

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2006-CP-01139

**VAN GRAY
APPELLANT**

vs.

**STATE OF MISSISSIPPI
APPELLEE**

**On Appeal From the Circuit Court
of Lamar County, Mississippi**

BRIEF OF APPELLEE

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal:

1. Van Gray, Appellant
2. R.I. Prichard III, Circuit Court Judge
3. Jim Hood, Attorney General

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellees:

1. Jane Mapp, Special Assistant Attorney General, State of Mississippi
2. James Norris, Attorney Senior, Mississippi Department of Corrections

By: Jane Mapp

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
ISSUE	v
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
CONCLUSION	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

<u>Case(s)</u>	<u>Page(s)</u>
<i>California Dept. of Corrections v. Morales</i> , 514 U.S. 499(1995)	9
<i>McBride v. Sparkman</i> , 860, 1237 (Miss.Ct.App. 2003)	4
<i>McKnight v. State</i> , 751 So.2d 471 (Miss.Ct.App. 1999)	8
<i>McNabb v. State</i> , 915 So.2d 478(Miss.Ct.App. 2005)	4
<i>Puckett v. Abels</i> , 684 So.2d 671 (Miss. 1996)	8
<i>Ross v. Sparkman</i> , 922 So.2d 847 (Miss.Ct.App. 2006)	7

<u>Other Authorities</u>	<u>Page(s)</u>
Miss. Code Ann. § 47-5-138 (Supp. 2003)	5, 8
Miss. Code Ann. § 47-5-138.1 (Supp. 2003)	5
Miss. Code Ann. § 47-5-138.1 (Supp. 2004)	4, 6, 7
Miss. Code Ann. § 47-5-139	5, 7
Miss. Code Ann. § 47-7-3	8
Miss. Code Ann. § 99-39-11(2)	4

ISSUES

I. Whether the Circuit Court Erred by Dismissing Petitioner's Ex Post Facto Claim Without the Benefit of an Evidentiary Hearing.

II. Whether the Petitioner Was Subjected to an Ex Post Facto Violation by Not Being Afforded the Classification Construction of MCA § 47-5-138 (Pre-April 28, 2004) as Applied to His Conviction/sentence Resulting from an October 24, 2001 Criminal Act Which He Pled Guilty to Because Classification Actions May Be Akin to Sentencing Guidelines Which Allow for Increases/decreases in Actual Time to Be Served Toward Convictions after the New Statue Acting as a Classification Guideline Took Effect.

STATEMENT OF THE CASE

On or about January 17, 2006, Van Gray, an inmate legally incarcerated within the Mississippi Department of Corrections (“MDOC”) filed a petition in the Circuit Court of Lamar County, Mississippi, entitled Petition to Clarify Sentence. (C.P. at 67)¹. In his petition Gray argued that Miss. Code Ann. § 47-5-138.1, as amended effective April 28, 2004, which excluded certain drug offenders from being eligible to receive the trusty earned time allowance, violated ex post facto laws as applied to offenders such as he who committed the crime of sale or transfer of a controlled substance prior to the effective date of the amendment. (C.P. 67-70).

On or about October 24, 2001, Gray committed the crime of Sale or Transfer of Cocaine. (C.P. at 2). He pled guilty and on October 1, 2004 he was sentenced to fifteen (15) years in the custody of MDOC with seven (7) years to serve and 8 years suspended. (C.P. at 7-11).

Miss. Code Ann. § 47-5-138.1 as it read on October 24, 2001, when Gray committed his crime, did not specifically exclude offenders convicted of sale or transfer of a controlled substance from being eligible for the trusty earned time allowance. However, prior to Gray being sentenced for the crime on October 1, 2004, Miss. Code Ann. 47-5-138.1 was amended to specifically exclude offenders convicted of certain crimes, including sale or transfer of a controlled substance, from being eligible for the trusty earned time allowance.

¹C.P. = Clerk’s Papers

Gray argues that this amendment is ex post facto as applied to offenders who committed their crimes before the April 28, 2004 effective date of the amendment. (C.P. at 38).

On or about June 16, 200 Circuit Court Judge R.I. Prichard, III entered an Order for Summary Dismissal. (C.P. at 91). Judge Prichard held in pertinent part as follows:

While it is true that Section 47-5-138.1 was amended following the consummation of the Petitioner's criminal act and therefore the Petitioner's ability to earn additional earned time was then eliminated, the Petitioner is incorrect to assert that the change in Section 47-5-138.1 constitutes a redefinition of the crime for [sic] the Petitioner was charged or an increase in the punishment for his criminal act.

...

The language used in the two earned time statutes, Sections 47-5-138 and 381.1, is permissive, using "may" instead of "shall." Hence, the entitlement to earned time is not proscribed by the Legislature and, if it is ever to apply to an inmate, it is to apply to his benefit.

The lack of availability of Section 47-5-138.1 to the Petitioner in order to reduce his time of incarceration in on [sic] way changed the elements of the crime for which he was charged or increased the amount of punishment that he would have to face according to the crime for which he was charged was defined on October 16, 2006, the date of consummation. By neither changing the elements of the crime nor increasing the amount of punishment, the amendment of Section 47-5-138.1 and application on the Petitioner in no way constituted a violation of the Ex Post Facto Clause.

(C.P. at 91-94).

Feeling aggrieved, Gray filed his notice of appeal to this Court. (C.P. at 96). Judge Prichard granted Gray's motion to proceed *in forma pauperis* and this matter now ensues. (C.P. at 105).

SUMMARY OF THE ARGUMENT

No inmate, upon sentencing, could reasonably expect to gain trusty status and thus any detriment or increase in punishment from retroactively excluding certain offenders from trusty status eligibility would be speculative and thus does not violate the ex post facto clause.

ARGUMENT

I. Whether the Circuit Court Erred by Dismissing Petitioner's Ex Post Facto Claim Without the Benefit of an Evidentiary Hearing.

Gray argues that the Circuit Court erred in dismissing his petition without first conducting an evidentiary hearing. Gray argues that an evidentiary hearing should have been held so that he could develop a record showing that many MDOC inmates still receive 10 days of trusty time for every 30 days in trusty status. He also argues that a hearing was necessary so that he could fully explain his ex post facto argument to the court.

The courts have repeatedly held that an offender has no right to an evidentiary hearing in matters such as the one currently before the court. A circuit court may dismiss a petition without a hearing when it is clear from the record that the prisoner is not entitled to any relief. *McNabb v. State*, 915 So.2d 478, 480 (Miss.Ct.App. 2005); *McBride v. Sparkman*, 860, 1237, 1240-1241 (Miss.Ct.App. 2003); Miss. Code Ann. § 99-39-11(2).

The matter before the court was a question of law, specifically, whether the application of Miss.Code.Ann. 47-5-138.1 (Rev. 2004) as applied to those offenders who committed their crimes before the statute was amended is a violation of the ex post facto clause. Since the issue before the court was a matter of law and not a question of fact, the court did not err in dismissing Gray's petition without first conducting an evidentiary hearing.

II. Whether the Petitioner Was Subjected to an Ex Post Facto Violation by Not Being Afforded the Classification Construction of MCA § 47-5-138 (Pre-April 28, 2004) as Applied to His Conviction/sentence Resulting from an October 24, 2001 Criminal Act Which He Pled Guilty to Because Classification Actions May Be Akin to Sentencing Guidelines Which Allow for Increases/decreases in Actual Time to Be Served Toward Convictions after the New Statue Acting as a Classification Guideline Took Effect.

Prior to April 28, 2004, Miss. Code Ann. § 47-5-138.1, Mississippi's trusty earned time allowance law, read as follows:

In addition to any other administrative reduction of sentence, an offender in trusty status as defined by the classification board of the Department of Corrections may be awarded a trusty time allowance of ten (10) days' reduction of sentence for each thirty (30) days of participation in an approved program while in trusty status, including satisfactory participation in education or instructional programs, satisfactory participation in work projects and satisfactory participation in any special incentive program.

Miss. Code Ann. § 47-5-138.1 (Supp. 2003).

Under the law as it read at that time, the only offenders not eligible to receive the 10 days per month trusty time allowance upon gaining trusty status where those offenders who were not eligible for earned time under pursuant to Miss. Code Ann. § 47-5-139. This included offenders with life sentences, habitual offenders, sex offenders and inmates who had not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon. *See*, Miss. Code Ann. § 47-5-139. The law prior to April 28, 2004 did not exclude offenders convicted of sale or transfer of a controlled substance from being eligible for trusty status.

Effective April 28, 2004, Miss. Code Ann. § 47-5-138.1 was amended

to read as follows:

(1) In addition to any other administrative reduction of sentence, an offender in trusty status as defined by the classification board of the Department of Corrections may be awarded a trusty time allowance of thirty (30) days' reduction of sentence for each thirty (30) days of participation during any calendar month in an approved program while in trusty status, including satisfactory participation in education or instructional programs, satisfactory participation in work projects and satisfactory participation in any special incentive program.

(2) An offender in trusty status shall not be eligible for a reduction of sentence under this section if:

(a) The offender was sentenced to life imprisonment;

(b) The offender was convicted as an habitual offender under Sections 99-19- 81 through 99-19-87;

(c) The offender was convicted of a sex crime;

(d) The offender has not served the mandatory time required for parole eligibility, as prescribed under Section 47-7-3, for a conviction of robbery or attempted robbery through the display of a deadly weapon, carjacking through the display of a deadly weapon or a drive-by shooting;

(e) The offender was convicted of violating Section 41-29-139(a) and sentenced under Section 41-29-139(b) or 41-29-139(f); or

(f) The offender was convicted of trafficking in controlled substances under Section 41-29-139.

The 2004 amendment increased the trusty time allowance from 10 days for every 30 days an offender is in trusty status ("10 for 30") to 30 days for every 30 days an offender is

in trusty status ("30 for 30"). The amendment also excluded additional types of offenders from trusty time eligibility. In addition to those offenders already excluded pursuant to § 47-5-139, the 2004 amendment to § 47-5-138.1 also excluded offenders who have not served the mandatory time required for parole eligibility for a conviction of carjacking through the display of a deadly weapon or drive-by shooting; offenders convicted of violating Section 41-29-139(a) and sentenced under Section 41-29-139(b) or 41-29-039(f); and offenders convicted of trafficking in controlled substances under Section 41-29-139.

When the amendment to Section 47-5-138.1 became effective on April 28, 2004, making inmates convicted of certain crimes ineligible for trusty status, MDOC did not remove any inmate already in trusty status, but allowed them to keep receiving the 10 for 30 trusty time allowance, but not the increased 30 for 30 trusty time allowance.² However, if an inmate who was ineligible to attain trusty status under the amendment was not already in trusty status at the time of the amendment, that inmate was not allowed to attain trusty status regardless of whether or not his crime was committed prior to the passage of the amendment.

Gray, having been convicted of the crime of Sale or Transfer of a Controlled Substance is not eligible for the trusty time allowance pursuant to Miss. Code Ann. 47-5-138.1 (Supp. 2004) and since he was not in trusty status at the time the amendment became effective, he is not eligible to attain trusty status. Gray argues in his brief that since he committed his crime before the trusty time statute was amended, the statute, in so far as it

²MDOC's application of the amendment to Section 47-5-138.1 was detailed in *Ross v. Sparkman*, 922 So.2d 847, 849-50 (Miss.Ct.App. 2006).

makes him ineligible for the trusty time allowance, violates the ex post facto clause of the constitutions of the United States and Mississippi. He cites to *McKnight v. State*, 751 So.2d 471 (Miss.Ct.App. 1999), wherein the Court of Appeals held that McKnight was “entitled to parole and earned time according to the law on the date the crime occurred.” *Id.* at 474. The State would argue that this ruling applies only to parole eligibility pursuant to Miss. Code Ann. § 47-7-3 and the 50% earned time allowance pursuant to Miss. Code. Ann. § 47-5-138, not to trusty time eligibility under Miss. Code Ann. § 47-5-138.1.

The Mississippi Supreme Court in *Puckett v. Abels*, 684 So.2d 671 (Miss. 1996), gave a detailed analysis of the Ex post facto Clause. In *Puckett*, the Court held that a statute violates the Ex post facto Clause when “applied retroactively ... has the effect of increasing the punishment beyond what was prescribed when the crimes were committed.” *Puckett*, 684 So.2d at 678. Prior to July 1, 1995 eligible offenders were automatically given a parole eligibility date usually equal to 25% of their sentence and they were credited with a 50% earned time allowance upon commitment to MDOC. *See* Miss. Code Ann. § 47-7-3(1) (Supp. 2003) and § 47-5-138(1) (Supp. 2003). At issue in *Puckett* were statutory amendments eliminating parole eligibility and decreasing the earned time allowance from 50% to 15%. The Court found that these amendments were ex post facto when applied to offenders who committed their crimes before the effective date of the amendments.

The case sub judice differs from *Puckett* in one significant respect: unlike the 25% parole eligibility date and the 50% earned time allowance, trusty status was not automatically

granted to an offender upon sentencing and commitment to MDOC, rather trusty status and thus the trusty earned time allowance was a special designation that had to be earned. Gray argues in his brief that he is entitled to 10 days of trusty earned time for every 30 days to be served from the date he originally requested to be placed in trusty status. (See Appellants brief at page 12). Trusty earned time is not a right to be demanded as Gray contends, but a privilege that must be earned in accordance with state statute and MDOC policy. No inmate, upon sentencing could reasonably expect to gain trusty status and thus any detriment or increase in punishment from retroactively excluding certain offenders from trusty status eligibility would be speculative and thus does not violate the ex post facto clause. *See, California Dept. of Corrections v. Morales*, 514 U.S. 499, 509-510, 115 S.Ct. 1597, 1605, 131 L.Ed.2d 588 (1995). Accordingly, the decision of the trial court should be affirmed and this appeal dismissed.

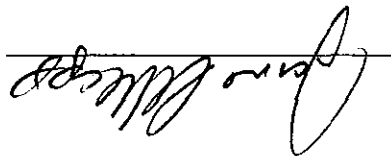
CONCLUSION

Based on the arguments herein above, the dismissal of Appellant's petition by the lower court was appropriate and should be affirmed.

Respectfully submitted,

STATE OF MISSISSIPPI
APPELLEE

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: 

JANE L. MAPP
SPECIAL ASSISTANT ATTORNEY GENERAL
MS BAR NO.: 

CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Brief of Appellee** in the above-styled and numbered cause to the following:

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SMCI - Area I
Post Office Box 1419
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Hon. R.I. Prichard, III
Circuit Court Judge
Post Office Box 1075
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This, the 23rd day of January, 2007.

A handwritten signature in cursive script, appearing to read "Jane L. Mapp", is written over a horizontal line.

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