D47 w/app

FILED
SID J. WHITE
FEB 13 1992
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary
Department of Corrections,

Petitioner,

v. Case No. 79,151

HAROLD CARPENTER HUBBARD,

Respondent.
_____/

ON PETITION FOR REVIEW FROM CERTIFIED QUESTION
FIRST DISTRICT COURT OF APPEAL
CASE NO. 90-2166

PETITIONER'S BRIEF ON THE MERITS

SUSAN A. MAHER
DEPUTY GENERAL COUNSEL
Fla. Bar No. 0438359
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

OTHER AUTHORITIES (cont'd)

STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the First District Court of Appeal reversing an Order of the Circuit Court for Leon County denying the Hubbard's Petition for Writ of Habeas Corpus, construed as a petition for writ of mandamus. (App. 1-3.) Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), the panel certified as a question of great public importance the following:

> MAY THE DEPARTMENT OF CORRECTIONS RELY ON INFORMATION TAKEN FROM AN ARREST REPORT WHICH IS INCLUDED IN THE PRESENTENCE INVESTIGATION (PSI) AS THE SOLE BASIS FOR DETERMINING AN INMATE'S ELIGIBILITY FOR PROVISIONAL CREDITS PURSUANT TO SECTION 944.277, FLORIDA STATUTES.

(App. at 3.)

At issue in this case is whether the Department of Corrections (DOC) is entitled to rely on information contained within a presentence investigation report (PSI) and an arrest report that substantiates that Hubbard's conviction for "disorderly conduct - indecent exposure" was the type of indecent act contemplated and excluded under Section 944.277(1)(c), Florida Statutes (1989). Use of that information led to Hubbard's disqualification from receiving early release credits which are awarded purely to control prison overcrowding.

At the time Hubbard filed his petition, he was serving an overall term of thirty (30) years for Second Degree Murder and

Possession of a Firearm by a Convicted Felon.[1] (App. at 13). Through the presentence investigation, the Department was apprised that Hubbard had a 1970 conviction for Indecent Exposure out of Duval County, Florida. (App. at 17.) The Department sought and obtained documentation from Duval County setting forth the circumstances of the indecent exposure conviction. (App. at 16.) The only documentation available from Duval County clerk's office for this misdeamnor conviction was the arrest report, which had served as the charging information. The arrest report indicated that Hubbard was charged with disorderly conduct - drunk and disorderly conduct - indecent exposure. (Id.) The factual circumstances related by the complainant to the arresting officer are contained in the arrest report:

> Comp. states subject on porch at 229 E. 4th exposing his sexual organs. Subject followed witness down 4th St., made attempt to grab her.

(App. at 16.)

Hubbard pled to these charges and was fined $25 for the "disorderly conduct - drunk" charge and $75 plus 15 days in jail for the "disorderly conduct - indecent exposure". (App. at 17.)

One of the early exceptions to eligibility for provisional credits provides that an inmate is not entitled to

---

[1] On January 28, this Court denied the Department's request to stay the effect of the mandate issued by the First District Court of Appeal on January 7, 1992. Accordingly, the Department granted Hubbard the award of previously denied provisional credits, which prompted Hubbard's emergency release on January 30, 1992.

provisional credit awards if the inmate,

> Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or a lewd or indecent assault or act.

§ 944.277(1)(c), Fla. Stat. (1989).[2]

DOC officials relied on the conviction indicated within the PSI and the circumstances outlined in the arrest report which served as the charging document for Hubbard's misdemeanor conviction for "indecent exposure" to determine whether Hubbard fell within the proscriptions of Section 944.277(1)(c).

---

[2] Section (1)(c) of Section 944.277 previously precluded the award of provisional credits based upon convictions for any lewd or indecent assault or act. See § 944.277(1)(c), Fla. Stat. (1989). By amendment during the 1990 legislative session, see ch. 90-186, 90-337, Laws of Fla., the provision became more restrictive regarding the specific types of lewd and lascivious behavior to be excluded under the statute. The amendment to the statute also permitted the retroactive award to all non-excluded offenses, which had previously been excluded. The provision, as it was clarified in 1990, now reads:

> Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person . . . .

§ 944.277(1)(c), Fla. Stat. (1990 Supp.)

The district court's decision did not reach the question of whether the circumstances described in the arrest report meet the statutory requirements of a lewd or indecent assault or act as contemplated by the statute after amendment.

