OA 2-8-95

IN THE SUPREME COURT OF FLORIDA

ROBIN M. OROSZ,

Petitioner,

v. Case No. 83,487

HARRY K. SINGLETARY, JR., Secretary,
Department of Corrections,

Respondent.
_____/

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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ARGUMENT

The Court has directed the parties to supplement the briefs on the impact of chapter 78-304, § 2 at 870, Laws of Fla. (effective July 1, 1978) on the issue of whether the Department was authorized to combine Orosz's consecutive sentences for the purpose of calculating gain time. Respondent submits the following supplemental argument.

* * * *

Chapter 78-304, § 2, Laws of Fla., repealed sections 944.27 and 944.271, Florida Statutes. These gaintime statutes were supplanted by section 944.275, effective July 1, 1978. The Court's question is directed to the impact of the repeal of a provision contained in section 944.27(2) that directed the department to apply and forfeit gaintime on cumulative sentences as if the sentences were one overall term.[1] The language in section 944.27(2) was not carried over to any provision in section 944.275. To understand the impact of this omission it is necessary to study the history of Florida's gaintime statutes and the department's historical method of structuring sentences.

Florida's gaintime statutes date back over 100 years. In 1889, the first gaintime provision was enacted by the Florida

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[1] Specifically, subsection 2 provided:

> When a prisoner is under two or more cumulative sentences, he shall be allowed gain time as if they were all one sentnece and his gain time, including any extra gain time allowed him under section 944.29, Florida Statutes, shall be subject to forfeiture as though such sentences were all one sentence.

legislature allowing for 2 days of credit for each month in which a prisoner was not disciplined for bad conduct and an additional 3 days credit could be awarded for each month in which a prisoner performed the labor assigned him. § 3059, Rev. Stat. Fla. (1892). There were no provisions for forfeiture of gaintime.

In 1911, Governor Gilchrist recommended adoption of a progressive scale of gaintime to give proportionately greater credits to inmates with lengthier sentences. The Legislature responded by enacting a progressive scale of gaintime credits based upon sentence length, beginning with 2 days per month for the first year of sentence and increasing to a maximum of 15 days per month for the tenth and all succeeding years. § 4140, 2 Comp. Laws Fla. (1914). Provision was also made for forfeiture of gaintime accrued up to the date of any escape, attempted escape or other serious misconduct. Id.

In 1937, the progressive scale of gaintime credits was revised to provide for 5 days per month for the first two years of sentence; 10 days per month for the third and fourth years of sentence; and 15 days per month for the fifth and all succeeding years. § 8567, 6 Comp. Gen. Laws Fla. (Supp. 1938).

In 1957, the first Corrections Code was enacted through Chapters 944 and 945, Florida Statutes. The previous statutory scale of gaintime was deleted from the statute and the State Board of Commissioners adopted the former 5-10-15 progressive scale upon the recommendation of the Director of Corrections. An additional 6 days of discretionary gaintime could also be awarded for work or

participation in other constructive activities. In 1963, the 5-10-15 progressive scale of gaintime allowances was recodified at Section 944.27, Florida Statutes, and the additional 6 days of gaintime for labor and productive activities remained available through Section 944.29.

In 1978, during a legislative sunset review of the corrections code, the progressive gaintime awards were reduced from 5-10-15 to a 3-6-9 progressive scale. § 944.275(1)(a)-(c), Fla. Stat. (1978 Supp.). "Work" gaintime was authorized at the rate of 1 day of "work" gaintime for every day of labor performed. § 944.275(2)(b), Fla. Stat. (1978 Supp.) For those inmates physically unable to participate in a work program, a maximum of 6 days per month was authorized. § 944.275(2)(e), Fla. Stat. (1978 Supp.) In addition to or in lieu of "work" gaintime, an inmate could also earn up to 6 days per month of "extra" gaintime for participation in educational, vocational, or other self-improvement programs. § 944.275(3)(a), Fla. Stat. (1978 Supp.)

In 1983, the Correctional Reform Act provided major revision to the gaintime law. Three categories of gaintime were established: "basic", "incentive", and "meritorious". § 944.275, Fla. Stat. (1983). "Basic" gaintime, which is based upon length of sentence, is awarded at the rate of 10 days per month, to all prisoners whose offense dates occurred on or after July 1, 1978. § 944.275(4)(a), Fla. Stat. (1983). This gaintime supplanted the 3-6-9 progressive scale and the sentences of all inmates in custody were adjusted to comply with the more beneficial 10-day per month awards.

For over 75 years, the department has structured consecutive or cumulative sentences as one overall term for purposes of award and forfeiture of gaintime. As noted by this Court in Joiner v. Sinclair, 110 So. 2d 12 (Fla. 1959), in which a previous 1957 statute, section 951.21, was construed:

> [I]t would be inconsistent to say that a prisoner under consecutive sentences is regarded as undergoing one continuous term of confinement rather than a series of distinct terms, for the purpose of earning credits, yet the same prisoner, when he commits an ofense causing those same credits to be forfeited, is to be regarded as serving a series of distinct terms, the earlier ones of which have been completed . . . .

Id. citing to In re Cowen, 27 Cal. 2d 637, 166 P.2d 279, 282 (1946).

Although section 944.27 when first enacted in 1957 carried over by policy and rule the earlier statutory provisions of section 951.21, it was completely devoid of language with regard to structuring of consecutive or cumulative sentences for purposes of awarding and forfeiting gaintime. However, the principles recognized in Joiner for treating such sentences as one overall term -- that is, in reaping the benefit of the progressive scale of gaintime to be awarded, a prisoner also accepted the consequences of forfeiture of gaintime on a series of cumulative sentences:

> If the Legislature had intended to provide for the forfeiture only of that portion of his gain time earned during and attributable to theparticular snetnece he was serving at the time of his escape, it would have been a simple matter to so provide. Since they did not, we can conclude only that the Legislature meant what it said: that *all* gain time should be forfeited.

Joiner, 110 So. 2d at 13.

Specific statutory language codifying the principle of law articulated in Joiner was enacted in section 944.27 in 1963. § 944.27(2), Fla. Stat. (1963). Although this language was not directly carried over into section 944.275 when it was enacted in 1978, history of the statutes would dictate that such language was unnecessary as section 944.275, like the previous statutes in place for almost 70 years, provided for a progressive award of gaintime based upon length of sentence. There was certainly no reason to believe that the Legislature had changed its mind after 70 years that the progressive rates of gaintime would only be applied to individual distinct terms rather than overall terms. This is only confirmed by the fact that when the Legislature enacted the Correctional Reform Act in 1983 and leveled the basic gaintime rate to 10 days per month rather than the previous progessive 3-6-9 scale, it found it necessary to restore language that would require the department to continue structuring consecutive or cumulative sentences as one overall term since the principles articulated in Joiner relative to the progressive scale gaintime statutes would no longer apply.[2]

Moreover, to construe section 944.275 as it existed between 1978 and 1983 to require sentences for offenses committed in that time period to be treated as individual terms turns sentence structuring on its head and would produce absurd results.

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[2] The specific language regarding cumulative sentences from section 944.27(2) was not used but language contained in sections 944.275(2), (3) establishes that multiple sentences will be cumulated into one overall term.

It simply does not make sense that the Legislature would have intended a window of 5 years where sentences would be treated individually and then return to cumulating sentences into one overall term. For example, if sentences in the 1978-1983 window are not cumulated into one overall term and a prisoner is serving a 1975 sentence, a 1979 sentence, and a 1981 sentence and that prisoner escapes while in service of the 1981 sentence, a forfeiture of gaintime under section 944.28(1) would apply to the 1975 sentence and the 1981 sentence from which the prisoner escaped, but not the 1979 sentence in between. Or, for example, if a prisoner is serving a 1975 sentence, a 1979 sentence, a 1981 sentence, and a 1985 sentence and escapes while in service of the 1985 sentence, then under petitioner's theory, that prisoner would only be subject to a forfeiture of gaintime on the 1975 sentence and the 1985 sentence, but not the 1979 and 1981 sentences in between. Such scenarios are absurd and section 944.275 as it existed between 1978 and 1983 should not be construed to create such results as it would defeat legislative intent. See Schultz v. Schultz, 361 So.2d 416, 419 (Fla. 1978) (when reasonably possible and consistent with legislative intent, we must give preference to a construction which will give effect to the statute over another construction which would defeat it).

Finally, the 1983 amendment of section 944.275 applied retroactively to sentences for offenses committed between 1978 and 1983. Petitioner reaped the benefit of greater basic gaintime awards as a result, as the 3-6-9 progressive scale was supplanted

by a 10 day per month flat rate. In accepting this benefit, petitioner must also accept the other provisions of section 944.275 (1983) that require his sentences to be cumulated into one overall term.

As noted above, the department has been structuring consecutive or cumulative sentences into one overall term for at least 75 years. To do otherwise, turns sentence structuring on its head and defeats legislative intent in awarding and forfeiting gaintime. Deference to the agency's interpretation of these statutes is mandated. 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); State v. Florida Development Commission, 211 So. 2d 8 (Fla. 1968) (construction given statute by administrative agency charged with its enforcement is entitled to great weight and court generally will not depart therefrom except for most cogent reasons and unless clearly erroneous); Department of Professional Regulation, Bd. of Medical Examiners v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984) (agency's interpretation of statute need not be sole possible interpretation or even the most desirable one, but need be only within the range of *possible* interpretations).

CONCLUSION

It is the department's position that specific statutory language directing the cumulation of sentences into one overall term for purposes of calculating gaintime under the 1978-1983 statutes is unnecessary and that the repeal of earlier gaintime statutes containing such statutory language is of no substantive effect. For the reasons stated above, the department retained the authority to cumulate petitioner's 1978 sentence into one overall term with the 1975 sentence and to award gaintime in accordance with such structuring.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S SECOND SUPPLEMENTAL BRIEF** has been furnished by U.S. Mail to **R. MITCHELL PRUGH, ESQ.**, Middleton, Prugh & Edmonds, P.A., Route 3, Box 3050, Melrose, Florida 32666, on this 2d day of February, 1995.

SUSAN A. MAHER

Orosz.SSB/sam