)(b) was subject to treatment under Chapter 917, the Department did establish that the sexual battery was a component of an overall commitment entitled to be treated as a present commitment for the purposes of award and forfeiture of

was to identify for treatment offenders "who [have] been sentenced for a violation of law involving a sex offense and placed in [the Department's] custody." § 917.012(1), Fla. Stat. (1987). Unlike the petitioner in Dugger v. Miller, who had a fully-satisfied conviction in his prior criminal history and who had been placed in the Department's custody solely to serve a sentence for a non-sexual offense, Henry is presently in the Department's custody to serve an overall commitment which includes a sex offense. Whether the sentence imposed for the sex offense was to be served first or last within the overall present commitment is irrelevant to the clear statutory language of Chapter 917. That Henry was subject to treatment is evident from the language of the statute alone. In footnote 1 of the Amended Opinion, the First District acknowledged the Department's argument that Henry was subject to treatment but rejected the argument as one first raised on appeal and, therefore, not subject to appellate consideration. The First District's application of the decision in Dugger v. Miller to this case is erroneous as a matter of law. While the district court's determination that Henry was entitled to administrative gaintime under Dugger v. Miller is not the reason this Court accepted

gaintime. See Joiner v. Sinclair, 110 So.2d 12 (Fla. 1959); Kimmons v. Wainwright, 338 So.2d 239 (Fla. 1st DCA 1976). Consistent with the conception of the overall commitment, Chapter 917 afforded treatment to inmates in custody who were in custody for a sexual offense, regardless of where that sexual offense fell within the overall present commitment. Moreover, Petitioner Henry provided no evidence to the contrary, other than his contention that his conviction was a "prior" conviction. For this reason, the Department believes that the First District erroneously concluded that Petitioner's sexual battery conviction was a fully-satisfied, prior conviction as contemplated by Dugger v. Miller, supra.

jurisdiction in this cause, the Respondent contends that this Court may correct any error of the lower tribunal made during the course of the appellate proceedings. Thus, Respondent submits that this Court should reverse and remand this cause to the district court to correct its erroneous conclusion that Henry's sexual conviction is a "prior" conviction as contemplated in Dugger v. Miller, supra, and Chapter 917, and to declare Henry ineligible for administrative gaintime in accordance with Florida Statute § 944.276(1)(c).

Respondent presumes that this Court has accepted jurisdiction in this case because of the conflict between the previous decision of this Court in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), the decision of the First District in Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990),⁴ and the decision of the Second District in Rodrick v. State, 567 So.2d 906 (Fla. 2d DCA 1990). This Court recently resolved the conflict between these decisions in Dugger v. Rodrick, 16 F.L.W. S482 (Fla. 1991). In Rodrick, this Court determined that the provisional credits statute, like the administrative gaintime statute, provides the Department an administrative mechanism or procedure by which it may control prison overcrowding, and, thus, the statute does not address substantive matters of punishment or reward. In Rodrick, the Court specifically approved Miller v. Dugger, and declared that the early release statutes administered by the Department are not

⁴ The decision in Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990) should not be confused with the decision in Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989), both of which are cited in this brief.

subject to ex post facto restrictions.

In the Henry case, however, the First District expanded its decision in Miller v. Dugger beyond ex post facto analysis. Although the First District agreed with Henry that he should have received administrative gaintime under Section 944.276, the court determined that Henry was now barred from accruing the administrative gaintime by virtue of the 1988 enactment of Florida Statute § 944.277, under which Henry was clearly excluded. In essence, the First District concluded that since the provisional credits statute is not subject to ex post facto restrictions, the excluding provisions of the statute could be utilized to retroactively void administrative gaintime which should have been awarded to Henry during the time the administrative gaintime statute was in effect. It is not entirely clear to Respondent whether the First District is correct in its position that the ex post facto clause does not prevent the retroactive application of Section 944.277 to void administrative gaintime, which, at least under the stated findings of this case, should have been awarded to inmate Henry. Rather, it seems to Respondent that this is really an issue of vested rights.⁵

For reasons which differ from the district court's analysis, the Respondent believes that the ultimate decision of the district court is correct as to the result but not necessarily as to the law. The Respondent is obligated to present to this Court

⁵ A statute may not be retroactively applied if it violates the ex post facto clause or impairs a vested right.

all law which may address the issue presently before the Court even though adverse to the Respondent. Thus, to the extent that the decision of the district court presents a conflict among decisions arising out of the retroactive impairment of vested rights, the Respondent notes that the following law may be applicable.

This Court has consistently taken the position that gaintime statutes do not create vested rights until gaintime is actually awarded. See Waldrup v. Dugger, 562 So.2d 687, 694 (Fla. 1990).⁶ In this instance, Henry does not have a vested right in continuing to receive future awards of administrative gaintime, assuming that Henry was indeed eligible to receive such awards during the pendency of the administrative gaintime statute. The issue whether a vested right exists in continuing future awards of gaintime was resolved in Waldrup, supra. However, Henry's entitlement to previous administrative gaintime awards, based upon the findings as stated by the district court, correct or incorrect, may have vested those prior awards for him. If such awards vested, the district court improperly applied the decision in Miller v. Dugger.

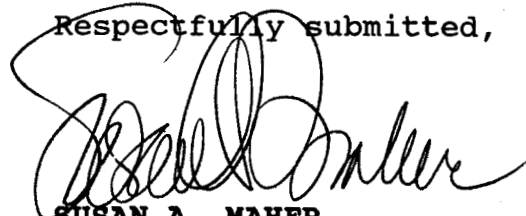
⁶ In its opinion on motion for clarification, the Court stated:

We also agree with DOC that gain-time statutes do not create vested rights until gain-time actually is awarded, subject to all other applicable statutory conditions. Thus, inmates convicted of crimes prior to the 1978 amendments who have not actually received a valid award of gain-time have no vested right in the potential amount of gain-time available under either the 1978 or 1983 statutory amendments.

CONCLUSION

For the foregoing reasons, this Court should correct the error of the district court in concluding that Henry's sexual offense is a "prior" conviction as contemplated by the decision in Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989), and Chapter 917, Florida Statutes (1987), and reverse and remand to the district court to enter an opinion affirming the decision of the trial court on the basis that Henry was excluded from receiving administrative gaintime under Section 944.276(1)(c). In so doing, the issue presented by the application of the decision in Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990), is rendered moot.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S ANSWER BRIEF ON THE MERITS** has been furnished by U.S. Mail to **WILLIE C. HENRY, #044006**, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 16th day of September, 1991.



SUSAN A. MAHER

HenryBrf.AB/sam