SUMMARY OF THE ARGUMENT

Section 944.277 (1)(c), Florida Statutes (1989), as well as the provision as it was amended in 1990, preclude the award of provisional credits to an inmate who is convicted of certain types of lewd or indecent assaults or acts. Because only certain types of lewd or indecent assaults or acts are excluded, the conviction itself does not generally provide for clear automatic disqualification. Thus, the Department must utilize other documents to make the necessary eligibility determination. In determining the factual circumstances underlying a conviction, the Department does no fact-finding in the sense of weighting certain portions of these documents or assessing the quality of information contained within the presentence (PSI) report, nor does it seek to conduct evidentiary hearings or mini-trials by obtaining affidavits of victims, witnesses, arresting officers, or attorneys or extraneous documents produced by the defendant. Instead, the Department relies upon documents generated during the course of criminal proceeding from which the conviction results. Those documents include but are not limited to pre and post-sentence investigations, arrest reports, informations and indictments, or other such documents typically generated during a criminal proceeding. The Department presumes these documents to be competent as they were generated for specific purposes during the course of the criminal proceedings, in accordance with statutes and rules governing such documents, and are relied upon the Court in the disposition of its duties.

In the instant case, the arrest report relied upon by the Department was also apparently relied upon by the sentencing court as the charging document, as the offense charged was a misdemeanor. The arrest report was the only document furnished the Department by the sentencing court, and arrest reports frequently serve as charging documents where misdemeanor offenses are concerned. In administrative disciplinary matters involving prisoners, the Department is only required to demonstrate that there is a modicum of evidence present and the nature of that evidence need not be direct evidence nor evidence which meets the evidentiary standards required in a criminal proceeding. To require something more for administrative eligibility determinations for early release credits would be inconsistent since (1) there is no protected liberty interest in receiving early release credits, (2) the determination that an inmate is ineligible for provisional credits is not punishment, (3) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public, and (4) the eligibility decision is one committed to the administrative expertise of the Department, and as such, presumptively correct.

For these reasons, an arrest report should be determined to be competent evidence which can be relied upon to make an administrative eligibility determination required under Section 944.277, Florida Statutes.

ARGUMENT

IN PERFORMANCE OF ITS STATUTORY DUTIES, THE DEPARTMENT OF CORRECTIONS MAY RELY ON INFORMATION TAKEN FROM AN ARREST REPORT AS THE SOLE BASIS FOR DETERMINING AN INMATE'S ELIGIBILITY FOR PROVISIONAL CREDITS PURSUANT TO SECTION 944.277, FLORIDA STATUTES.

The issue presented by the certified question is whether the Department of Corrections (DOC) may use the contents of the presentence investigation report (PSI) taken from an arrest report as an aid in determining whether conviction for a lewd or indecent assault or act falls within the exclusions of Section 944.277(1)(c), a provision which determines eligibility for early release credits. Although the certified question of the district court of appeal implies that the Department relied on a presentence investigation which referenced factual circumstances taken from an arrest report, in actuality the Department relied on the arrest report itself. The presentence report contained in the Department's files for Hubbard's present conviction listed a prior conviction for indecent exposure. (App. at 17.) Because it was necessary for the Department to ascertain the nature of the indecent act in order to decide whether the conviction fell within the exclusions of Section 944.277(1)(c), the Department requested and obtained additional documents from the court file on Hubbard's Duval County misdemeanor conviction. The document obtained from the Duval County clerk's office was the arrest report, which had apparently served as the charging information for this misdemeanor offense.

The district court made clear in its decision that it had not reached the question of whether the matters described in the arrest report meet the statutory requirement of a "lewd or indecent assault or act" as contemplated in Section 944.277(1)(c), notwithstanding that the "indecent exposure" was within the context of a disorderly conduct charge. (App. at 3, n. 3.) The district court's concern was the quality of the evidence relied upon by the Department in making its eligibility determination, and in particular, the use of information contained within an arrest report. The district court chided the Department for not providing a charging document, evidence of the circumstances of Hubbard's plea to the offense, or an affidavit or other sworn material to substantiate the "sketchy" statement contained in the field arrest report. (App. at 3.)

First, the Department points out that the district court erroneously assumes that an independent charging document exists. The Department may obtain a wide array of supporting documents depending upon the whether the conviction is for a misdemeanor or a felony. The documents available for a misdemeanor conviction are generally more limited than those available for a felony conviction. It has been the Department's experience that arrest reports frequently serve as the charging document for a misdemeanor offense.[3] Similarly, in misdemeanor settings, a notice to appear

[3] The rules of criminal procedure recognize that for misdemeanor offenses, documents other than informations or indictments may serve a formal charging documents. See Fla. R. Crim. P. 3.134. The Department has been regularly advised by both circuit court staff and assistant state attorneys that arrest

may serve as the charging document. In this instance, the Department was required to obtain supporting documentation on a 20-year-old misdemeanor conviction. The sole supporting document provided to the Department was the field arrest report. The document indicates that the arrest was without a warrant and was based in part upon the arresting officer's personal observation. In addition to the officer's personal observations, the officer recorded the statement of the victim complainant as to the charge of indecent exposure. This document was deemed competent by the circuit court of Duval County to serve as the charging document. The district court now indicates that the Department should somehow be required to provide something more substantial. The Department disagrees. On the basis of this report, and this report alone, Hubbard was arrested and detained in the county jail. Hubbard pled to the misdemeanor offense -- apparently no independent charging information was generated as it could not be provided to the Department. The Department should not now be required to obtain an affidavit from the victim or seek independent sworn material that was not required at the time that Hubbard was arrested and convicted. If the arrest report was sufficient for these purposes, it is certainly sufficient for the purposes of the administrative determination at issue in this case.

The Department emphasizes that making eligibility determinations for the award of early release credits is **not**

---

reports may and do serve as the sole charging documents for misdemeanor offenses.

equivalent to a criminal proceeding. It is an administrative determination. This Court has recognized that [illegible] aspect in its recent decision in Dugger v. Rodrick, 584 So.2d (Fla. 1991), cert. denied, ___ L.W. ___ (January 13, 1992), in which the Court was required to determine whether Florida's early release statutes were substantive statutes related to punishment or reward. This Court concluded that the early release statutes were essentially remedial, not penal in nature. There can be no doubt from the legislative history[4] of the early release statutes that

---

[4] The provisional credits statute is one of several mechanisms enacted by the Florida Legislature to address the overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. (The consent decree in Costello v. Singletary, Case Nos. 72-109-Civ-J-14, 72-94-Civ-J-14, has been in place almost two decades.) The first emergency mechanism, enacted in 1983, provided for the emergency release of prisoners, after the declaration of a state of emergency, by the application of up to 30 days gaintime, in 5-day increments, to the overall term of each inmate in the system until the inmate population reaches 97% of lawful capacity. See § 944.598, Fla. Stat. (1983). There were no exclusionary provisions contained in the emergency release statute. Although the emergency release statute is still in effect, its provisions have never been implemented. See Blankenship v. Dugger, 521 So.2d 1097, 1098 (Fla. 1988).

Because of the legitimate and compelling concern for public safety, the Legislature enacted a second early release mechanism which was designed to be triggered prior to the emergency release statute. The administrative gaintime statute, enacted at Florida Statute Section 944.276 (1987), became operational at 98% of lawful capacity, and the emergency gaintime statute's triggering level was raised to 99% of lawful capacity, as defined by the statute. The administrative gaintime statute contained a number of exclusions which eliminated from eligibility certain types of violent or repeat offenders. See § 944.276(1)(a)-(d), Fla. Stat. (1987). The administrative gaintime statute was repealed effective July 1, 1988, by Chapter 88-122, Laws of Florida, and was supplanted with a more comprehensive early release statute, which

the sole purpose of the statutes is to provide an interim administrative solution to prison overcrowding. There also can be no doubt that the Legislature intended to provide this solution without jeopardizing the public safety. There has never been any intent expressed in the statutes that would lead one to believe that these statutes have been enacted, through the generosity of the Legislature, as a benefit to the prison population. Since it is now clear that the statutes are remedial in nature -- **see** Rodrick, supra -- the statutory provisions should be construed liberally, and the Department should be given latitude in making these administrative decisions.

The Department is administering the statute in accordance with the Department's informed knowledge of the legislature's intent. The legislature made clear, through the various exclusions enacted, that it did not intend to reduce overcrowding at the expense of public safety. Thus, any questions regarding an inmate's eligibility for provisional credits should be resolved in favor of protecting the public's interest in safety. It is well

---

excluded more classes of violent or habitual offenders, and which, in later versions, added a limited period of supervision after release. **See § 944.277**, Fla. Stat. (1988 - **1990**). Most recently, the Legislature enacted another early release program, called control release, which is administered by the Florida Parole Commission, sitting as the Control Release Authority. **See §947.146**, Fla. Stat. **(1989** - 1990). The eligibility exclusions for control release are identical to those contained in the provisional credits statute; however, the control release program affords the Control Release Authority more discretion in establishing control release dates for early release. Cf. **§ 944.277**, Fla. Stat. (1990 Supp.) with **§ 947.146**, Fla. Stat **(1990** Supp.). The provisional credits statute now serves as a backup early release mechanism to the control release program. **§ 947.146(3)**, Fla. Stat. **(1990 Supp.)**

settled that statutes enacted for the public's welfare should be construed so that the public interest may be fostered to the fullest extent. Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So.2d 234 (Fla. 1944); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). Even where a statute enacted to protect a public interest has penal aspects, the statute should nonetheless be construed liberally in favor of the public interest. State v. Hamilton, 388 So.2d 561 (Fla. 1980); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).

The provisional credits statute provides an administrative mechanism for resolving a problem. Although inmates ultimately receive the "benefit" of earlier release, the statute was not enacted with the rights, needs, or concerns of inmates in mind. Because a remedy for prison overcrowding had to be found, the Legislature was faced with decisions regarding the kinds of inmates who were less of a risk for early release. The exclusions found in Section 944.277, Florida Statutes, which for the most part concern violent and sexual offenders, demonstrate that the Legislature determined that these offenders pose special safety concerns for the public. The danger posed by individuals prone to commit, to attempt, or who intend to commit, nonconsensual sexual acts has been recognized by Florida courts. Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990). Henderson v. State, 543 So.2d 344 (Fla. 1st DCA 1989), review denied, 551 So.2d 461 (Fla. 1989). Further evidence of the Legislature's determination that inmates prone to commit nonconsensual sexual acts pose significant dangers

to the public is that a conviction for a sexual crime is not necessary to deny an inmate provisional credits. See Fla. Stat. §§944.277(1)(d) and (e).

Because credits are not earned but are simply awarded as an administrative tool to relieve overcrowding, a decision that an inmate is ineligible is not punishment or in any way related to punishment. With this in mind, the Department submits that the "quality" or "weight" of the evidence utilized to make these determinations should be viewed in the context of the administrative determination being made. The district court expresses its concern that the "evidence" utilized by the Department -- that is, the field arrest report -- is not competent. Presumably this is because the details of the offense contained in the arrest report are "sketchy". However, the Department points out that the Supreme Court of the United States has determined that the presence of a modicum of evidence is sufficient for a court to uphold the decision to revoke good time credits. Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1988). The Supreme Court rejected the argument that there must be substantial evidence in the record. "Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context." Hill, 472 U.S. at 456 (citations omitted). The court held that "the relevant question is whether there is any evidence in the record that could support the conclusion reached ...." Hill, 472

U.S. at 455-6 (emphasis supplied). While the Petitioner notes there may be a distinction between the amount of evidence to be necessary to support the administrative determination and the quality or competency of the evidence, the facts of the Hill case are instructive as to the type of evidence which may be considered competent.

> [In Hill,] [t]he disciplinary board received evidence in the form of testimony of the prison guard and copies of his written report. That evidence indicated that the guard heard some commotion and, upon investigating, discovered an inmate who evidently had just been assaulted. The guard saw three other inmates fleeing together down an enclosed walkway. No other inmates were in the area. The Supreme Judicial Court found that this evidence was constitutionally insufficient because it did not support an inference that more than one person had struck the victim or that either of the respondents was the assailant or otherwise participated in the assault. (citations omitted) This conclusion, however, misperceives the nature of the evidence required by the Due Process Clause.
>
> The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board. Instead, due process in this context requires only that there be some evidence to support the findings made in the disciplinary hearing. Although the evidence in this case might be characterized as measer, and there was no direct evidence identifying any one of three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary.

Hill, 472 U.S. at 456-457; 105 S.Ct. at ___; 86 L.Ed.2d at 365-366. (Emphasis added.)

It would be inconsistent to hold the Department to a higher standard of evidence, both in weight and competency, in

reviewing its decision regarding provisional credits as contrasted with disciplinary loss of gaintime since (1) there is no protected liberty interest in receiving early release credits, see Blankenship, supra, (2) the determination that an inmate is ineligible for provisional credits is not punishment, (3) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public and (4) the eligibility decision is one committed to the administrative expertise of the Department, (see Section 944.277, Florida Statutes), and as such, presumptively correct. State ex rel Seigendorf v. Stone, 266 So.2d 345, 346 (Fla. 1972) ("the decisions of public administrators made within the ambit of their responsibilities, and with due regard to law and due process, are presumptively correct and will be upheld, if factually accurate and absent some compelling circumstances, clear error or overriding legal basis ...."); City of Hollywood v. Fla. Pub. Employees Relations Comm'n, 476 So.2d 1340, 1342 (Fla. 1st DCA 1985) ("the general rule in Florida is that a decision by an administrative body if made within its area of authority will be upheld if factually correct, absent some compelling circumstances).

The decision of the Department to exclude Hubbard from the receipt of provisional credits based upon an arrest report, which provided the basis for the arrest and served as the charging document for the misdemeanor offense, is not arbitrary and capricious. If the arrest report was the document relied upon and considered competent by the sentencing court in disposing of the

misdemeanor charges, it certainly must be considered sufficient for the Department to make an administrative determination as to Hubbard's eligibility for early release credits.

Although the question certified by the district court in this case is identical to that certified by the district court in Grant case (Docket No. 78,844), the Department recognizes that in actuality the use of the arrest report is somewhat different. In Grant, the arrest report was used during preparation of the presentence investigation to outline the factual circumstances of the offense. The independent charging information did not contain the factual specifics of the crime. In the instant case, the presentence investigation for Hubbard's present offense revealed a conviction for indecent exposure, but did not outline the factual circumstances of the offense. No presentence investigation was prepared for the prior 1970 indecent exposure conviction. However, had the preparer of the PSI for the Hubbard's present offense chosen to delineate the circumstances of the prior offense, he would have necessarily taken those factual circumstances from the same arrest report relied upon by the Department. Thus, to that extent, the cases are similar and the issue at hand is the competency of an arrest report to serve as "evidence" sufficient to support the Department's administrative determination with regard to eligibility for early release credits, regardless of whether it is contained within the presentence report or independently utilized where no presentence report exists. It is the Department's position that it is appropriate for the Department to

use information in an arrest report, regardless of whether it appears in the PSI or is taken from the arrest report itself, to make these eligibility determinations, as these documents are generated in accordance with statutes and rules governing criminal proceedings. While use of these documents as evidence to secure a conviction would not be appropriate, use of the documents by the sentencing courts for post-conviction sentencing and by the Florida Parole Commission and the Department in the administration of their respective duties is clearly a different matter.

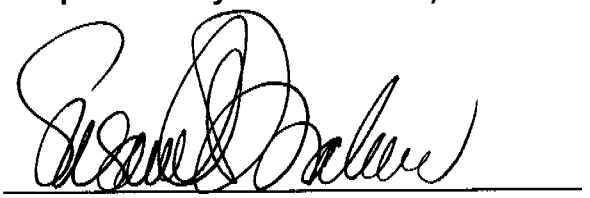
The Department again emphasizes that making eligibility decisions is not a part of criminal proceeding. This is an administrative determination. Dugger V. Rodrick, supra. The inmate has already been adjudged guilty of a crime and been afforded all the attendant due process protections. Eliminating the ability to use a PSI simply because the preparer has noted the circumstances were derived from an arrest report or to utilize the arrest report in misdemeanor settings where the report actually serves as the charging document, will prevent the Department from effectively administering large portions of the provisional credits statute and will lead to the retroactive application of credits to significant portions of the present inmate population.

The Department strongly contends that the Legislature intended to protect society from being preyed upon by inmates who committed crimes with sexual overtones. Allowing the Department to use the PSI, and other documents generated in accordance with statutes and rules governing criminal proceedings, will further that goal. The inmate is not punished. He is simply required to serve his original sentence.

CONCLUSION

Wherefore, for the foregoing reasons, the Department respectfully requests that the certified question be answered in the affirmative and the decision of the First District Court of Appeal in Hubbard v. Dugger be disapproved.

Respectfully submitted,



SUSAN A. MAHER
Deputy General Counsel
Fla. Bar No. 0438359
DEPARTMENT OF CORRECTIONB
2601 Blairstone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS has been furnished by U.S. Mail to HAROLD CARPENTER HUBBARD, c/o Harold Hubbard III, 9968 Billmore Circle, Jacksonville, Florida 32222, on this 13 hay of February, 1992.

SUSAN A. MAHER

Hubbard.Brf/sam

cc: Sharon Bradley, Esquire
Daley & Miller
Post Office Box 1177
Tallahassee, Florida 32302

Elaine D. Hall, Assistant General Counsel
Department of Corrections