

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL MICHAEL WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

January 29, 2002

No. 225573

Jackson Circuit Court

LC No. 99-093810-FH

Before: Sawyer, P.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of assault on a corrections employee, MCL 750.197c, and sentenced to serve two concurrent prison terms of two to four years, consecutive to the prison term he was serving at the time of the assaults. He appeals as of right, challenging the lawfulness of his incarceration at the time of the assaults due to an alleged miscalculation of his discharge date by the Department of Corrections.¹ We affirm. This matter is being decided without oral argument pursuant to MCR 7.214(E).

Defendant hinges his assertion of unlawful incarceration at the time of the assaults on the following forfeitures of good time credits: (1) 540 days of earned good time credits were unlawfully forfeited by the warden for a parole violation where such a forfeiture can only be authorized by the parole board, and (2) 143 total days of good time credits were automatically forfeited because of prison misconduct tickets in violation of Ex Post Facto clauses. We note that defendant’s challenge to the lawfulness of his incarceration in the proceedings below did not involve either of the two specific challenges he now asserts, but rather involved various other challenges to the DOC’s computation of his outdate. However, because no special steps are required to preserve for appeal the issue whether sufficient evidence was presented to sustain his conviction, our review remains de novo. *People v Hawkins*, 245 Mich App 439; 628 NW2d 105 (2001). When the sufficiency of the evidence at a bench trial is challenged on appeal, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven

¹ We note that an essential element of the offense of assault on a corrections employee, MCL 750.197c, requires that the prosecution prove the defendant was “lawfully imprisoned” at the time of the assault. *People v Clay*, 239 Mich App 365; 608 NW2d 76 (2000), rev’d 463 Mich 971; 623 NW2d 597 (2001).

beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *Hawkins*, *supra*.

First, defendant asserts that 540 days of earned good time credits were forfeited by the warden in violation of MCL 800.33(13), which provides that “[t]he parole board shall be exclusively empowered to cause the forfeiture of good time or disciplinary credits earned by a prisoner at the time of a parole violation.” The record belies this claim.

Defendant had absconded from parole on September 27, 1993, and was not apprehended until May 13, 1994. Defendant does not contest the 228 days of dead time during which the running of his sentence was suspended. However, he does challenge a “Time Review & Disposition” form, dated July 1, 1994, and signed by Warden Gary M. Gabry, which stated: “Because of your above listed misconduct [parole violation], I am ordering 540 days of earned credits to be forfeited.” Although this form makes it appear as though the warden authorized the forfeiture, defendant himself admitted at trial that it was ordered by the parole board chairman.² Further, the prosecution notes in its appeal brief that Gabry was the parole board chairman in 1994 when the forfeiture was ordered. Thus, this issue lacks merit.

Second, defendant asserts that the automatic forfeiture of 143 days of good time credits because of misconduct tickets, pursuant to a 1987 amendment to MCL 800.33, constituted an ex post facto violation.³ Pursuant to MCL 800.33, a prisoner may earn disciplinary credits for each month served but may also forfeit such credits upon being found guilty of major misconduct. After amendment of the statute, effective April 1, 1987, § 33(6) provided:

(6) On and after April 1, 1987, a prisoner shall not earn good time under this section during any month in which the prisoner is found guilty of having committed a major misconduct. The amount of good time not earned as a result of being found guilty of a major misconduct shall be limited to the amount of good time that would have been earned during the month in which the major misconduct occurred. Any good time not earned as a result of the prisoner being found guilty of a major misconduct shall never be earned or restored. [MCL 800.33(6).]

Prior to its amendment, forfeiture of good time credits during a month in which a misconduct was incurred was discretionary, as opposed to mandatory. Because defendant was convicted of a Proposal B offense in 1981, he asserts that retroactive application of the 1987 amendment to his sentence constitutes an ex post facto violation. Defendant relies on *Lowe v Dep’t of Corrections (On Rehearing)*, 206 Mich App 128, 137; 521 NW2d 336 (1994), where this Court held that a 1982 statutory amendment that eliminated good time credits for Proposal B offenders and instead awarded less favorable disciplinary credits constituted an ex post facto violation.

² See Trial Transcript, 1/12/2000, p 14.

³ Although it is unnecessary to reach the merits of this issue, we analyze it in light of its constitutional implications.

Defendant's reliance on *Lowe, supra*, is misplaced. Unlike in *Lowe*, the statutory amendment challenged by defendant does not have the effect of increasing his punishment for a crime after its commission. *Garner v Jones*, 529 US 244; 120 S Ct 1362, 1367; 146 L Ed 2d 236 (2000); *Payne v Dep't of Corrections*, 242 Mich App 638, 641; 619 NW2d 719 (2000). Instead, the amendment of § 33(6) relates to misconduct committed after the effective date of the amendment, not to the offense for which he was imprisoned originally. Had defendant not engaged in repeated misconduct while in prison, he would have suffered no ill effects from the amendment of § 33(6). Thus, because the statute provided fair notice of its consequences, and defendant's punishment for his original offense was not increased, there has been no ex post facto violation. Accord, *Weaver v Graham*, 450 US 24, 28-29, 31; 101 S Ct 960; 67 L Ed 2d 17 (1981); *Payne, supra*.

Accordingly, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra