

IN THE SUPREME COURT OF FLORIDA

JAMES V. CROSBY, JR., ETC.

Petitioner,

v.

FSC CASE NO. SC03-137
1DCA CASE NO. 1D01-3205

JOHNNY BOLDEN,

Respondent.

-----/

PETITIONER'S REPLY BRIEF

On Review from the District Court
of Appeal, First District,
State of Florida

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CERTIFIED QUESTION

WHEN AN INMATE WHO IS SERVING SEVERAL RELATED SENTENCES SUBJECT TO CONDITIONAL RELEASE SUPERVISION FOR MULTIPLE CRIMES OCCURRING IN THE SAME CRIMINAL EPISODE HAS VIOLATED CONDITIONAL RELEASE SUPERVISION, SHOULD THE DEPARTMENT OF CORRECTIONS IN CALCULATING THE NEW RELEASE DATE, CONSIDER TIME SERVED FOLLOWING THE EXPIRATION OF THE INCARCERATIVE PORTION OF ONE SENTENCE, WHILE AWAITING EXPIRATION OF THE INCARCERATIVE PORTIONS OF THE OTHER RELATED SENTENCES, AS TOLLED, PURSUANT TO EVANS v. SINGLETARY, 737 SO.2D 505 (FLA. 1999), AND, IF SO, SHOULD THE DEPARTMENT ADD SUCH TOLLED TIME ONTO THE SENTENCE IN CALCULATING THE NEW RELEASE DATE?

1. Respondent Bolden's position in a nutshell is that related concurrent sentences subject to conditional release supervision continue to run until the date of physical release from custody, and that they cannot end sooner through the accumulation of gain time. His position emasculates the gain time law,¹ undermines the Conditional Release Program, and is without statutory authority.

¹Throughout his answer brief, he makes such statements as, "If the gain time did not exist, then the jail time was for that offense as well." (AB. 4); "If Mr. Bolden had not accrued gain time on that first releasable sentence, then he was logically still serving it and those days in jail were appropriately still ascribed to that sentence." (AB. 11); "*** [H]ad the gain time not been accrued for the incident for which the earlier release date and then lost by violation of conditional release then the total days that the inmate would have been asked to spend in jail on that offense would be less than the suggested result of the Petitioner." (AB. 6-7); "Mr. Bolden was in jail on what has now, with the forfeiture of gain time, become the equivalent of jailed days for that first offense." (AB. 12)

Except for a mandatory prison sentence, the service of all sentences are governed by the gain time law, which is the only method statutorily authorized for the Department to calculate the ending date of a sentence and the date the inmate is to be released from prison. All sentences end through a combination of time served and the accumulation of gain time (unless the gain time is all forfeited due to disciplinary action), and an inmate is released from prison when the last sentence ends.

Section 944.275 gives the Department explicit instructions on how sentences are to be served, including the award of gain time, and section 944.28 authorizes the Department to declare a forfeiture of gain time resulting from disciplinary actions. Neither statute authorizes the Department to allow a prison sentence to continue to run after it has ended through the accumulation of gain time, or to substitute prison time for gain time upon revocation of probation. Yet, this is what Bolden advocates and the First DCA has held.

The devastating impact that Bolden's position would have on the gain time law spills over into the Conditional Release Program itself. The Legislature has determined that certain inmates must serve the gain time that is applied to a sentence

under executive supervision. Under Bolden's position, however, the amount of gain time to be served on supervision could be substantially reduced or eliminated entirely.

There, of course, is no legislative authority to support Bolden's position. At a minimum what he needs is a statute that provides, "Notwithstanding any other law, all related concurrent sentences subject to conditional release supervision shall continue to run until the prison term is served day for day incarcerated, or until the prisoner is physically released from custody, whichever occurs first." The First DCA's holding, however, is much broader than this because, according to the First DCA, the maximum release date cannot be extended upon revocation of supervision under any circumstances. To account for a holding of this magnitude, the statute would need to read, "Notwithstanding any other law, all sentences, whether being served concurrently or consecutively, shall continue to run until the prison term is served day for day incarcerated, or until the prisoner is released from custody to either judicial or executive supervision, or a combination thereof, whichever occurs first."

2. According to Respondent Bolden, the Department has admitted that Evans v. Singletary, 737 So.2d 505 (Fla. 1999)

did not address the tolling issue. (AB. 5-6) Bolden misreads the Department's initial brief. There the Department pointed out that the First DCA did not think there was any **statutory** authority (§ 947.1405) or **judicial** authority (Evans) to toll Bolden's conditional release supervision, and that by operation of the general rule applicable to probationary split sentences, supervision commenced immediately upon his **constructive release** from custody resulting from the completion of the incarcerative portion of the sentence. (IB. 18, 23-29) The Department disagreed and argued that the **conditional release supervision statute** itself provides that supervision is to commence solely upon **physical release from custody** and thus supervision necessarily is tolled on any sentence (whether concurrent or consecutive, or related or unrelated) that has ended before that date through the accumulation of gain time. (IB. 20-22)

The Department pointed out that this Court in Evans had not squarely addressed this issue (i.e., whether, under the **conditional release statute**, supervision begins solely upon actual release from custody, or does it also begin upon constructive release from custody). (IB. 28) The Department explained that this Court's focus was elsewhere. (IB. 27) At best, one could say that this Court may have silently assumed,

without deciding, that the **statute** covered constructive releases, but that, if so, the facts in Evans justified invoking the **actual release** date for commencement of the period of supervision, which, of course, meant that the supervision was tolled.

3. Respondent Bolden asserts that supervision in his case would not have "run out" by allowing him to continue earning credit for time served after reaching his release date, "as it would have in *Evans* where the longer sentence had no conditional release provision." (A.B. 7) The Department's response is twofold.

First, Bolden is wrong on the facts in Evans. Evans would have had 819 days to serve on supervision even had he received prison credit on the eligible sentence while serving time exclusively on the ineligible sentence. Evans was on control release supervision on the ineligible 15-year sentence when he received the concurrent eligible 7-year sentence. The maximum release date on the eligible sentence was June 14, 1999, 819 days beyond the date he satisfied the ineligible sentence and was released to supervision. These facts are set out in the Department's court-ordered response filed in this Court in Evans, of which this Court may take judicial notice. Foxworth v. Wainwright, 167 So.2d 868, 870 (Fla. 1964).

Second, Bolden's suggestion that the actual length of supervision is an insignificant arbitrary factor is contradicted by the manner in which sentences are served and the purpose for the supervision. As to each sentence, an inmate is expected to adjust to prison life, and if his sentence is subject to conditional release supervision, he also is expected to adjust to community life. (The inmate needs supervision while he is adjusting to living in society, and the public needs additional protection during the adjustment period.) Gain time awarded on a sentence reflects the inmate's institutional adjustment, but he still must prove himself on supervision for a period of time equal to the amount of gain time awarded. Shortening the period of supervision by substituting prison time earned on one sentence for the gain time applied to another sentence could reek havoc with this process.

4. Respondent Bolden asserts that this Court in Evans "did not reach the question of how much time the inmate would be required to serve back in prison if the conditional release requirements were thereafter not met." (AB. 7) To be sure, Evans does not expressly state that the Department created an out-time segment equal to the tolling period, but the Court most assuredly was well aware of this fact from the

Department's court-ordered response filed in the case.

Foxworth.

What this Court did conclude in Evans was that "the State has shown that it determined the length of Evans' supervision period only by the gain time earned during the eligible manslaughter sentence and forfeited only the gain time awarded in that case." Evans, 737 So.2d at 508. Had the Department not extended the maximum release date by the number of days the supervision was tolled, Evans clearly would not have been serving all the gain time that had been awarded and forfeited in the case.

5. Respondent Bolden characterizes the Department's position as nonsense and asserts that it suffers from the same flaw that the Department attributed to the First DCA's position. (AB. 7-8) He contends that he was incarcerated for 337 days and that, therefore, 337 days are not gain time. (AB 7-8) The Department respectfully disagrees.

In its initial brief, the Department pointed out that the First DCA gave mixed signals. On the one hand, the First DCA held that the conditional release supervision commenced upon Bolden's constructive release from prison on the **shotgun sentence**, and that on the other hand, it held that the prison term on the **shotgun sentence** continued to run after the

sentence ended through the accumulation of gain time. (IB. 11-12, 39-41) Of course, a person cannot be in prison and on supervision simultaneously on the **same sentence**. By contrast, the Department's argument is that Bolden was neither serving prison time nor serving supervision on the shotgun sentence while he completed his prison terms on the aggravated assault/battery sentences. The prison term had ended, and he was in a holding pattern awaiting commencement of his supervision. To be sure, Bolden was incarcerated for 337 days, but it was not on the shotgun sentence but rather on the aggravated assault/battery sentences.

6. Respondent Bolden states, "**With normal forfeiture the total days does not extend the total sentence**, in the scenario provided by the instant case and if the wishes of the Petitioner and Amicus were granted, it would." (AB. 10) (emphasis supplied) This is a very misleading statement.

Whenever an inmate returns to prison as a supervision violator, the term of imprisonment initially imposed is "extended" under the following circumstances: (1) The inmate received a probationary split sentence (prison + probation) followed by a consecutive prison sentence which will end last; (2) The inmate received a straight prison term subject to conditional release supervision followed by a consecutive

prison sentence which will end last; (3) The inmate received a true split sentence or a probationary split sentence to be served concurrently with another prison sentence (of any combination), which will end last; and (4) The inmate received a straight prison term subject to conditional release supervision to be served concurrently with another sentence (of any combination) which will end last.

Under the above scenarios, the period of supervision does not commence immediately upon satisfaction of the incarcerative portion of the sentence, and neither does the prison term continue to run after it has ended through the accumulation of gain time. This period of time is accounted for in different ways upon revocation of supervision, depending on whether the inmate returns to prison as an executive supervision violator or as a judicial supervision violator. If the former, the period of time shows up as an extension of the maximum release date, but if the latter, it silently disappears because the computation of the release date begins with the date the new sentence was imposed. The former (executive supervision) would be analogous to the latter (judicial supervision), if the computation of the release date began with the date the executive supervision was revoked (instead of the date the sentence initially was

imposed).

Under the above scenarios, there is no "pretending" as to the status of the inmate after his supervision sentences ended through the accumulation of gain time prior to service of the last prison sentence. (AB. 8) The Department does not "pretend" that the inmate was on supervision in these cases; nor does it "pretend" that the inmate was still serving these sentences. The reality is that the inmate was incarcerated serving the prison term on a sentence not yet satisfied, and once that occurred, he then would commence his period of supervision on the other sentences.

7. Respondent Bolden, without citing or discussing any of the cases cited by the Department, summarily dismisses them on the ground that they are not dispositive of the issue presented here. (AB. 10-11) Of course, there is no decided case with facts identical to Bolden's, but what the cases cited do illustrate is that an inmate can be incarcerated without receiving prison credit on each and every sentence that is subject to supervision. If an inmate is **simultaneously in service** of more than one sentence, the prison credit is applied to each; otherwise, it is applied to only one sentence. As previously stated, once a sentence has ended through the accumulation of gain time, the inmate no

longer is in service of that sentence.

8. Respondent Bolden asserts that the position of the Department and the Commission would "discourage" inmates from engaging in "good behavior" while incarcerated. Bolden misapprehends the gain time law and the circumstances of prison life.

The service of a minimum mandatory term is not a license to flout the prison rules, and should an inmate do so, his basic and future gain time are subject to forfeiture, which means that he could end up serving the entire sentence day for day incarcerated, and not just the mandatory term. § 944.28(2)(b), Fla. Stat.; Fla. Admin. Code R. 33-601.308(4)(m). Singletary v. Jones, 681 So.2d 836 (Fla. 1DCA 1996). Moreover, as punishment for misbehavior, inmates can be placed in disciplinary confinement and denied also sorts of privileges, such as the transfer to a more favorable location, opportunities for program participation, opportunity for work release, use of the telephone, use of the United States mail, visitation with family and friends, and access to the canteen. Fla. Admin. Code R. 33-601.308. Thus, unless an inmate intends to serve his entire sentence day for day incarcerated in disciplinary confinement without any privileges, he is highly motivated to abide by the prison rules.

Had Respondent Bolden decided not to abide by the prison rules while serving the firearm minimum mandatory terms on the aggravated assault/battery sentences, not only would he not have received gain time on the shotgun sentence (of which he now complains), but he also would have lost basic and possibly future gain time on the aggravated assault/battery sentences. The end result would have been a much longer stay in prison than actually occurred. Bolden, therefore, clearly benefitted from the 337 days of gain time that were applied to the shotgun sentence, notwithstanding his continued incarceration to complete the other two sentences.

Moreover, although Bolden keeps complaining about having to serve more than 10 years in prison, that has not yet happened, and he currently is on conditional release supervision for the second time. To date he has been incarcerated approximately 9 1/2 years: 4-27-93 (date sentence imposed) to 3-27-00 (date physically released to supervision the first time); 11-18-00 (date supervision revoked) to 2-5-03 (date physically released to supervision the second time) = 3,335 days (prison time served) + 127 days (jail credit) + 1 day (FPC credit) for a grand total of 3,463 days (approximately 9 1/2 years). Of course, if he returns to prison again, it will be own fault.

9. Respondent Bolden implies that the Commission and the Department will have no problem in deciding whether concurrent sentences are related because, as he sees it, concurrent sentences are related if the underlying offenses were all scored on a single scoresheet under the sentencing guidelines. He cites Tripp v. State, 622 So.2d 941 (Fla. 1993) to support his proposed definition. (A.B. 6) The Department respectfully disagrees for at least two reasons.

First, many inmates are not sentenced under the guidelines. Bolden himself was sentenced as an habitual offender, which is governed by section 775.084, as construed in Hale v. State, 630 So.2d 521, 525-525 (Fla. 1993), rather than the sentencing guidelines, § 775.084(4)(e), Fla. Stat. (1991). Under Hale, concurrent sentences must be imposed if the crimes arose out of the same criminal episode, but there is no litmus test for determining what constitutes the same criminal episode. See e.g., Sprow v. State, 639 So.2d 992 (Fla. 3rd DCA 1994) (two burglaries in same building on same day constituted different criminal episodes) and the cases cited therein. In addition, the fact that the judge imposed concurrent sentences is not proof that a single criminal episode was involved because the judge has the discretion to impose concurrent sentences even when different criminal

episodes are involved.

Second, the result reached in Tripp v. State was obtained to preserve uniformity in sentencing under the sentencing guidelines, which is not a legislative goal of the gain time law (nor apparently of the Criminal Punishment Code, since the judge may impose the statutory maximum).

Under the sentencing guidelines and in reliance on a single scoresheet, a defendant must be sentenced simultaneously in all pending cases ready for sentencing, regardless of when the offenses were committed. In Tripp, the defendant was ready for sentencing for the commission of two crimes but was only sentenced to prison for one of the crimes (Crime #1) and placed on probation for the other crime (Crime #2). Upon revocation of probation, the defendant then was sentenced to prison for Crime #2. This Court in substance held that the defendant was to be treated as if he initially had received simultaneous prison sentences for both crimes, which was accomplished by granting him prison credit (at that time consisting of both time served and gain time) on the sentence for Crime #2 that he had earned on the sentence for Crime #1.

There is no parallel to Tripp under the gain time law. The rate of gain time is tied to the offense date and is

unique to each sentence, regardless of how it is to be served (concurrently, consecutively, or by itself). Incentive gain time is earned and applied monthly on each eligible sentence that is actively being served. Basic gain time (which is not applicable to offenses committed on or after 1-1-94) is awarded in a lump sum up front upon the inmate's entry into the prison system. The total amount of basic gain time due is determined by aggregating the prison terms on consecutive sentences, but not on concurrent sentences. All gain time applied to sentences within the consecutive chain is subject to forfeiture until the inmate's physical release from custody, whereas gain time is not subject to forfeiture on concurrent sentences once the sentence has ended through the accumulation of gain time.

CONCLUSION

The Department respectfully requests this Honorable Court to reverse the First DCA and uphold the mandamus court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief was furnished by U.S. mail to **DEBORAH B. MARKS**, Esquire, 999 Brickell Bay Drive, Suite 1809, Miami, Florida 33131, attorney for Johnny Bolden, and to **BRADLEY R. BISCHOFF**, Assistant General Counsel, Florida Parole Commission, 2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450 this _____ day of June 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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