# STATE OF MICHIGAN

# COURT OF APPEALS

MARK WHITE,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, MARJORIE VAN OCHTEN, LINDA WITTMAN, a/k/a LINDA WHITTMAN,

Defendants-Appellees.

UNPUBLISHED
December 27, 2002

No. 234274
Ingham Circuit Court
LC No. 01-093032-AW

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's[1] motion for summary disposition and dismissing plaintiff's complaint for a writ of mandamus. We affirm.

In 1995, plaintiff was convicted by an Oakland County jury of several offenses including unarmed robbery.[2] He was subsequently sentenced as an habitual offender and orally received a ten to fifteen year sentence for the unarmed robbery conviction. However, the judgment of sentence provided that plaintiff was sentenced to seven to thirty years' imprisonment for the unarmed robbery conviction. Plaintiff moved to clarify the sentence. The trial court resentenced defendant to ten to fifteen years' imprisonment for the unarmed robbery conviction. At plaintiff's urging, the sentencing court orally stated that it would "permit" plaintiff to "receive good time." The written order granting the motion for clarification of sentence provided that plaintiff "shall be entitled to receive any good time or disciplinary credits available to him pursuant to Department of Corrections policy." The amended judgment of sentence provided that plaintiff "shall be entitled to good time credit."

[1] Because of the nature of the claim of relief, entitlement to good time credits, we will use the singular "defendant."

[2] Plaintiff stole the purse of an elderly woman in a parking lot. The next business day, plaintiff was apprehended while attempting to cash checks from the checkbook contained in the stolen purse. Plaintiff was apprehended at the bank, fled police custody, and was taken into custody following a police chase. See *People v White*, unpublished opinion per curiam of the Court of Appeals, issued March 28, 1997 (Docket No. 185321). Although defendant was convicted of multiple offenses, only the unarmed robbery sentence is contested in this claim of appeal.

Plaintiff filed a writ of mandamus to compel defendant to grant good time credit on his sentence, alleging that defendant did not comply with the sentencing court's order. Defendant moved for summary disposition, alleging that it was statutorily precluded from awarding good time credit to an inmate who was serving a sentence for a crime committed after April 1, 1987. Following oral arguments, the trial court granted defendant's motion for summary disposition and dismissed the complaint for writ of mandamus.

"A writ of mandamus will only be issued if the plaintiffs prove they have a 'clear legal right to performance of the specific duty sought to be compelled' and that the defendant has a 'clear legal duty to perform such act . . . .'" *In re MCI Telecommunications Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999), quoting *Toan v McGinn*, 271 Mich 28, 34; 260 NW 108 (1935). The decision to grant or deny a writ of mandamus is reviewed for an abuse of discretion. *In re MCI Complaint, supra* at 443. The trial court's decision granting summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court's determination of underlying legal issues is also reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Plaintiff first alleges that the applicability of good time credit to habitual offenders is a matter that is unclear and has been misunderstood by trial courts since this Court's decision in *People ex rel Oakland Co Prosecuting Attorney v Bureau of Pardons & Paroles*, 78 Mich App 111; 259 NW2d 385 (1977), generally known as the *Trudeau* decision. Plaintiff claims that in response to *Trudeau* and a later decision, *Lamb v Bureau of Pardons & Paroles*, 106 Mich App 175; 307 NW2d 754 (1981), defendant implemented a policy directive, MDOC PD 03.01.102, that is inconsistent with the provision of the habitual offender statute governing early parole consideration. Plaintiff asserts that this Court must resolve the alleged confusion by explaining the manner in which defendant is to award behavior credit for inmates serving enhanced habitual sentences. We have already explained in *Lamb, supra*, how behavior credit is applied in sentences involving habitual offender sentences. We therefore conclude that this issue is not a matter of general misunderstanding.

The term "good time" in Michigan has a specific meaning. It designates the institutional credit formerly awarded to inmates for good behavior. MCL 800.33(2); *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 130; 521 NW2d 336 (1994). It was applicable to all inmates until the enactment of MCL 791.233b (in response to the voter referendum known generally as Proposal B) on December 12, 1978. *Lowe, supra* at 131. Under the provisions of § 233b, awards of good time were prohibited for certain designated offenses. *Id.* This system was modified effective December 30, 1982, to create a new category of good behavior credits, known as "disciplinary credits" and "special disciplinary credits," that are less "generous" than good time credits. *Id.* at 131-133. Effective April 1, 1987, good time credits were eliminated altogether for all offenses committed after that date and only disciplinary credits continued to be awarded. MCL 800.33(3).

Plaintiff was sentenced for a crime committed in 1994, and he was sentenced as an habitual offender. He was therefore not eligible for good time credit, although he is eligible for disciplinary credit. At the time of plaintiff's sentencing, the habitual offender statute, MCL 769.12(3), provided, in relevant part:

> Offenders sentenced under this section or section 10 or 11 for offenses other than a major controlled substance offense shall not be eligible for parole before the expiration of the minimum term fixed by the sentencing judge at the time of sentence without the written approval of the sentencing judge or a successor.

This Court held in *Lamb, supra* at 184, that the statutory language "the minimum term fixed by the sentencing judge at the time of sentence" refers to the calendar minimum; that is, the actual minimum sentence imposed by the court, unreduced by good time (or, after December 30 1982, disciplinary credits). Thus, as this Court concluded in *Lamb*, while the MDOC is required to calculate behavior credit, application of such accumulated credit in the case of an habitual offender merely means that the offender may be *considered* for parole by the parole board at the completion of the offender's net minimum sentence (calendar minimum sentence minus accumulated good time or disciplinary credit). However, MCL 769.12(3) [now MCL 769.12(4)(a)], as interpreted by *Lamb*, requires that parole may not actually be *granted* unless the sentencing judge (or a successor) provides written approval of early parole, i.e., parole before the calendar minimum sentence.[3]

Pursuant to *Lamb* and *Trudeau*, defendant has promulgated policy directive 03.01.02. The subsection implicated in this appeal, PD 03.01.102(C), provides:

> Approval by the sentencing court allowing the Parole Board to parole prior to the calendar minimum must be in the form of written correspondence from the court to the Board clearly indicating that jurisdiction is given to the board to approve parole prior to the calendar minimum. The Parole Board shall contact the court to clarify the issue. Language such as "I grant good time" or "I do not oppose good time being given" will not be interpreted as approval by the sentencing court since good time or disciplinary credits are a statutory right and not subject to judicial approval or disapproval.

Contrary to plaintiff's position, this policy directive properly implements this Court's decisions in *Trudeau* and *Lamb* while also preserving the statutory prohibition against the parole board granting early parole to an habitual offender without first obtaining the written approval of the sentencing court. The policy directive covers a matter for which defendant is responsible, and it merely interprets the requirements of the statute to provide guidance. This is a proper exercise of defendant's authority and ordinarily such an interpretive rule will be followed absent a showing that it is contrary to the dictates of the statute. *Clonlara, Inc v State Bd of Ed,* 442 Mich 230, 239-241; 501 NW2d 88 (1993). Plaintiff has failed to make such a showing.

Plaintiff nevertheless contends that the trial court's verbal and written statements approving the award of good time credit constituted binding directives that defendant did not have the authority to ignore and that, by refusing to comply with the sentencing court's "orders"

[3] The current statutory provision, MCL 769.12(4)(a), makes this even clearer because it provides that an habitual offender "is not eligible for parole until expiration of . . . the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval *for parole at an earlier date*." [Emphasis supplied.]

defendant is violating the separation of powers doctrine and the plain language of the statute. Because the sentencing court does not have the authority to order defendant to award any form of behavior credit, and particularly not good time credit, plaintiff's argument is without merit.

Plaintiff is incarcerated as an habitual offender for crimes committed after April 1, 1987. He is therefore ineligible for good time credit. MCL 800.33(3); *Lowe, supra* at 133. The decision whether to award any form of behavior credit during the course of an inmate's incarceration is expressly reserved by statute to the discretion of defendant and its agents. MCL 800.33. The Legislature has not given the sentencing court any authority to become involved in that discretionary decision. Therefore, regardless of what the sentencing court stated orally at sentencing, or in writing in its order granting clarification of sentence or its amended judgment of sentence, the sentencing court was without authority to order defendant to provide good time credit to plaintiff.[4]

Plaintiff further claims that defendant is violating the separation of powers doctrine by refusing to comply with the sentencing court's directive that it award good time credit to plaintiff. The separation of powers doctrine, Const 1963, art 3, § 2,[5] "intends to preserve the independence of the three branches of government." *Hopkins v Parole Bd,* 237 Mich App 629, 636; 604 NW2d 686 (1999). This Court held, in *Hopkins*, that the Legislature has granted defendant sole jurisdiction over questions of parole. *Id.* at 637. Likewise, pursuant to MCL 800.33, the Legislature has granted defendant sole jurisdiction over the determination and award of good time. The Legislature has further declared that good time is unavailable to those inmates – like plaintiff – who are incarcerated for crimes committed after April 1, 1987. MCL 800.33(3).

Because the sentencing court had no authority to order an award of good time (both because such credit is no longer statutorily available and because the award of any form of behavior credit is a matter of discretion for defendant, not the sentencing court), if there is a violation of the separation of powers doctrine, it has been committed by the sentencing court in trying to usurp the discretionary authority that has been statutorily placed by the Legislature in the executive branch of government. Accordingly, this Court rejects plaintiff's separation of powers claim.

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[4] To the extent that the amended judgment of sentence purported to "order" defendant to provide good time credit to plaintiff, that provision in the judgment was invalid. MCL 769.24 provides that a judgment of sentence containing an excess fine or punishment is invalid only to the extent of the excess. See also *People v Thomas,* 447 Mich 390, 393; 523 NW2d 215 (1994). A provision in a judgment of sentence awarding good time to an inmate who is not statutorily eligible for good time is likewise invalid to the extent that it orders an award of behavior credit that the sentencing court is not empowered to award and that is, in any event, not statutorily available. Accordingly, defendant properly refused to award good time credit to plaintiff.

[5] Const 1963, art 3, § 2 provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Plaintiff's claim that he has a vested right in the award of good time is likewise without merit. He cannot have a vested right in something the Legislature has provided he may not receive. In *Bejger v Zawadski*, 252 Mich 14, 19; 232 NW 746 (1930), our Supreme Court quoted from Sutherland, Statutory Construction (2d ed), § 282 as follows: "[t]he general rule is that when an act of the legislature is repealed without a savings clause, it is considered, except as to transactions past and closed, as though it had never existed." When MCL 800.33 was amended to eliminate the availability of good time for all inmates whose crimes were committed after April 1, 1987, the good time provision was wiped out – "as though it had never existed" – for all future inmates.[6] The sentencing court could not create a vested right in a statutory provision that, by its terms, did not apply to plaintiff.

Finally, plaintiff contends that the prosecutor's failure to object to, or challenge on appeal, the sentencing court's amended judgment of sentence precluded defendant, pursuant to principles of collateral estoppel and res judicata, from contesting the good time provision in the judgment. We disagree. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). The validity of the good time credit provision in the judgment of sentence was never previously litigated and defendant was not a party to any previous litigation involving plaintiff and this claim. Accordingly, the doctrine of collateral estoppel is inapplicable to this case.

There are three prerequisites to the application of the doctrine of res judicata: a prior decision on the merits; the issues were resolved in the first case; and both actions were between the same parties or their privies. *Baraga Co v State Tax Commission*, 466 Mich 264, 269; 645 NW2d 13 (2002). The criminal prosecution and appeal were litigated by the Oakland County Prosecutor; defendant was not a party to those actions. The state is not in privity with a subordinate political division. *Baraga Co, supra* at 271. Additionally, the issue of the validity of the good time provision in the judgment of sentence was never litigated in the prior action. Plaintiff has therefore failed to carry his burden, *Baraga Co, supra* at 269, of demonstrating the applicability of either collateral estoppel or res judicata.

Plaintiff's remaining claims were not preserved in the trial court, and manifest injustice will not result from our decision not to review them. *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).[7]

We conclude that defendant was statutorily precluded from awarding good time credit to plaintiff and that, in any event, the sentencing court was without authority to order defendant to perform that discretionary act. Therefore, defendant had no clear legal duty to award plaintiff good time credit, and plaintiff did not have a clear legal right to the performance of such an act

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[6] Similarly, in *People v Jackson*, 465 Mich 390, 403; 633 NW2d 825 (2001), where the defendant's conviction had become final before the promulgation of MCR 6.500 *et seq.*, the defendant had no vested right in the former procedure for obtaining post-conviction relief.

[7] Plaintiff's contention that defendant conceded that the sentence was invalid is not borne out by the record.

by defendant. Accordingly, the trial court did not commit error requiring reversal in granting defendant's motion for summary disposition and dismissing plaintiff's complaint for writ of mandamus. *Maiden, supra*; *In re MCI Complaint, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly