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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of the Personal Restraint of ISAIAH E. PRESTON, Petitioner.	No. 47179-5-II UNPUBLISHED OPINION

JOHANSON, C.J. — In this personal restraint petition (PRP), Isaiah Preston petitions this court for relief from the Indeterminate Sentence Review Board's (ISRB) denial of his petition for parole. Preston argues that (1) former RCW 9.94A.730(1) (2014) is ambiguous regarding whether early release credits may apply to reduce the 20-year term he must serve before he petitions for parole and (2) the ISRB's refusal to apply early release credits to the 20-year term violates the ex post facto clause of the federal constitution resulting in his unlawful restraint. We conclude that former RCW 9.94A.730(1) is not ambiguous, that the ISRB correctly interpreted former RCW 9.94A.730(1), and that Preston fails to show that former RCW 9.94A.730(1)

retroactively altered his ability to earn early release credit in violation of the ex post facto clause.[1] Because Preston is lawfully restrained, we deny Preston's petition.

FACTS

Preston was convicted of one count of first degree rape committed on December 22, 1998, when he was a juvenile. In 2003, the superior court sentenced him to 378 months on this conviction. He was also convicted of one count of second degree rape committed on October 16, 2000, when he was 17 years old. In 2002, Preston was sentenced to 280 months on this conviction. He is serving the sentences concurrently and his total sentence is over 397 months.

In October 2014, Preston requested a review hearing to determine whether he was eligible for parole. Preston argued that the early release time he had earned under former RCW 9.94A.729 (2014) reduced the 20-year term that he must serve before being considered for parole under former RCW 9.94A.730 (2014). The ISRB responded that its "current interpretation of [RCW 9.94A.730] is that individuals must serve 20 years 'flat time'[2] before they are eligible for early release consideration." PRP, Ex. B at 3. The ISRB denied his request for a parole eligibility review hearing. Preston appeals this denial.

[1] Ex post facto clauses of the state and federal constitutions prohibit the state from enacting any law that imposes punishment for an act that was not punishable when committed or that increases the quantum of punishment for the offense after the crime was committed. U.S. CONST. art. 1, § 10, cl.1; WASH. CONST. art. 1, § 23.

[2] "Flat time" refers to a prison term that is to be served without the benefit of time-reduction allowances for good behavior and the like. BLACK'S LAW DICTIONARY 1710 (10th ed. 2014).

ANALYSIS

I. STANDARD OF REVIEW AND PRINCIPLES OF LAW

A petitioner who challenges a decision from which he has had no previous or alternative avenue for obtaining state judicial review must show he is under restraint unlawfully under the provisions of RAP 16.4(c). *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 149, 866 P.2d 8 (1994). Under RAP 16.4, Preston may show either a constitutional or a state law violation to obtain relief. RAP 16.4(c)(2), (6).

Interpretation of a statute is a question of law that we review de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). We also review alleged violations of the prohibition of ex post facto laws de novo. *State v. Pillatos*, 159 Wn.2d 459, 469, 474-77, 150 P.3d 1130 (2007).

II. Former RCW 9.94.A.730(1) IS UNAMBIGUOUS

Preston argues that former RCW 9.94A.730(1) is ambiguous because unlike some other sentencing statutes, it does not expressly provide whether the minimum sentence served before becoming eligible for parole can be reduced by earned early release credits. Preston argues that the rule of lenity should apply in his favor because of this ambiguity and that the 20 years of confinement set out in former RCW 9.94A.730(1) must be reduced by earned early release time under former RCW 9.94A.729. The ISRB responds that former RCW 9.94A.730(1) is unambiguous when read plainly and requires inmates to serve a full 20 years in custody prior to filing an early release petition. We agree with the ISRB.

We must interpret former RCW 9.94A.730(1) that was enacted in 2014 and provides,

> [A]ny person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the [ISRB] for early release *after serving no less than twenty years of total confinement.*

(Emphasis added.)

Former RCW 9.94A.729(1)(a) provides that "[t]he term of the sentence of an offender committed to a correctional facility operated by the [Department of Corrections] *may be* reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined." (Emphasis added.) In the case of an offender convicted of a sex offense committed on or after July 1, 1990, and before July 1, 2003, the aggregate earned release time *may not exceed 15 percent of the sentence*. Former RCW 9.94A.729(3)(b).

If a statute's meaning is plain on its face, then we must give effect to that plain meaning as an expression of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The plain meaning of a statute should be discerned from the ordinary meaning of the language at issue and from the context of related provisions and whole statutory schemes. *Jacobs*, 154 Wn.2d at 600.

Although we consider this broader statutory context for guidance, we do not add words where the legislature has chosen not to include them, and we must construe statutes such that all of the language is given effect. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). If the language is unambiguous, we give effect to that language because we presume the legislature says what it means and means what it says. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). If a statute is subject to more than one interpretation, the statute is ambiguous and the rule of lenity applies. *Jacobs*, 154 Wn.2d at 600-01.

Here, the plain meaning of "after serving no less than twenty years of total confinement" contained in former RCW 9.94A.730(1) ordinarily means just that—an inmate subject to former RCW 9.94A.730(1) must serve *no less than 20 years in total confinement* before petitioning for early release.

Preston points to RCW 9.94A.590(1)(e) and (2), RCW 9.94A.540(1)(a)-(e) and former RCW 9.94A.729(6), and relies on *Jacobs* to support his argument of ambiguity. He argues that because the legislature expressly provided that earned release credits *do not* apply in the contexts covered by these other statutes, but did not expressly do so in former RCW 9.94A.730, that former RCW 9.94A.730(1) is therefore ambiguous regarding the application of earned release time. He also argues that because the legislature has shown that they know how to draft a statute that sets a minimum term that cannot be reduced by earned credits, they must not have intended this effect in former RCW 9.94A.730. But nothing about his argument explains how the plain language of former RCW 9.94A.730(1) is rendered ambiguous. And even as we consider the language of former RCW 9.94A.730(1) in the context of these other statutes, we will not add language to former RCW 9.94A.730(1) where it is unambiguous. *Lake*, 169 Wn.2d at 526.

In addition, *Jacobs* does not support Preston's arguments. There, two defendants were convicted under a statute that allowed for sentencing enhancements for both of the crimes the defendants committed but did not state whether those enhancements should be applied concurrently or consecutively. *Jacobs*, 154 Wn.2d at 599, 602. The court in *Jacobs* found that because the statutory language of the sentencing statute and the context offered in surrounding provisions made the legislature's intent "far from 'plain,'" they had to apply the rule of lenity in the defendants' favor. 154 Wn.2d at 603. But this case is distinguishable from *Jacobs*. Here,

former RCW 9.94A.730(1)'s language states that an offender must serve no less than 20 years in total confinement prior to petitioning for early release. Thus, the legislature squarely directs that an offender must serve no less than 20 years before applying for early release. There is no ambiguity such as was found in *Jacobs*. Because we conclude former RCW 9.94A.730(1) is unambiguous, we do not apply the rule of lenity. *Jacobs*, 154 Wn.2d at 600-01.

We conclude that the ISRB correctly interpreted former RCW 9.94A.730(1) and properly denied Preston's request to apply earned early release time to the required 20-year term.

III. EX POST FACTO DOCTRINE NOT VIOLATED

Next, Preston argues that the ISRB's decision that his early release credits cannot apply before he serves 20 years violates the ex post facto clause of the federal constitution because this decision results in a retroactive reduction of his earned release time, effectively unlawfully restraining him. Specifically, Preston argues that the ISRB decision denies him eligibility for a parole hearing for three years, which results in unlawful restraint. The ISRB argues that Preston is incorrect because his early release credits are not reduced, they just cannot apply until after he has served 20 years under former RCW 9.94A.730. We agree with the ISRB.

Preston must show that he is unlawfully restrained because of a violation of constitutional law. RAP 16.4(c)(2), (6). We review alleged violations of the prohibition of ex post facto laws de novo. *Pillatos*, 159 Wn.2d at 469.

Retroactive application of a law violates the ex post facto clause if it increases the quantum of punishment for an offense after the offense was committed. *State v. Hennings*, 129 Wn.2d 512, 524-25, 919 P.2d 580 (1996); *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Specifically, a law violates the ex post facto clause if (1) it is substantive, as opposed to merely

procedural, (2) retrospective, and (3) disadvantages the person affected by it. *In re Personal Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991). The purpose of the ex post facto clause is not to ensure an inmate's right to less punishment, as they are not entitled to that, but to provide for fair notice and governmental restraint. *Powell*, 117 Wn.2d at 188. A change in the law that limits eligibility for reduced imprisonment violates the ex post facto clause when applied to individuals whose crimes were committed before the law's enactment. *In re Pers. Restraint of Smith*, 139 Wn.2d 199, 208, 986 P.2d 131 (1999).

Even if we assume the first two requirements of an ex post facto violation are met, Preston fails to meet the third requirement of being disadvantaged by former RCW 9.94A.730(1). Former RCW 9.94A.729 was not in effect when Preston committed his crimes and when he sought to petition for parole, it provided that a person convicted of a sex offense, like him, was entitled to earn good time credits for no more than 15 percent of the sentence. Preston cites to *Smith*, which states, "A change in the law that limits eligibility for reduced imprisonment violates the ex post facto clause when applied to individuals whose crimes were committed before the law's enactment." 139 Wn.2d at 208. But Preston does not show how former RCW 9.94A.730(1) limits his eligibility for reduced imprisonment.

The ISRB states that under preexisting statutes, even if Preston received his current earned early release credits and applied them to the time he must serve on his shorter sentence for the second degree rape charge before being eligible for parole, he would not be eligible for release

until after he served 20 years, 5 months, and 21 days; his early release credits have not been reduced.[3] First, the ISRB is correct that former RCW 9.94A.730(1) did not retroactively limit Preston's eligibility for reduced imprisonment. Former RCW 9.94A.730(1) did nothing to modify former RCW 9.94A.729 to prohibit him from earning early release credits up to 15 percent of his total sentence nor does it reduce the early release credits he has already earned.

Second, Preston is serving his sentences concurrently for a total sentence of over 397 months or over 33 years. Under former RCW 9.94A.729, he could earn early release credits up to 15 percent of that time or for 59.55 months or 4.96 years. Thus, under former RCW 9.94A.729, he would have to serve over 28 years before he could petition to apply his early release credits from the ISRB.

Third, Preston's "quantum of punishment"—his sentence—has not been increased overall leading to his disadvantage. *Hennings*, 129 Wn.2d at 524-25. Former RCW 9.94A.730(1) makes *when* Preston will be considered for parole determinate: after a minimum of 20 years. Both before and after the passage of former RCW 9.94A.730(1), Preston was eligible to earn up to 15 percent earned release credits. Thus, former RCW 9.94A.730(1) has not limited his eligibility for reduced imprisonment in violation of the ex post facto clause. *Smith*, 139 Wn.2d at 208. As discussed above, Preston will not be eligible for early release sooner than 28 years even if he earned the maximum credit available.

[3] Under former RCW 9.94.729, this is based on taking 15 percent of his 8,522-day sentence to calculate his early release credits earned, including 99 days of credit for jail time served and 17 days of credit for early release time he has already earned, and minus 230 days of good conduct time he did not earn while serving his sentence.

Thus, Preston fails to show a violation of the ex post facto clause because he was not disadvantaged by the retroactive application of former RCW 9.94A.730(1). Accordingly, we hold that Preston is not unlawfully restrained and we deny his personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.

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We concur:

Worswick J

WORSWICK, J.

J

LEE, J.