

IN THE SUPREME COURT OF FLORIDA

FILED
DEBBIE CAUSSEAU

APR 28 2000

CLERK, SUPREME COURT
BY _____

JERRY L. WILSON, dc# 670412 ,

Petitioner,

v.

Case No. SC94377

MICHAEL MOORE

and

THE FLORIDA PAROLE COMMISSION,

et al.,

Respondents.

SECRETARY MOORE'S RESPONSE TO ORDER TO SHOW CAUSE

Respondent, Michael Moore, Secretary for the Department of Corrections, through counsel, and pursuant to this court's order to show cause, responds to the Petition for Writ of Habeas Corpus and requests that the petition be denied for the reasons that follow.

Preliminary Statement

Petitioner, Jerry Wilson, is an inmate in the Florida Department of Corrections, currently incarcerated at Dade Correctional Institution, Dade City, Florida. He has filed a Petition for Writ of Habeas Corpus challenging his release to control release and the forfeiture of gaintime that resulted from the revocation of control release. As will be shown below, the petitioner accepted the benefits of control release and thereby waived any challenge to the forfeiture of the gaintime earned before release.

The relevant facts are as follows:

On June 16, 1986, the Petitioner was sentenced in Broward County to concurrent terms of two and one-half (2 1/2) years for carrying a concealed firearm and possession of cocaine. (Exhibit

A at 1; B at B1-6.) The offenses occurred on December 7, 1984. (See, Exhibit A at 1; B at B2.)

On September 2, 1986, the Petitioner was sentenced to fifteen (15) years for the offense of trafficking in cocaine. (Exhibit A at 1; B at B10-15.) The sentence is consecutive to the Broward County sentences. (Exhibit A at 1; B at B15.) The offense occurred on February 7, 1986. (See, Exhibit A at 1; B at B10A, 10B.)

The petitioner was received by the Department of Corrections to serve these sentences on September 4, 1986. (Exhibit A at 1.)

Due to prison overcrowding, Petitioner was released from prison early by the Florida Parole Commission. (See, Exhibit A at 2.) The Petitioner signed a control release agreement. (Exhibit B at B32-33.) That agreement specifically provided that,

I agree to accept the terms and conditions of control release or if my offense(s) were committed on or after December 1, 1990, I acknowledge that I am subject to the terms and conditions of control release.

(Id.)

On October 27, 1992, approximately six years after receipt into the department's custody and due to prison overcrowding, the petitioner was released to control release supervision. (Exhibit A at 2.) At the time of his release, his tentative release date was scheduled to occur on July 23, 1994. (Exhibit A at 2.)

While on control release supervision, the petitioner committed new offenses, namely two counts of the sale of cocaine. (See, Exhibit A at 2-3; B at B17-26.) He was sentenced for these offenses to 35.2 months, to be served concurrently with each other

and the sentences he was serving before control release. (Id.)

The Parole Commission revoked the grant of control release, effective as of January 20, 1997. (Exhibit A at 3; B at B35.)

The Petitioner returned to prison on January 12, 1998. (Exhibit A at 2.) Pursuant to § 944.28(1) and due to the revocation of control release, the Department forfeited the gaintime earned before release, including basic gaintime, incentive gaintime and administrative gaintime. (Exhibit A at 3.)

The Department considered whether to provide relief under Gomez v. Singletary, 733 So.2d 499 (Fla. 1998) and determined that no relief was due because the petitioner had actually received control release and that benefit was more beneficial than the emergency gaintime he could have received.¹

Petitioner's tentative release date is scheduled to occur on August 1, 2002. (Exhibit A at 6.) That date is established by forfeiting the gaintime earned before release to control release, tolling the running of the petitioner's sentence while on control release and applying the gaintime earned since return to prison. (Id.)

Argument

Petitioner contends that the forfeiture of gaintime, including

¹ Petitioner could have received no more than 300 days of emergency gaintime on the consecutive fifteen year sentence. See, Exhibit A at 3-4.) No emergency gaintime would have been awarded on the two and one-half year sentences. (Id.) The petitioner received benefit of over 600 days of control release gaintime, representing the time between his tentative release date when he was control released, (7/23/94) and the date of control release (10/27/92).

basic gaintime, incentive gaintime and control release credits, violates his ex post facto rights. He contends that he had a vested right to such gaintime and that he had a right to expect that such gaintime would not be taken away for post-prison misbehavior.

These very arguments have already been rejected by this court in Bowles v. Singletary, 698 So.2d 1201 (Fla. 1997), Dowdy v. Singletary, 704 So.2d 1052 (Fla. 1998), Duncan v. Moore, 25 Fla. L. Weekly S215 (Fla. March 23, 2000) and Lewis v. Moore, 25 Fla. L. Weekly S152 (Fla. February 17, 2000). In Bowles, this Court rejected an ex post facto challenge to the forfeiture of basic and incentive gaintime that occurred as a result of the revocation of control release. Control release was enacted in 1989. See, Ch. 89-526 § § 1,2,3,4,6,7,8,52, Laws of Fla. Bowles, who offended in 1989, before the control release program went into effect, argued, much like the petitioner at bar,

that he had a right to reasonably expect that once his basic and incentive gain time was awarded and he was released, gain time could not be taken away for post-prison misbehavior; at the time of this offenses he could not have contemplated that his gain time would be forfeited if his Control Release supervision was revoked because Control Release had not yet gone into effect.

Bowles at 1201.

This Court rejected the argument, noting that by the time control release went into effect, the statutes had been amended to make clear that a forfeiture of gaintime would result upon revocation.

Control Release allowed eligible inmates to be released early to held alleviate prison overcrowding. . . . By the

time inmates were offered this conditional benefit, the gain time statutes had been amended to make clear that a revocation of Control Release would result in a forfeiture of basic and incentive gain time. § § 944.28(1), 948.06(6), 947.146(9), 947.141, Fla. Stat. (1989).

Id. at 1203.

Given these amendments, this Court found that Bowles had waived the ex post facto challenge to the forfeiture of gaintime.

The Control Release certificate offered to inmates in Bowles' position, whose offenses were committed before the effective date of the Control Release program, provided the option of choosing not to accept release. See, Fla. Admin. Code. R. 23-22.006(25). Bowles has made no allegation that he did not wish to be released early or that he was forced to accept release despite his objections. Furthermore, Bowles signed the Control Release certificate acknowledging that "I agree to accept the terms and conditions of Control Release ." This constituted a waiver as to any ex post facto claim he may otherwise have been able to argue.

Id. at 1203-1204.

Relying on cases such as Joyner v. State, 594 So.2d 328 (Fla. 1985), where the supreme court found that a defendant who accepted community control by the failure to object or appeal, waives the right to attack community control at revocation, the court explained its reasoning as follows:

Both the beneficial opportunity and the potential forfeiture provisions of the Control Release program were created together and were a "package deal" offered to inmates. The consequences of Bowles' failure to follow the terms of his Control Release were all part of "the bargain" to which Bowles agreed. The state, therefore, was obligated to return Bowles to prison to finish serving his sentence.

Accordingly, we hold that by accepting the terms and conditions of early release under the Control Release program, Bowles and other inmates in his position waived any ex post facto argument they otherwise may have had as to the forfeiture of incentive and basic gaintime after

a violation of Control Release.

Id. at 1204.

In Lewis v. Moore, 25 Fla. L. Weekly S152 (Fla. February 17, 2000), the holding of Bowles, which addressed the forfeiture of basic and incentive gaintime upon revocation of control release, was applied to the forfeiture of control release gaintime, upon revocation of control release. There, this court held that,

if a releasee who committed the underlying criminal offense prior to the effective ate of the control release program accepts placement on that program and then violates the terms and conditions of control release, the State may forfeit both regular (basic and incentive) gain time and the overcrowding gain time known as control release credits. The State may forfeit all such credits despite the fact that the relevant forfeiture provisions were enacted after the releasee's underlying criminal offense because, by accepting the release under the newly created control release program, the releasee waived any ex post facto claims.

(Id. at S153.)

This same reasoning applies to the forfeiture of administrative gaintime. Provisional credits and administrative gaintime are a type of credit that may be forfeited upon violation of the conditions of release under the same circumstances that regular (basic and incentive) gaintime may be forfeited. See, State v. Lancaster, 731 So.2d 1227 (Fla. 1998), cert. denied, (119 S. Ct. 1591 (1999)). The forfeiture of all the gaintime awarded or earned by the petitioner before his release to control release is the penalty petitioner must bear for the failure to comply with the terms of control release supervision.

Petitioner attempts to avoid the consequences of his failure to abide by the terms of his release by contending that he was

forced to accept an early release and therefore, a waiver of his ex post facto rights could not have occurred.² As evidence that he was forced to accept control release, petitioner relies upon Ch. 89-526 § 52, Laws of Florida, which provides in part that,

all inmates committed to the department as of September 1, 1990, shall have a control release date established by December 1, 1990.

That provision obviously did not compel the Commission to force inmates out of prison and on to control release. It simply required that a date be established and that date could have been one that did not afford the inmate early release from prison at all. Moreover, at the time Petitioner accepted release, § 921.001(12), Fla. Stat. (Supp. 1992) clearly provided that acceptance of control release was mandatory only for inmates who offended on or after December 1, 1990. Furthermore, the control release certificate the petitioner signed indicated that control release was mandatory only for those inmates who offended after December 1, 1990. Thus, contrary to Petitioner's assertion, the law did not require his early release from prison. He was provided constructive and actual notice that release was not mandatory. Moreover, while petitioner asserts before this court that he was forced to accept control release, six months before his release, he wrote the Florida Parole Commission and requested control release,

² To some extent the Department will defer to the Commission on issues regarding the claim that the petitioner was forced to accept control release. The claim revolves around the Commission's statutes and while departmental employees provided the control release forms to inmates, departmental employees were acting as agents of the Commission in this capacity.

informing the Commission that he would not violate and that he would become a productive member of society. (See, Exhibit B at 35-36.) 37

Just as Petitioner Bowles challenge to the forfeiture of gaintime was rejected, Petitioner Wilson's must be rejected. Like Petitioner Bowles, Petitioner Wilson signed the control release agreement. More importantly, like Bowles, Petitioner accepted the benefits of an early release from prison. In fact, Petitioner accepted his freedom for years. (He was released on control release in 1992 and did not return to prison until 1998.) Signing the control release document and accepting the benefits of an early release operates as a waiver of ex post facto rights to the forfeiture of gaintime. See, Delaine v. Singletary, 715 So.2d 376 (Fla. 1st DCA 1998) (signature on control release certificate is an express waiver of any ex post facto claim regarding forfeiture of gaintime upon revocation); see also Lewis, supra (inmate who accepts placement on control release supervision, waives any ex post facto challenge to the forfeiture of regular and overcrowding gaintime that results from the revocation of control release.)

Even had Petitioner been incorrectly informed that control release was not optional and even had Petitioner preferred to have served out his sentence in prison, he ratified the control release agreement by accepting the benefits of that agreement and remaining free. A party who accepts the benefits of an agreement may not avoid the obligations of that agreement. See, Scocozzo v. General Development Corp., 191 So.2d 572 (Fla. 4th DCA 1966); Treasure

Salvors v. Unidentified Vessel, 556 F.Supp. 1319 (Fla. S.D. 1983). The Supreme Court itself has noted that a party may not retain the benefits of an act of law while attacking the constitutionality of one of the law's important conditions. See, Fahey v. Mallonee, 332 U.S. 245 (1947). Control release offered Petitioner the benefit of a very early release from prison on the condition that he comply with the conditions of that early release with the penalty that failure to so comply could result in a revocation of the release and a forfeiture of gaintime. Petitioner accepted the benefits of the control release act by leaving prison years before his scheduled release and remaining out of prison for years. As a result, he cannot challenge the constitutionality of the conditions of that release, including the forfeiture of gaintime upon revocation.

Inmates challenging the forfeiture of gaintime as a result of the revocation of control release often claim that they were threatened with disciplinary action if they did not sign the control release certificate. In such a case, the remedy would have been to reject the early release and pursue DOC's administrative remedies as set out in Chapter 33-103. DOC's administrative grievance process is readily available and like the thousands of other inmates who file many many grievances each year, an inmate who was informed that he would be disciplined if he did not accept control release, should have availed himself of the process if he did not wish to accept the early release.

At the very minimum, shortly after his release, an inmate who

claims that he was forced to accept an early release from prison should have contacted the Parole Commission and sought to undo his release and if unsuccessful, bring some sort of action to effect this result. What an inmate cannot do is accept the benefits of an early release and then claim that he did not wish to be released early in order to avoid the consequences of his failure to comply with the conditions of that early release.

Petitioner's reliance on State v. Green, 547 So.2d 925 (Fla. 1989) and Heuring v State, 559 So.2d 207 (Fla. 1990) for the proposition that his sentence was completely expired upon release to conditional release and that gaintime is the functional equivalent of time served is misplaced. In fact, in Dowdy v. Singletary, supra and again in Duncan v. State, supra, this Court issued an opinion to emphasize that gaintime is not the functional equivalent of time served for inmates who violate control or conditional release. Because inmates were filing a large number of petitions, quoting either Green or Heuring v. State, 559 So.2d 207 (Fla. 1990), for the proposition that once a prisoner is released due to the award of gaintime the remaining period of sentence is extinguished because gaintime is the equivalent of time served, the Court issued the Dowdy decision, specifically stating that,

we take this opportunity to make clear that Green stands only for the proposition that upon revocation of probation, community control or provisional release, an inmate is entitled to credit for prior awarded gaintime only if the underlying offense was committed prior to October 1, 1989.

Dowdy at 154.

Noting legislative changes, including changes effective September 1, 1990, authorizing the forfeiture of gaintime upon revocation of control release, this Court stated that,

for releasees whose offenses were committed after the above-mentioned legislative changes, the State does have the statutory authority to consider that the releasees' sentences have not completely expired until completion of the supervisory period. That is, due to subsequent legislation, the retention of an inmate's gain time is now dependent not only upon satisfactory behavior while in prison but also upon satisfactory behavior while under supervision after release.

(Id. at 1054.)


Recently in Duncan, while noting that the gaintime earned before release to conditional release is subject to forfeiture upon revocation, just as the gaintime earned before release to control release supervision is subject to forfeiture upon revocation of control release supervision, this court noted that,

as we have explained before, the retention of gain time is now dependant not only upon satisfactory behavior while in prison but also upon satisfactory behavior while under supervision after release.

(Duncan at .)

Petitioner has not demonstrated grounds for any relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
FLORIDA DEPARTMENT OF CORRECTIONS' RESPONSE TO ORDER TO SHOW CAUSE
has been furnished by U.S. Mail to Jerry L. Wilson, DC# 670412,
Dade Correctional Institution, 19000 S.W. 377th Street, Florida
City, Florida 33034³ and by hand delivery to Mark ~~Henderson~~^{Hiers},
Assistant General Counsel, Florida Parole Commission, , 2601 Blair
Stone Road, Tallahassee, FL on this 27 day of April 2000.



Judy Bone

³ While counsel has not received a notice of a change of address, the Department's computerized data base shows that the petitioner was transferred to Dade C.I. in October 1999. As a result, the response is being served at Dade C.I.