

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re RONNIE E. YOUNG,

on Habeas Corpus.

2d Civil No. B155373
(Super. Ct. No. HC 3772)
(San Luis Obispo County)

A "second strike" state prison inmate saves a state prison employee from choking to death by performing the Heimlich maneuver. May the Department of Corrections (Department) reduce the inmate's sentence pursuant to the "Heroic Act" provision of Penal Code section 2935?¹ We regretfully conclude that the Department may not. The "Three Strikes" law limits the credits that may be awarded to a "strike" offender, and contains no express exception for rewarding heroic conduct by a "strike" offender. (§ 667, subd. (c)(5).) We publish this opinion to urge the Legislature to amend section 667 so that such an inmate is theoretically eligible to receive a reduction of sentence pursuant to section 2935.

In 1996, petitioner was sentenced to a term of nine years in state prison after pleading guilty to first degree burglary. Petitioner also had a prior felony conviction which subjected him to the Three Strikes law.

In January 2001, while on a break from his prison work assignment, petitioner saved the life of his work supervisor, Bud Stocking, who was choking on some food. Stocking had motioned for help to another inmate, but that inmate refused to help him. Petitioner performed the Heimlich maneuver and dislodged the food that had been blocking Stocking's airway.

¹ All statutory references are to the Penal Code unless otherwise stated.

Petitioner later requested that the Department reduce his prison term in recognition of his meritorious conduct. Stocking was interviewed in connection with this request and expressed gratitude to petitioner for saving his life. The Department denied the request because he had already been awarded the maximum amount of credit permitted under the Three Strikes law. The superior court summarily denied petitioner's petition for writ of habeas corpus. Petitioner asked this court for relief and we issued an order to show cause.

Section 667 subdivision (c)(5) provides: "Notwithstanding any other law . . . [¶] . . . [t]he total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison." (See also *People v. Buckhalter* (2001) 26 Cal.4th 20, 32.) The "Heroic Act" provision of section 2935 gives the Department discretion to "grant up to 12 additional months of reduction of the sentence to a prisoner who has performed a heroic act in a life-threatening situation, or who has provided exceptional assistance in maintaining the safety and security of a prison." Section 2935 is contained in article 2.5 commencing with section 2930 of chapter 7 of title 1 of part 3.

The question presented here is whether the credit limitation imposed by section 667 abrogates the Department's discretion to grant up to 12 months' reduction of a sentence for heroic conduct pursuant to section 2935. We are constrained to hold that it does. We must read both section 667 and section 2935 in the context of the entire statutory scheme of which they are a part, giving significance to every word, phrase, sentence and part of the statute in order to effect the legislative purpose. (*People v. Buena Vista Mines, Inc.* (1996) 48 Cal.App.4th 1030, 1036.) "This court is loathe to construe a statute which has the effect of 'adding' or 'subtracting' language." (*Id.* at p. 1034.)

We honor the separation of powers and exercise judicial restraint. (See *People v. Pecci* (1999) 72 Cal.App.4th 1500, 1504.) This is not one of the extreme cases in which we are required to add or subtract language to construe the statute. By its plain language, the credit limitation imposed by section 667 applies, "[n]otwithstanding any other law" When a statute is clear and unambiguous, it must be given literal effect by the courts unless to do so would violate the clear statutory purpose. (*People v. Dorsey* (1999) 75 Cal.App.4th 729, 733; see also *People v. Mancebo* (2002) 27 Cal.4th 735, 743.) The clear statutory purpose of the Three Strikes law is to impose longer prison terms on recidivist offenders.

(§ 667, subd. (b).) We have no difficulty in concluding that the Legislature, at least by implication, intended for section 2935 to be one of the "other laws" whose application is limited by section 667, subdivision (c)(5).²

Petitioner contends that the sentence reduction available under section 2935 is not a form of credits subject to the limitation imposed by section 667. We are not persuaded. Although section 2935 permits a "reduction of the sentence," rather than an award of "credit" against a sentence, the result is identical: The time served is less. It would elevate form over substance to conclude that a reduction differs from a credit. (See Civ. Code § 3528 ["The law respects form less than substance."].) Given the statutory purpose of the Three Strikes law and the express legislative intent that its credit limitations be imposed "notwithstanding" other laws, we must conclude the sentence reduction available under section 2935 is a form of credit subject to the section 667 limitation. An appellate court should not engage in a semantic charade to achieve a desired result.

"Our duty does not end with disposition of the case at bench. We have an obligation to call to the attention of the Legislature . . . [a potential injustice, flowing from a literal application of statute]." (*Meritplan Ins. Co. v. Woollum* (1975) 52 Cal.App.3d 167, 176; see also 9 Witkin, Cal. Procedure (4th ed.) Appeal, § 694, pp. 728-731.)

We urge the Legislature to consider the issue presented by this petition. The Department ought to have discretion to reduce the sentence of a "strike" offender who takes extraordinary, heroic measures to protect life, property or the security and safety of a prison. Correctional officers and other state employees who work in the California prison system face enough danger already. In some instances, they need assistance from inmates. A "strike" offender who performs heroic measures, such as petitioner, should be theoretically eligible for a section 2935 reduction. We urge the Legislature to grant the Department

² We use the phrase, "at least by implication," because section 2935 was enacted prior to the Three Strikes scheme and such scheme did not expressly mention section 2935. In this situation, it is presumed that the author or authors of the Three Strikes scheme were aware that section 2935 would not be operative. (See *Estate of McDill* 1975) 14 Cal.3d 831, 837; *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1697-1698.) Whether this presumption has a basis in fact is beyond our ken.

The dissent here erases the section 667.5, subdivision (c)(5) limitation. We are not responsible for placing section 2935 in article 2.5 which also deals with work time credits. That was a Legislative determination. It alone placed whales and fish in the same ocean. (See dissent, at p. 2.) The Court of Appeal does not sit as a "super-Legislature." (*Unzueta v. Oceanview "School Dist.*, *supra*, 6 Cal.App.4th at pp. 1698-1699.)

discretion to make such an award in extraordinary cases such as this one. Doing so may save the life of correctional officer or state employee.

The order to show cause is discharged. The petition for writ of habeas corpus is denied.

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YEGAN, J.

I concur:

COFFEE, J.

DISSENTING OPINION – GILBERT, P. J.

I respectfully dissent.

The majority's deference to separation of powers is commendable, but, in my view, the deference here is misplaced. The majority take too broad a view of the limitation on credits provided by Penal Code section 667.³

I agree with petitioner that the nature and character of the two statutes are different. Section 667, subdivision (c) speaks to "credits." It provides: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following: [¶] . . . (5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison."

As petitioner aptly points out, the language in section 2935 speaks of a "reduction" in sentence, not "credits." Section 2935 provides: "Under the guidelines prescribed by the rules and regulations of the director, the Director of Corrections may grant up to 12 additional months of reduction of the sentence to a prisoner who has performed an heroic act in a life-threatening situation, or who has provided exceptional assistance in maintaining the safety and security of a prison. "

Generally, it requires minimal if any effort to obtain conduct credits. Prisoners who have committed crimes prior to January 1, 1983, for example, may earn credit against their sentence under section 2931 if the prisoner does not do any "act for which the prisoner could be prosecuted in a court of

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law, either as a misdemeanor or felony, or any act of misconduct described as a serious disciplinary infraction" Section 2933 awards credit for work assignments or attendance in an approved educational program. Section 2935, on the other hand, allows for a possible sentence reduction for the extraordinary performance of an heroic act. This is a far cry from performing work.

Because a prisoner may serve less time under both the conduct credit statutes and section 2935, the majority conclude they are both conduct credit statutes. But these similarities do not place section 2935 in the same category as the conduct credit statutes. Whales and fish both swim in the ocean but only one is a mammal.

The majority creates the illusion that section 2935 is identical to the conduct credit statutes by doing what it deprecates. It construes section 2935 by, in effect, adding conduct credit language to the statute. Section 2935 allows for the possibility of a sentence "reduction" in unique circumstances. It says nothing about conduct credits which may be lost as well as earned.

The majority posit that section 667, subdivision (c)(5) is clear and unambiguous. But the use of different language in the conduct credit statutes and in section 2935 suggests that the application of section 667, subdivision (c)(5) to section 2935 is at best ambiguous. Ambiguity must be resolved in favor of the defendant. (*People v. Davis* (1981) 29 Cal.3d 814, 828.) The majority also point to the clear intent of the Three Strikes law to impose longer prison terms for repeat felony offenders. The possible reduction of one year for an heroic act provided by section 2935 does not undermine the severe sentencing scheme of the Three Strikes law. If petitioner had in fact received a year's reduction in sentence under section 2935, his sentence would still be considerably longer than if it had not fallen within the Three Strikes law.

The majority thinks it would be a semantic charade to treat differently these statutes in which the Legislature used different language and described different circumstances. Petitioner saved the life of a prison guard. One prisoner watched with indifference as the guard was choking to death. Presumably his insouciance would not render him ineligible for his section 2933 credits. In my view, it is a charade to treat the statutes the same.

The majority and I agree that "a 'strike' offender who performs heroic measures, such as petitioner, should be theoretically eligible for a section 2935 reduction." Petitioner performed an heroic act in saving Mr. Stocking's life in a relatively remote area of the prison facility where there was no telephone, and where help was not immediately available. If anyone deserves consideration for a sentence reduction, it is petitioner. Therefore, should this dissent be found not to reflect an accurate interpretation of the law, I enthusiastically join the majority in urging the Legislature to change the law forthwith.

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GILBERT, P.J.

James E. Ream, Judge
Superior Court County of San Luis Obispo

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