STATE OF MICHIGAN

COURT OF APPEALS

DEAN V. LANGWORTHY,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
August 27, 1999

No. 211314
Ingham Circuit Court
LC No. 97-085628 CZ

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff Dean V. Langworthy appeals as of right from an order granting summary disposition to defendant Michigan Department of Corrections ("MDOC"). We affirm.

I. Basic Facts And Procedural History

In 1976, Langworthy and two other men shot and killed a stranger, William Wedge. The men bound Wedge's body with antenna wire, put it in a garbage bag, and then used gasoline to burn the body beyond recognition. Langworthy attributed his actions, which were reported as uncharacteristic for a man described by others as "nonviolent, well behaved, liked, . . . and anxious to please," to the drugs and alcohol he had been using to numb pain from an eye injury he sustained at work. A trial court subsequently convicted Langworthy of second-degree murder in a bench trial and sentenced him to sixty to ninety years in prison. The court credited the 334 days Langworthy spent in jail prior to sentencing.

Under the credit policy in place when Langworthy was convicted, he could reduce his time spent serving the minimum and maximum prison terms by earning regular good time ("RGT") and special good time ("SGT") credits.[1] If Langworthy earned and was awarded all RGT available from his first date of incarceration, his earliest possible release date would be July 28, 2010, and his latest release date would be July 28, 2025. If awarded the highest level of SGT, Langworthy could have been released as early as June 10, 1997, or as late as December 10, 2004.

Between 1977 and October 11, 1984, Langworthy did not receive any misconduct reports, which would have limited his ability to earn SGT and may have required him to forfeit other good time credits. Langworthy's supervisors reported that he had an "excellent institutional record," which included earning a variety of degrees with honors and making significant contributions in his prison work. In early April of 1995, although continuing to recognize Langworthy's generally good conduct, educational accomplishments, and professional contributions as an electrician at the prison, a special parole consideration committee declined to recommend him for parole. The committee cited his refusal to take a drug test, major misconduct reports for assault and battery, disobeying a direct order, and substance abuse, and a major misconduct report for being out of place. The committee acknowledged that those infractions resulted in "only a few Major Misconduct Reports" but concluded that his "progress and achievements [were] not beyond normal expectations. . . ." Langworthy may have received an additional major misconduct report during 1994 or 1995.

Langworthy alleged that in late August of 1996, he met Stephen Marschke, chairperson of the Michigan Parole Board, who indicated that he intended to vote to parole Langworthy on his July 28, 1997 SGT release date. Yet, in mid-September, 1996, Langworthy received a "Time Review & Disposition" evaluation, which reported his adjusted release dates as between December 4, 2009 and August 12, 2007 [sic: 2017] using a maximum potential award of SGT, and December 4, 2009 and May 11, 2027 using a maximum potential award of RGT. At that time, Langworthy had forfeited 402 days of SGT or RGT, which were not available to be restored. However, he had thirty forfeited days available for restoration and 4,512 days of SGT available to be awarded. The evaluation noted that the committee charged with recommending credits suggested awarding him 3,500 days of SGT and did not propose restoring any credits.[2] Joseph Abramajtys, as the warden at the E.C. Brooks Correctional Facility ("BCF"), where Langworthy was being incarcerated, was the person responsible for acting on the committee's recommendation. He did not award Langworthy any days of SGT or restore any forfeited credits.

By letter (the "Crosby letter"), Langworthy objected to Warden Abramajtys' decision declining to award him any SGT or restore credits. By Langworthy's calculation, even accounting for his misconduct, his SGT minimum release date should have been July 28, 1997. He claimed that the 1996 release date evaluation erroneously listed that he had 4,512 SGT days available for *restoration* when the 1995 release date evaluation did not list any days available to *forfeit*. In the Crosby letter, Langworthy stated that

> [i]t is my belief that once the time computations are calculated which reflect a specific time calculation that those calculations cannot be arbitrarily changed without justification for the action. In other words, if I committed no infraction or violation warranting change, the fixed time calculations must accurately reflect those calculations with the special/good time awards factored therein. The 9-19-96 calculations do not reflect this nor does the Time Review reflect the 810 EPA days awarded.

