

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BRYAN ERICK RICHTER, *Petitioner/Appellant*,

v.

CHARLES L. RYAN; STATE OF ARIZONA, *Respondents/Appellees*.

No. 1 CA-CV 15-0702
FILED 2-16-2017

Appeal from the Superior Court in Maricopa County
No. LC2015-000012-001
The Honorable David B. Gass, Judge

AFFIRMED

COUNSEL

Bryan Erick Richter, Florence
Petitioner/Appellant

Arizona Attorney General's Office, Phoenix
By Michael E. Gottfried
Counsel for Respondents/Appellees

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge John C. Gemmill and Judge Patricia A. Orozco joined.¹

T H U M M A, Judge:

¶1 Bryan Erick Richter appeals from the superior court’s order accepting special action jurisdiction but denying relief on his claim regarding early release credits for his prison sentences. Because Richter has shown no error, the order is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 After pleading guilty to three counts of attempted sexual assault committed on different dates in 1990 and 1991, Richter was sentenced to three consecutive 10-year prison terms. The sentence for Count 1 began April 3, 1992 and Richter was given 291 days presentence incarceration credit. The sentence for Count 3 was consecutive to the sentence for Count 1. The sentence for Count 6 was consecutive to the sentence for Count 3.

¶3 As calculated by the Arizona Department of Corrections (ADC), Richter completed his sentence on Count 1 on June 16, 2001 and immediately began serving his sentence on Count 3. In February 2006, Richter challenged a time computation report showing he did not receive earned release credits for his sentence on Count 1, meaning he was “forced to serve [his] first sentence in its entirety 10 years day for day.”

¹ The Honorable John C. Gemmill and Honorable Patricia A. Orozco, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

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¶4 In a July 2006 response, respondents quoted Arizona Revised Statutes (A.R.S.) section 41-1604.07(D)(1990),² which in pertinent part stated the ADC director,

according to rules promulgated by the [ADC], may authorize the release of any prisoner who has earned release credits which, when added to the time served by the prisoner, equal the sentence imposed by the court which shall be the prisoner's earned release credit date. *A prisoner on earned release credit release is not under the control of the [ADC]* and the [ADC] is not required to provide parole services or otherwise supervise any prisoner released, except that the [ADC] may revoke the release of the prisoner until the final expiration of [the prisoner's] sentence if the [ADC] has reason to believe that the released prisoner has engaged in criminal conduct during the term of release.

(Emphasis added.) Because Richter was sentenced to three consecutive sentences, and was still “under the control of the” ADC while serving the entirety of his first and second sentences (Counts 1 and 3), the response stated he was not entitled to early release credit for those sentences. As a result, absent a grant of parole by the Board of Executive Clemency, Richter's second sentence would not expire until June 16, 2011. The response added that, when he began serving his third sentence (Count 6), he would be eligible for early release credits on that sentence.

¶5 Later in July 2006, respondents clarified that his entitlement to early release credit was based on, among other things, “A.R.S. § 41-1604.[07(D) (1990)] for inmates with an offense date between August 13, 1986 and December 31, 1993.” In 2006 and 2007, Richter unsuccessfully made administrative challenges to these July 2006 responses.

² Given recodification, the applicable provision currently is located in A.R.S. § 41-1604.10(D) (2017), but given the dates of Richter's offenses, the references throughout this decision are to A.R.S. § 41-1604.07(D) (1990). *See Crumrine v. Stewart*, 200 Ariz. 186, 188 n.2 (App. 2001) (“For purposes of this case, former § 41-1604.07, in effect in 1989, which was renumbered as § 41-1604.10 in 1993, is in substance the same as present § 41-1604.10.”).

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¶6 The Board of Executive Clemency granted Richter parole on the second sentence, and he began serving his third sentence (Count 6) on December 13, 2010. It is undisputed that Richter began earning early release credits on Count 6 at the rate of one day for every two days served since that time, and that his earned release credit date (if he continues to earn such credits without forfeiture) is in 2017.

¶7 After unsuccessfully seeking post-conviction relief, Richter filed this special action with the superior court, claiming due process and ex post facto violations. After full briefing, the superior court accepted special action jurisdiction, but denied relief. The court concluded, “[u]nder the controlling authority of *Crumrine* [*v. Stewart*, 200 Ariz. 186, 189 (App. 2001)], Richter [did] not raise a colorable claim for the application of earned release credits to the first two of his three consecutive sentences.” This court has appellate jurisdiction over Richter’s timely appeal from the final judgment entered by the superior court pursuant to Article 6, Section 9, of the Arizona Constitution; A.R.S. §§ 12-120.21(A)(1) (2017) and -2101(A)(1) (2017) and Arizona Rule of Procedure for Special Actions 8(a) (2017).

