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

APPELLEE'S RESPONSE TO BRIEF OF *AMICUS CURIAE*

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ISSUE

I. Whether the Application of the Revised Miss. Code Ann. § 47-5-138.1 as Applied to Offenders Such as the Appellant Violates the *Ex Post Facto* Clause of the United States Constitution.

SUMMARY OF THE ARGUMENT

No inmate, upon sentencing, could reasonably expect to gain trusty status and thus any detriment 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 Application of the Revised Miss. Code Ann. § 47-5-138.1 as Applied to Offenders Such as the Appellant Violates the *Ex Post Facto* Clause of the United States Constitution.

When Miss. Code Ann. § 47-5-138.1 was amended effective April 28, 2004, making inmates convicted of certain crimes ineligible for trusty status, MDOC did not remove any inmate convicted of such crimes from trusty status. Those inmates already in trusty status as of the date of the amendment were allowed to keep receiving the 10 days for 30 days trusty earned time allowance, but not the increased 30 days for 30 days trusty earned time allowance. However, if an inmate, such as the Appellant, who was ineligible to attain trusty status under the amendment was not already in trusty status, 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.

The question before the Court is whether this application of the 2004 amendment to § 47-5-138.1 violates the *Ex Post Facto* Clause of the United States Constitution. Put in more practical terms, the issue is whether all inmates who committed their crimes prior to the April 28, 2004 amendment to § 47-5-138.1 should be eligible to attain 10 for 30 trusty status if they would have been eligible prior to the revision.

"The States are prohibited from enacting an *ex post facto* law. U.S. Const., Art. I, § 10, cl. 1. One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." ***Garner v.***

Jones, 529 U.S. 244, 250 120 S.Ct. 1362,1367, 146 L.Ed.2d (2000) (citing ***Collins v. Youngblood***, 497 U.S. 37, 42, 100 S.Ct. 2715, 111 L.Ed. 2d 30 (1990). The Mississippi Supreme Court in ***Puckett v. Abels***, 684 So.2d 671 (Miss. 1996), 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." ***Id.*** at 678.[1]

The United States Supreme Court in ***California Dept. of Corrections v. Morales***, 514 U.S. 499, 509-510, 115 S.Ct. 1597, 1605, 131 L.Ed.2d 588 (1995) clarified earlier decisions as they related to the *ex post facto* question, stating that

> the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor ... on whether an amendment affects a prisoner's "**opportunity** to take advantage of provisions for early release," but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Id. at 506 n.3 (emphasis in original)(citations omitted).

The Court in ***Morales*** went on to hold that when an "amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" there is no *ex post facto* violation. In the case at bar, prior to the 2004 amendment 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. Contrary to Gray's argument

[1]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.

he would not have been entitled to trusty status merely because he requested it. 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.

The *Amicus Curiae* relies heavily on ***Weaver v. Graham***, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1980), but the facts of the case sub judice are easily distinguishable from those in ***Weaver***. At issue in ***Weaver*** was a Florida penal statute "repealing an earlier statute and reducing the amount of 'gain time' for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence...." ***Id.*** at 24. The statute in effect at the time the petitioner both committed his crime and was sentenced

> provided a formula for deducting gain-time credits from the sentences "**of every prisoner** who has committed no infraction of the rules or regulations of the division, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him." Fla.Stat. § 944.27(1) (1975). According to the formula, gain-time credits were to be calculated by the month and were to accumulate at a n increasing rate the more time the prisoner had already served. Thus, the statute directed that **the authorities "shall grant** the following deduction" from a prisoner's sentence as gain-time for good conduct:
>
> "(a) Five days per month off the first and second years of his sentence;
> "(b) Ten days per month off the third and fourth years of his sentence; and
> "(c) Fifteen days per month off the fifth and all succeeding years of his sentence." Fla.Stat. § 944.27(1) (1975).

Weaver at 26. (emphasis added)(footnote omitted.).

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).

The statue at issue in ***Weaver*** used the mandatory term "shall" giving the corrections authorities no discretion in awarding gain-time under the Florida statute. It was a right awarded to "every prisoner" who obeyed the rules. On the other hand, Miss. Code Ann. § 47-5-138.1 used the permissive term "may" and left trusty status and the awarding of trusty earned time to the complete discretion of MDOC authorities. No inmate, at the time of sentencing, could reasonably believe he would attain trusty status. Thus, any reliance Gray may have had on his attorney's alleged assurance that he would receive trusty earned time[2] was misplaced and may go toward the voluntariness of his plea, but it does not create an *ex post facto* violation as argued by the *Amicus Curiae.*

In ***Wottlin v. Fleming***, 136 F.3d 1032 (5th Cir. 1998), the Fifth Circuit Court of appeals found that an amendment to a Federal Bureau of Prisons (BOP) regulation making

[2]Gray has received the 15% Earned Time Allowance provided for pursuant to Miss. Code Ann. § 47-5-138 and § 47-5-139.

inmates who previously would have be eligible for early release of upon completion a substance-abuse treatment program ineligible if they had a prior conviction for a violent crime did not violate the ***ex post facto*** clause. The Court held that:

> Wottlin's eligibility for the early release program had always been subject to the discretion of BOP. **See** 18 U.S.C. § 3621(e)(2)(B) ("period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program **may** be reduced by the [BOP] ...." (Emphasis added)). Section 550.58 is merely a categorical determination by the BOP that it will not exercise that discretion in the case of inmates with a prior conviction for certain specified crimes.

Wottlin, 136 F.3d at 1037-38.

Just as in ***Wottlin***, an inmate's placement in trusty status and the award of trusty earned time credits was discretionary with MDOC and the 2004 amendment simply means that such discretion will no longer be extended to inmates convicted of specified crimes if they had not attained trusty status as of April 28, 2004.

The case at bar is also readily distinguishable from another case relied upon by the *Amicus Curiae*. In ***Lynce v. Mathis***, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), the Petitioner, who had received a 22 year sentence in 1986 for the crime of attempted murder, was released from prison 1992 due to early release credits which included provisional credits awarded under a Florida statute that authorized such credits to alleviate prison overcrowding. Shortly after his release, "the state attorney general issued an opinion interpreting a 1992 statute as having retroactively canceled all provisional credits awarded to inmates convicted of murder and attempted murder. Petitioner was therefore rearrested and returned to custody." ***Id.*** at 433. The Supreme Court held that the 1992 statute canceling

these provisional credits violated the *Ex Post Facto* Clause.

The case at bar is easily distinguishable for ***Lynce***. There, not only had the inmate already been awarded "early release credits", he had actually been released from incarceration before the state applied the new law to him and had him arrested and re-incarcerated. Here, Gray never lost any "trusty earned time" credits, he was simply never given the opportunity to earn them. Whether or not he would have earned time if given the opportunity is speculative at best.

The Fifth Circuit Court of Appeals ***Wottlin***, *supra*, found that "***Lynce*** concerned a change in the applicable statue making the petitioner ineligible for the good-time credits at issue, causing the retroactive removal of the good-time credits that the petitioner had already been awarded, and directing the re-arrest of the petitioner subsequent to his early release." The Court declined to extend ***Lynce*** to a situation where early release was discretionary and the inmate had never been released. ***Wottlin*** at 1038. (citing, ***Hallmark v. Johnson***, 118 F3d 1073, 1079 (5th Cir.)(declining to extend Lynce to invalidate a Texas directive removing a corrections official's discretion to restore good-time credits forfeited for prison violations and noting that the fact that the official previously had discretion as to whether to restore credit constituted fair warning that forfeited credits might not be restored at all), *cert. denied sub nom.*, 522 U.S. 1003, 118 S.Ct. 56, 139 L.Ed.2d 415 (1997).

The *Amicus Curiae* brief also cites to ***Post v. Ruth***, 354 So.2d 1111 (Miss. 1978) in what appears to be an attempt to argue that not only is the Appellant entitled to the 10 for 30

trusty earned time allowance but also the increased 30 for 30 trusty earned time allowance. In ***Post*** the Court held "where all prisoners ... are treated equally, there is no violation of rights to equal protection of law." ***Id.*** at 1114. The *amicus curiae* takes issue with this Court's holding in ***Ross v. Epps***, 922 So.2d 847 (Miss.Ct.App. 2006) that the 2004 amendment to § 47-5-138.1 was not *ex post facto* as to an inmate who was ineligible for the 30 for 30 trusty earned time, but who was allowed to continue earning the 10 for 30 trusty earned time allowance since the inmate remained in the same position he was in prior to the amendment. The *Amicus Curiae* brief states that "under the reasoning in ***Post***, *supra*, prisoners who are not being treated equally in the application of this trusty statute, the *ex post facto* problem that was resolved in ***Post*** is undone (at least partially) by the finding in ***Ross***."

The *Amicus Curiae* completely misinterprets the Court's holding in ***Post***. ***Ross*** in no way overrules or undoes ***Post***. The Court in ***Post*** merely stated that when all prisoners are treated equally there can be no equal protection violation. This was a statement of the obvious by the Court, not a dictate that every single prisoner, no matter their situation must to treated equally at all times in order to conform with the rules of equal protection. Certainly an offender convicted of capital murder is not entitled to all the same privileges as an offender convicted of shoplifting. Likewise, not all prisoners are entitled to the same trusty time allowance.

It has long been held that only similarly situated offenders must be treated equally unless there is a rational basis to treat them differently. **See *City of Cleburne, Tx v.***

Cleburne Living Ctr., Inc., 473 U.S. 432, 44, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (holding that the Equal Protection Clause " is essentially a directive that all persons similarly situated should be treated alike."). Similarly situated offenders in the context of the case at bar are those offenders who committed crimes which pursuant to the 2004 amendment to § 47-5-138.1 are ineligible for trusty earned time and who had not yet attained trusty status as of the effective date of the amendment. Since MDOC is treating all such inmates the same in regards to trusty eligibility there is no equal protection violation.

Furthermore, the ruling in ***Post*** actually supports the Appellees' argument that the retroactive application of the revised § 47-5-138.1 is not *ex post facto* as to the Appellant and other similarly situated offenders. In ***Post*** an offender was sentenced to probation in 1974. In 1975 Miss. Code Ann. § 47-5-139, the general earned time statute, was amended changing the way earned time was awarded and calculated. After this amendment went into effect the appellant's probation was revoked and he was sentenced to a term in the penitentiary. The Court held that the amendment was not *ex post facto* when applied to an offender who committed his crime prior to the amendment since earned time credits do not actually reduce a sentence and they only become vested after the prisoner is discharged. ***Post***, 354 So.2d at 1112-1114.

Even if the Court finds that the retroactive application of the 2004 amendment to § 47-5-138.1 is *ex post facto*, neither Gray, nor any similarly situated inmate, has a right to trusty status. Trusty status is still a privilege which must be earned, not a right to be

demanded by an inmate. At most Gray would be entitled to a classification review to determine whether or not it is likely that he would have been granted trusty status at some point during his incarceration under the rules and policies in place at the time he committed his crimes.

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,

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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 **Appellee's Response to *Amicus* Brief** in the above-styled and numbered cause to the following:

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