MDOC responded that the 4,512 SGT days were not in fact applied to Langworthy's minimum sentence unless and until the warden actually awarded them. MDOC explained that if the warden does not grant any part of the SGT, the minimum and maximum release dates are "increased by the number

of days not granted as the special credits are deducted from the calculation. [Prisoners] do not have an automatic right to receive special good time and once it's not granted it cannot be changed." Warden Abramajtys wrote a letter to Darla Loney[3], explaining:

> Be advised that in deciding whether or not a prisoner ought to receive good time, I review his entire prison record in making that decision. I agree that Prisoner Langworthy has made progress since his incarceration over 20 years ago and I am encouraging him to continue to do so. However, I do not believe he is worthy enough to receive good time. I also look forward to seeing how the Parole Board will handle his case in the future.

Warden Abramajtys' letter to Mayvelle Langworthy, Langworthy's mother, expressed a similar sentiment, and specifically stated that he had reviewed Langworthy's file and history before declining to award the SGT credits. Warden Abramajtys also stated that he believed that Langworthy "should do the sentence that was imposed upon him by the courts."

Langworthy evidently went through a grievance process to challenge the warden's decision to deny him the SGT but received an unfavorable result. When Langworthy filed the instant action, he alleged that when he was first incarcerated MDOC had a policy of automatically awarding SGT and he had a statutory right to the 4,512 days of credit unless he committed major misconduct or otherwise forfeited the credits. Langworthy contended that when he was first convicted, MDOC did not have a policy of automatic forfeiture and that time forfeited could be restored after at least six months of good conduct. As a result, he claimed, Warden Abramajtys' reliance on the 1982 and 1986 amendments to MCL 800.33; MSA 28.1403 and recent policies to declare that Langworthy had forfeited his SGT was a violation of the constitutional prohibitions against ex post facto laws.

MDOC moved for summary disposition under MCR 2.116(C)(7), arguing that Langworthy failed "to plead facts establishing that an administrative rule or its application interferes with or impairs, or imminently threatens to interfere with or impair [Langworthy's] legal rights or privileges . . . ." MDOC also moved for summary disposition under MCR 2.116(C)(8), contending that Langworthy could not demonstrate how the amendments to MCL 800.33; MSA 28.1403 after his 1977 conviction imposed any greater punishment on him because the warden did not have any duty to grant SGT credits. Langworthy, in his brief opposing summary disposition, asked the trial court to permit him to amend his complaint to include a count alleging that Warden Abramajtys abused his discretion if the trial court viewed the suit as a new civil action rather than an appeal of an administrative decision. Part of Langworthy's argument was that a prisoner should receive SGT automatically if he maintains his good conduct, does not receive any "Notices of Intent Not to Grant Special Good Time," and the committee in charge of making recommendations regarding SGT recommends an award.

The trial court did not specifically rule on Langworthy's request to amend the complaint, but implicitly denied the motion by reaching the merits of his argument. The trial court apparently treated the case as an original civil action rather than an appeal from an administrative agency because it addressed Langworthy's legal arguments without referring to any prior administrative procedures, even though it did not indicate which subsection of MCR 2.116(C) it relied on to grant summary disposition. Instead,

the trial court construed MCL 800.33; MSA 28.1403 as it read in 1977 and concluded that SGT was discretionary and not automatically accumulated under the statutory scheme. Therefore, the trial court decided that the discretionary practice used in 1996 was not an ex post facto law. The trial court also declined to find that Warden Abramajtys abused his discretion by refusing to award Langworthy any SGT because evidence of major misconduct reports and continuing substance abuse indicated Langworthy did not have "especially good behavior" meriting the credits. Finally, the trial court concluded that MDOC was not obligated to award SGT simply because the warden had not given a "Notice of Intent Not to Grant Special Good Time" to Langworthy. The trial court's analysis suggests that it granted summary disposition pursuant to MCR 2.116(C)(8) on the ex post facto issue because the trial court held, in essence, that Langworthy failed to bring a legally enforceable claim.

The trial court's analysis on the abuse of discretion issue appears to have been pursuant to MCR 2.116(C)(10) because it assessed the factual basis of Langworthy's claim, concluding that there were "no clear and articulable grounds upon which to base a finding of abuse of discretion." The trial court also, apparently, rejected Langworthy's claim[4] that Warden Abramajtys' decision to deny him SGT violated procedural due process under MCR 2.116(C)(10) because it decided that MDOC policy did not require an award of SGT when a warden fails to issue a "Notice of Intent Not to Grant Special Good Time."

II. Preservation Of Issue And Standard Of Review

A. Prohibition Against Ex Post Facto Laws

In his complaint, Langworthy claimed that MDOC changed its automatic SGT policy, which violated the prohibition against ex post facto laws. The trial court disagreed, ruling that the good time statute has never required a warden to automatically grant SGT. Therefore, this issue is preserved. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). This Court reviews constitutional issues de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

B. Procedural Due Process

In his brief opposing summary disposition, Langworthy argued he was entitled to notice and a hearing before Warden Abramajtys could deny him SGT. The trial court disagreed. Therefore, this issue is preserved. *Peterman, supra*. As noted above, this Court reviews constitutional issues de novo. *Pitts*, *supra*.

C. Abuse Of Discretion

In his brief opposing summary disposition, Langworthy argued that Warden Abramajtys abused his discretion by refusing to award Langworthy SGT. The trial court disagreed. Therefore, this issue is preserved. *Peterman*, *supra*. We note that the trial court was not clear regarding what subsection of MCR 2.116 applied to its decision, but we conclude from the context of the analysis that it was subsection (C)(10). Whether the trial court properly ordered summary disposition under MCR

2.116(C)(10) is a question of law that this Court reviews de novo. *Professional Rehabilitation Associates v State Farm Mutual Automobile Ins Co (On Remand)*, 228 Mich App 167, 169-170; 577 NW2d 909 (1998).

III. Prohibition Against Ex Post Facto Laws

Langworthy claims that when he was convicted in 1977, the prison system automatically awarded SGT according to the good time statute, MCL 800.33; MSA 28.1403, or by policy. He contends that he is entitled to virtually all SGT from the date of his conviction and that Warden Abramajtys' decision to deny him SGT was actually a forfeiture under MCL 800.33(6); MSA 28.1403(6). He argues that this forfeiture violated the constitutional prohibition against ex post facto laws, US Const, art I, § 10; Const 1963, art 1, § 10, because the Legislature added subsection 6 almost ten years after his incarceration. We disagree.

In *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996), we explained that:

> [a] statute that affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence.

This constitutional protection is aimed at limiting the Legislature's ability to enact arbitrary and oppressive legislation. *Id.* In light of this constitutional prohibition against ex post facto laws, Michigan courts have consistently held that laws limiting good time credits may only be applied prospectively. See *People v Moon*, 125 Mich App 773, 777; 337 NW2d 293 (1983).

When Langworthy was convicted in October 1977, MCL 800.33; MSA 28.1403 remained unchanged from its 1953 amendment, 1953 PA 105, and provided that

> [t]he warden of any institution subject to the provisions of this act *may*, with the consent and approval of the commissioner of corrections, extend the good time allowance beyond that herein specific, to persons whom he deems to have achieved a decided reformation since the date of commitment or for good work records or for exemplary conduct: Provided, however, That such additional good time allowance shall not exceed 50 per cent of the good time allowance under the foregoing [regular good time] schedule. [Emphasis supplied].

On its face, this language granted the warden of a correctional facility the discretion to award SGT but did not require SGT to be awarded under any particular circumstances. See *Rickner v Frederick*, 459 Mich 371, 378; 590 NW2d 288 (1999) ("if the Legislature has created a clear and unambiguous provision, we assume that the plain meaning was intended, and we enforce the statute as written"). Subsequent amendments to the law in 1978, 1982, 1986, and 1994 provided that changes to the statute's applicability only applied prospectively. See *People v Fleming*, 428 Mich 408, 422-423, n

16; 410 NW2d 266 (1987); *Lowe v Dep't of Corrections (On Reh)*, 206 Mich App 128; 521 NW2d 336 (1994).

Based on our reading of the amendments to the good time statute, we reject Langworthy's argument that Warden Abramajtys' discretion to award SGT has changed through the amendments to the good time statute after 1977. We also note that subsection 6 does not apply to this case. The text of MCL 800.33; MSA 28.1403 as amended in 1986 makes clear that the permanent forfeiture provision in subsection 6 only applies to regular good time—a different sentence reduction credit that accrues automatically—because it only refers to "good time." "Good time" is the name for the regular good time credits identified in subsection 2. In contrast, subsection 12 now addresses SGT and specifically calls those credits "special good time allowances." Furthermore, even if subsection 6 granted the warden authority to forfeit SGT, Langworthy has not demonstrated that any warden at any prison actually awarded him the SGT he may have been eligible to receive. Having never received any SGT, he cannot characterize Warden Abramajtys' decision as an order forfeiting it under subsection 6.

Langworthy's alternative argument, that if the good time statute did not allow automatic accrual of SGT, then longstanding MDOC policy achieved that result, is not persuasive. Langworthy suggests that this Court's decision in *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681; 503 NW2d 465 (1993), supplies evidence of an automatic accrual policy. However, *Oakland Co Prosecutor* did not allude to any automatic accrual policy, much less endorse one. Rather, that case confronted the policies used to account for SGT that a warden had already awarded to ascertain parole eligibility. *Id.* at 687-688. The legislative history Langworthy submits alludes to an automatic accrual policy for SGT, but it does nothing to sway our ultimate decision. This reference is but a bare assertion without any factual support or context. Even if such a policy existed, we have no evidence of the length or brevity of the policy, much less the requisite legislative and judicial acquiescence to the policy that served as the foundation for our reasoning in *Oakland Co Prosecutor*. We conclude that there was no ex post facto violation in this case.

IV. Procedural Due Process

Langworthy argues that Warden Abramajtys' decision to deny him SGT without notice, hearing, or a full explanation violated procedural due process. US Const, Am XIV; Const 1963, art 1, § 17. We again disagree.

Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by the due process clauses, namely life, liberty, and property interests. See *Electro-Tech, Inc v H.F. Campbell Co*, 433 Mich 57, 66, n 9; 445 NW2d 61 (1989); *Dow v Michigan*, 396 Mich 192, 202-206; 240 NW2d 450 (1976). In a procedural due process inquiry, we must first decide if process is due to an individual contesting a government action. See generally, *Bundo v Walled Lake*, 395 Mich 679, 685-686; 238 NW2d 154 (1976). This inquiry turns on whether the individual can show that his or her property or liberty is at issue. *Williams v Hofley Mfg Co*, 430 Mich 603, 610-611; 424 NW2d 278 (1988). Second, if process is due, we must resolve "what process is due" to determine the scope of the necessary procedural safeguards. *Id.* "What process is due in a particular proceeding depends upon the nature of the proceeding, the risks

and costs involved, and the private and governmental interests that might be affected." *Pitts, supra* at 263.

It is well settled that even though neither the state nor federal constitutions provide a prisoner the right to sentence reduction, "once a state adopts good-time provisions and a prisoner earns credit, the deprivation of that good-time credit constitutes a substantial sanction, and a prisoner can properly claim that a summary deprivation of good-time amounts to a deprivation of liberty without due process of law." *Tessin v Dep't of Corrections (After Remand)*, 197 Mich App 236, 241; 495 NW2d 397 (1992), citing *Wolff v McDonnell*, 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (1974). In the context of SGT, where credits are awarded and not automatically earned, this means that the warden must have granted the SGT before a liberty interest protected by due process can exist. This comports with the United States Supreme Court's statement in *Bd of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972), that "a person clearly must have more than an abstract need or desire for [a due process right]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." See also *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 9; 99 S Ct 2100; 60 L Ed 2d 668 (1979).

While Langworthy's personal desire for SGT is indisputable and significant, the record does not indicate that he has ever been awarded SGT during his more than twenty years of incarceration. His interest in the SGT is therefore too "ephemeral" to be constitutionally protected. *Meachum v Fano*, 427 US 215, 228; 96 S Ct 2532; 49 L Ed 2d 451 (1976). Therefore, we conclude that Langworthy does not have a protected liberty interest under the due process clauses. Thus, he had no constitutionally protected right to procedural due process with regard to the denial of SGT.

V. Abuse Of Discretion

Langworthy contends that the trial court erred by concluding that Warden Abramajtys did not abuse his discretion when he declined to award SGT to Langworthy, even though he had awarded SGT to other prisoners with blemished institutional records. We disagree once more.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record in favor of the nonmoving party. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 320; 575 NW2d 324 (1998). However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact. MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

An abuse of discretion occurs when "an unprejudiced person, upon considering the facts on which the [decisionmaker] acted, would say there was no justification or excuse for the ruling." *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991). MDOC policy 03.01.100(P) states that "[s]pecial good time shall be granted based on a prisoner's satisfactory institutional adjustment, cooperativeness [sic] and program participation as well as for specific meritorious or exemplary acts." Subsection Q provides that when a prisoner demonstrates

"unsatisfactory" behavior it "shall be noted immediately" and prison officials will send the inmate a form indicating that SGT will not be granted so that he has an "adequate opportunity for behavioral improvement." *Id*. The trial court record does not indicate that prison officials ever sent Langworthy a notice of the intent not to grant SGT. In any event, subsection T indicates that failure to give notice of an intent to deny SGT on the specified form "does not mean SGT must be granted." *Id*.

Warden Abramajtys explained his decision to deny SGT in two letters, noting that he was aware of Langworthy's progress while incarcerated but stating that Langworthy was not "worthy enough to receive good time" and "that he should do the sentence imposed upon him by the courts." Warden Abramajtys also stated that he made his decision in light of "a prisoner's entire file and history with the Department of Corrections." Warden Abramajtys' conclusion that Langworthy's prison conduct had not been satisfactory is implicit in the letters. Given Warden Abramajtys' stated familiarity with Langworthy's record, it is logical and reasonable to conclude that he was aware of Langworthy's major misconduct reports and what may be a continuing drug problem, which would have influenced his decision to deny SGT.

Langworthy's infractions may be rather slight standing alone, yet the standard for receiving SGT is very high. In the absence of statutory guidelines, MDOC policies defining "satisfactory conduct" in concrete terms, or a liberty interest that falls under due process protection that might have required a record of Warden Abramajtys' decision making, it is impossible to say that these major misconducts fail to justify Warden Abramajtys' decision. Langworthy has not suggested what other evidence might be able to demonstrate that Warden Abramajtys' decision was motivated by bias or improper considerations. MCR 2.116(G)(4); *Etter*, *supra*. Therefore, we conclude that the trial court did not err by granting summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] Earning, forfeiting, and restoring good time credits depends on statutory factors that take into account a standard rate of accrual and a prisoner's conduct. Below, we discuss these factors and the relevant decisionmaking process in detail.

[2] Apparently, although Langworthy had engaged in the positive behavior that might warrant SGT, the wardens at the different correctional facilities where Langworthy was incarcerated had never actually awarded those credits to him. Consequently, the committee involved with the 1996 time evaluation had such a large number of days available to award to Langworthy.

[3] The record does not explain who Loney is or why she would have inquired about Langworthy's term of incarceration.

[4] Langworthy has never claimed that the warden's SGT decision violated procedural process. However, he uses procedural due process arguments to support his assertion that the warden abused his discretion.