DISCUSSION³

I. The Superior Court Did Not Err In Applying *Crumrine*.

¶8 Richter argues *Crumrine* was wrongly decided and does not apply. *Crumrine* rejected a nearly identical early release credit challenge for offenses committed in 1989, construing A.R.S. § 41-1604.07 (1990) and Department Order (DO) 1002.06 § 1.2.1, the same authorities relied upon by respondents here. 200 Ariz. at 188-89. *Crumrine* rejected a challenge to DO 1002.06 § 1.2.1, and applied it to those offenses. 200 Ariz. at 188 ¶ 8 (noting ADC’s interpretation of law as set forth in DO 1002.06 § 1.2.1 “is not inconsistent with the language of the statute”).⁴

³ Because there is no challenge to the superior court’s acceptance of special action jurisdiction, the discussion here is limited to whether that court erred in denying Richter relief. *See Crumrine*, 200 Ariz. at 187 ¶ 4.

⁴ For this same reason, Richter’s argument that the earned release statute is “rendered meaningless” by respondents’ “[t]ortured [i]nterpretation” fails.

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¶9 “Inmates serving a sentence of imprisonment with a consecutive sentence to serve and whose date of offense is between August 13, 1986 and December 31, 1993 shall not be entitled to deduction of release credits.” DO 1002.06 § 1.2.1 (emphasis added). Clearly this specific provision supports the ADC action Richter challenges here. And although Richter cites other DOs discussing in a more general way early release credits, he has not shown how they trump DO 1002.06 § 1.2.1.

¶10 Richter cites *State v. Thomas*, 131 Ariz. 547 (App. 1982) in arguing *Crumrine* was incorrectly decided. *Thomas*, however, involved offenses committed in 1977 and, construing statutes enacted in 1970 and 1974 (which were amended before Richter’s offenses and, accordingly, are inapplicable),⁵ rejected a prisoner’s ex post facto argument. 131 Ariz. at 548 & n.3, 549 & n.4. Richter has not shown how *Thomas* means *Crumrine* was wrongly decided or how the statutes applicable in *Thomas* could apply here.

¶11 For these reasons, Richter’s arguments that *Crumrine* was wrongly decided or does not apply fail.

II. Richter Has Not Shown He Had An Enforceable Liberty Interest In Earned Release Credits.

¶12 Richter argues that “unequivocal” statutory and DO language “mandating” his “release has certainly created a presumption of release implicating the constitutional right to due process.” As applicable here, however, A.R.S. § 41-1604.07(D) “mak[es] the release discretionary.” *Crumrine*, 200 Ariz. at 189 ¶ 12. Because “application of the credits is discretionary under subsection D,” Richter “did not have an enforceable liberty interest in the application of his earned release credits.” *Crumrine*, 200 Ariz. at 189 ¶ 12. Nothing Richter has cited is to the contrary.

III. Application Of DO 1002.06 § 1.2.1 To Richter Is Not An Ex Post Facto Violation.

¶13 Finally, Richter argues DO 1002.06 § 1.2.1 is an ex post facto violation because it was promulgated after the dates of his offenses and after his sentencing. But as noted in *Crumrine*, DO 1002.06 § 1.2.1 represents the ADC’s appropriate interpretation of applicable statutes. 200 Ariz. at 189 ¶¶ 7, 8, 10. In rejecting an ex post facto claim based on superseded substantive law, *Thomas* observed a prisoner

⁵ A.R.S. § 31-251 as amended, Laws 1989, Ch. 173, § 2; A.R.S. § 31-411 as amended, Laws 1989, Ch. 86, §2.

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is not entitled to an erroneous, although more advantageous, interpretation of the statute. The correct interpretation now followed by the [ADC] merely reflects the law as it has existed since before [the prisoner] committed the illegal acts. Thus, applying the correct interpretation to [the prisoner] does not amount to an ex post facto application of a new law.

131 Ariz. at 550; *see also id.* at 551 (“Thus, applying the correct [ADC] interpretation to [the prisoner] does not constitute an ex post facto violation since the new interpretation merely reflects the law as it existed at the time [the prisoner] committed the” offenses.). Accordingly, Richter has shown no ex post facto violation.

CONCLUSION

¶14 The superior court’s order is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA