

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE COUNTY PROSECUTING ATTORNEY,

UNPUBLISHED

June 17, 1997

Plaintiff-Appellant,

v

No. 186106

Wayne Circuit Court

MICHIGAN DEPARTMENT OF
CORRECTIONS,

LC No. 95 512562 CZ

Defendant-Appellee,

DAROL WAYNE HOLBROOK,

Intervening Defendant-Appellee.

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

The Wayne County Prosecuting Attorney appeals as of right from the denial of its amended complaint for declaratory relief. Plaintiff argues that the manner in which the Department of Corrections computes good time credit violates the principles of indeterminate sentencing enunciated in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We affirm.

I

Following a jury trial, Darol Holbrook was convicted of first-degree murder for an offense that occurred on December 4, 1981. MCL 750.316; MSA 28.548. The trial judge sentenced him to life imprisonment. On appeal, Holbrook's conviction was reversed and the case remanded for a new trial. *People v Holbrook*, 154 Mich App 508; 397 NW2d 832 (1986). On remand, Holbrook pleaded no contest to second-degree murder. MCL 750.317; MSA 28.549. He was sentenced to twenty to thirty years' imprisonment, with credit for 2,236 days served.

Holbrook was scheduled to complete the minimum term on or about January 3, 2002, and the maximum term on or about January 3, 2012. However, from the time that Holbrook was initially

* Circuit judge, sitting on the Court of Appeals by assignment.

incarcerated in 1982, he earned 4,056 days of regular good-time credit and 2,028 days of special good time credit. The Department of Corrections applied the good-time credit to Holbrook's maximum sentence. As a result, his thirty-year maximum sentence was scheduled to be completed on May 8, 1995.

Plaintiff sought to prevent Holbrook's release by filing a complaint seeking declaratory relief against the Department of Corrections. It argued that the Department was relying on an erroneous interpretation of the statute governing the calculation of good-time and special good-time credits. MCL 800.33; MSA 28.1403. Plaintiff asserted that, by releasing Holbrook before completion of his minimum sentence, the Department had violated *Tanner, supra*.

The parties stipulated to add Holbrook as an intervening defendant. Both Holbrook and the Department of Corrections moved to dismiss the complaint. The trial court held that Holbrook was entitled to receive good-time and special good-time credits pursuant to MCL 791.233b; MSA 28.2303(3) as it existed before December 30, 1982. Accordingly, the trial court denied plaintiff's complaint for declaratory relief.

II

Plaintiff argues that, because of the manner in which the Department calculates good-time and disciplinary credits, Holbrook was able to complete his thirty-year maximum sentence in thirteen years and four months. Therefore, he was released from prison before the expiration of his twenty-year minimum sentence. This result, plaintiff contends, is contrary to the principle enunciated by the Supreme Court in *Tanner*. There, the Court held that a minimum sentence which is greater than two-thirds of the maximum sentence violates the intent and purpose of indeterminate sentencing. Plaintiff asserts that, in order to be consistent with *Tanner*, the Department of Corrections should not be allowed to award good-time credit so aggressively that a maximum sentence is reduced to the point where it approaches the length of the minimum sentence.

The Department of Corrections argues that Holbrook falls within a unique group of offenders whose crimes occurred between the effective date of MCL 791.233b; MSA 28.2303(3), and the amendment to MCL 800.33; MSA 28.1403, which took effect on December 31, 1982. Offenders in this category earn disciplinary credit on their minimum sentence and good-time credit on their maximum sentence. Because Holbrook earned all of the available good-time and special good-time credits, he was able to complete his thirty-year maximum sentence in thirteen years, four months and was entitled to be released. The Department asserts that to require an offender in Holbrook's position to complete his minimum sentence before discharge would negate the good-time and special good-time credits to which he is entitled by statute.

Whether the Department of Correction's award of credits violates *Tanner* is a question of law. We review such matters de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

A

Before the merits of plaintiff's issue can be addressed, it is necessary briefly to examine the legal background regarding the calculation of good-time, special good-time and disciplinary credits. Before December 30, 1982, prisoners in the custody of the Department of Corrections who did not violate prison rules or state laws were entitled to receive good-time credit. This credit served as an incentive for good behavior and reduced both minimum and maximum sentences. MCL 800.33(2)(a-g); MSA 28.1403(2)(a)-(g); *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 131; 521 NW2d 336 (1994).

However, in 1978, the people of this state voted to pass Proposal B, codified at MCL 791.233b; MSA 28.2303(3). Under Proposal B, the minimum sentence of a person convicted for certain enumerated crimes, including first and second-degree murder, could not be reduced by allowance for good-time or special good-time credits. Therefore, prisoners convicted after December 12, 1978, the effective date of the statute, were no longer eligible to receive good-time or special good-time credit on their minimum terms. They remained eligible to receive good-time and special good-time on their maximum terms. *Lowe, supra*.

In 1982, MCL 800.33; MSA 28.1403 was amended to create a new type of credit for Proposal B offenders. *Lowe, supra*. Proposal B offenders became eligible for disciplinary credit and special disciplinary credit. These new credits accrued at a slower rate than good-time credit. 1982 PA 442; *Lowe, supra* at 133. Disciplinary credit was deducted from both the minimum and maximum sentences. MCL 800.33(5); MSA 28.1403(5)

In 1987, MCL 800.33; MSA 28.1403 was amended once again to eliminate good-time credit altogether for offenses committed on or after April 1, 1987. After that date, all new offenses were eligible to receive only disciplinary and special disciplinary credits. 1986 PA 322; *Lowe, supra* at 133.

In light of the various amendments to the credit system, the Department of Corrections attempted to clarify the procedure by which good-time and disciplinary credits were to be awarded. Policy Directive PD-DWA-35.05 was adopted which provides, in pertinent part:

Disciplinary credits are earned as follows:

- 1) When serving for a Proposal B crime committed on or after January 1, 1983, prisoners earn disciplinary credit on both their minimum and maximum sentence. (Type A)
- 2) When serving for a Proposal B crime committed on or after December 10, 1978 but prior to January 1, 1983 prisoners earn disciplinary credit on their minimum sentence beginning January 1, 1983, but earn special and regular good time on their maximum sentence beginning from the date the sentence is effective. (Type B).

Under this interpretation of the statutory scheme, a prisoner such as Holbrook who committed a Proposal B offense after December 12, 1978, but before December 30, 1982, is eligible for disciplinary credit on his minimum term beginning January 1, 1983, but is eligible for special and regular good-time credits on his maximum term dating back to the time of sentencing. *Lowe, supra* at 133-134. This

Court has held that Policy Directive PD-DWA-35.05 conforms to the legislative intent behind MCL 800.33(5); MSA 28.1403(5). *Id.*

B

Application of Proposal B and the various amendments to MCL 800.33; MSA 28.1403 can lead to results that are contrary to common sense. Prisoners in Holbrook's position are eligible for good-time and special good-time credits on their maximum terms, but only the less favorable disciplinary credit on the minimum sentence. Therefore, the potential exists that these prisoners will complete their maximum term before they have served their minimum sentence. Because prisoners in this situation are not yet eligible for parole and have served their maximum term, they are released without supervision.

That is precisely what occurred here. The Department of Corrections applied Holbrook's regular and special good-time credits to his maximum sentence, and he became eligible for release before completing his minimum term.

C

Plaintiff contends that this result violates *Tanner*. In *Tanner*, the defendant pleaded guilty to manslaughter and was sentenced to a term of imprisonment from fourteen years, eleven months to fifteen years. *Tanner, supra* at 686. On appeal, he argued that the trial court abused its discretion in imposing a minimum sentence that was only thirty days shorter than the maximum sentence. *Id.* at 687. The Supreme Court found that the sentence violated the intent and purpose of the indeterminate sentence act, MCL 769.8; MSA 28.1080, MCL 769.9; MSA 28.1081. They reasoned that thirty days was not a sufficient time interval to enable the corrections authorities to exercise their discretion or judgment with any practicality. *Id.* at 689-690. The Court adopted the "two-thirds" rule, under which a minimum sentence must not exceed two-thirds of the maximum. *Id.* at 690.

Plaintiff argues that the instant case represents the mirror image of the issue addressed by the Court in *Tanner*. According to plaintiff, the Department of Corrections violated *Tanner* by applying good-time and special good-time credits in such a manner as to allow the length of Holbrook's maximum sentence to approach the length of his minimum term.

D

In our opinion, *Tanner* does not afford plaintiff the relief it seeks. As noted, the Court in *Tanner* was concerned with providing for indeterminate terms at the time of sentencing so that corrections authorities would be able to exercise their jurisdiction and judgment. The Court stated that a sentence either does or does not comply with the indeterminate sentence act, "irrespective of the effect of special remedial provisions such as those granting regular and special good time." *Id.* at 689.

Here, Holbrook's sentence was indeterminate at the time it was imposed. It was only after the Department of Corrections applied good-time credit that the length of the maximum sentence was reduced to a point where it was less than the minimum.

Moreover, to deny prisoners in Holbrook's position the right to have good-time and special good-time credits applied to their maximum terms would run afoul of the state and federal

constitutional prohibitions against the enactment of ex post facto laws. US Const, art I, §§ 9 and 10; Const 1963, art 1, § 10. A law enacted after the date of a prisoner's sentence that attempts to reduce the amount of credit given for good behavior, and in effect increases the sentence, is unconstitutional. *Lowe, supra* at 137, citing *Weaver v Graham*, 450 US 24, 27; 101 S Ct 960; 67 L Ed 2d 17 (1981).

Under the law as it existed in 1981, defendant Holbrook was entitled to good-time and special good-time credits applied to his maximum term. Therefore, any interpretation of the sentencing statutes that would prevent Holbrook from acquiring these credits would enhance his sentence and violate the constitutional prohibition against ex post facto laws. See *Lowe, supra* at 137-138.¹

E

We are in sympathy with the position of the Wayne County Prosecutor.² The crime for which defendant pleaded guilty was particularly heinous, and the Department of Corrections should have had more control over defendant's release date and the conditions of his parole. However, it did not, due to an oversight in the Legislature's codification of Proposal B in 1978 and a failure to close the loophole until 1982. Our Legislature has acknowledged that this situation presents "one of the more glaring inadequacies of proposal B." House Legislative Analysis, HB 6165, 6166, December 7, 1982, p 2.

We find comfort in the fact that few prisoners become eligible for release before their minimum terms have been completed. Due to the 1982 amendment to MCL 800.33; MSA 28.1403, prisoners sentenced after January 1, 1983 for a Proposal B offense earn disciplinary credit on both their minimum and maximum sentences. Moreover, MCL 800.33; MSA 28.1403 was amended again in 1987 to do away with good time credit altogether for offenses committed on or after April 1, 1987. The amendment will ensure that prisoners will not be released before the expiration of their minimum sentences.

III

Lastly, plaintiff argues that the trial court erred in awarding Holbrook good-time credit for time served on his void sentence for first-degree murder. Plaintiff failed to raise this issue below. Therefore, it has not been properly preserved for review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Affirmed.

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burrell

¹ In *Lowe*, we held that it would be unconstitutional to replace good-time credit with less favorable disciplinary credit for a prisoner sentenced after the enactment of Proposal B, but before the 1982 amendment to MCL 800.33; MSA 28.1403.

² This is true even though defendant Holbrook's counsel asserted at oral argument that the 20 to 30 year sentence was part of the plea bargain. If the claim is accurate, the prosecution should have anticipated the result in this case at the time of the plea agreement.