

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
v.)	C.A. No. 02M-02-087
)	
JOHN P. CLYNE,)	
)	
Defendant.)	

On Petition for Writ of Mandamus.
GRANTED in part and DENIED in part.

Submitted: July 15, 2002
Decided: July 22, 2002

ORDER

This 22 day of July, 2002, John P. Clyne, Jr. (“Petitioner”), having filed a Petition for a Writ of Mandamus (“the Petition”), and the Court having received several submissions relating thereto, and having conducted an evidentiary hearing on the Petition, it appears that:

1. Petitioner was sentenced in this Court on March 21, 1997, in Criminal Action No. 96C-10-1593 (Felony Driving Under the Influence), to five years at Level 5 suspended after six months for the balance at various levels of probation. According to records from the Department of Corrections (“the Department”), Petitioner served the entirety of his six month mandatory sentence before he was released. Thereafter, Petitioner violated his probation on several occasions and on each occasion his previous sentence was revoked and he was sentenced anew to

various periods of incarceration with probation to follow. Records from the Department indicate that as of November 20, 2001, Petitioner had served a total of 17 months and 14 days at Level 5. On December 7, 2001, Petitioner again was found to be in violation of his probation, his previous sentence was revoked, and he was sentenced, effective July 10, 2001, to three years six months at Level 5 suspended after completion of drug treatment for the balance at Level 4 and Level 3 probation. This sentence later was modified to reduce the Level 5 sentence from three years six months to three years.

2. Petitioner seeks a writ of mandamus compelling the Department to calculate his earned good time credits and ultimate release date correctly. He has not completed the Level 5 drug treatment component of his sentence and, consequently, he is still incarcerated. According to Petitioner, the Department has miscalculated his earned good time credits in a manner that will substantially extend his period of incarceration.

3. A writ of mandamus is a command that may be issued by the Superior Court to an inferior court, public official, or agency to compel the performance of a duty to which the Petitioner has established a clear legal right.¹ A writ of mandamus will not issue unless the petitioner can establish that there is no other adequate remedy available.² While it is true that a prisoner is not entitled to good time credit as a matter of constitutional right,³ this Court will grant mandamus relief in those rare instances where the Petitioner can show that the Department has awarded good time

¹*Milford 2nd St. Players v. Delaware Alcoholic Beverage Control Comm'n*, 552 A.2d 855 (Del. Super. 1988).

²*In re Hyson*, 649 A.2d 807 (Del. 1994).

³*Snyder v. Andrews*, 708 A.2d 237, 242 (Del. 1998).

credits but has done so in a manner contrary to the statutory scheme upon which such credits are granted and calculated.⁴

4. The Court conducted an evidentiary hearing on July 15, 2002. At that hearing, a representative of the Department testified that the Department had revoked some of the Petitioner's earned good time after each instance where he was found by the Court to be in violation of his probation. The testimony indicated that the Department will revoke earned good time after violations of probation, but will not do so after violations of parole. There is no written policy or procedure which memorializes this practice. At the conclusion of the hearing, the Court concluded that, in the absence of a policy or procedure, the Department could not revoke or forfeit a prisoner's good time credits once the Department gives those credits to a prisoner.⁵ The Department was directed to return to the Petitioner any good time credits it had taken away pursuant to this undocumented practice.

5. Petitioner also alleged that the Department had not recognized certain meritorious good time credit that he had earned as a result of his participation in various remedial programs. At the hearing, the Department agreed that the Petitioner was entitled to 53 days of meritorious good time credit.

6. The only issue remaining, then, is the appropriate means by which to calculate the good time credits Petitioner has earned to date. The Department argues that the calculation of Petitioner's good time credit should be based upon the time Petitioner actually has been incarcerated, as opposed to the time that has lapsed since Petitioner's first day of incarceration. The Department contends that the calculation

⁴See *e.g. Murray v. Messick*, 1995 WL 109006 (Del. Super.).

⁵See *Murray*, *supra* at * 3 (noting that 11 *Del. C.* § 4383 “provides that the Department may forfeit good time credits only pursuant to rules and regulations”).

of Petitioner's good time credits starts anew each time he is returned to Level 5 after violating his probation. Petitioner, of course, suggests that the Court should calculate good time based on the total time which has elapsed since his first day of incarceration in 1997, even though he has been resentenced for violations of probation several times since then.⁶

7. Petitioner contends that the Court's decision in this case is controlled by *Nardini v. Willin*.⁷ In *Nardini*, the Court held that 11 *Del. C.* § 4382 was clear and unambiguous, and that the statute required the Court to calculate good time credit from "the day of the commencing of the prisoner's term of imprisonment—the first day of his incarceration thereunder—not the first day of his return to the institution after a parole violation or escape."⁸ According to Petitioner, *Nardini* supports his contention that his credit for good time must be calculated from the date he first entered prison, not from each successive date he was incarcerated after being found in violation of his probation. Accordingly, in Petitioner's eyes, he is entitled to good

⁶Driving Under the Influence of Alcohol is not encompassed by Delaware's Truth In Sentencing ("TIS") Act, 67 *Del. Laws* Ch. 30 §3 (1989). Petitioner's sentence, therefore, is a non-TIS sentence. Accordingly, the Court must refer to the "old law" for purposes of computing good time credits. 11 *Del. C.* § 4382 is the applicable statute, and it reads: "when a person has not been guilty of any violation of discipline or any rules of the Department and has labored with diligence and fidelity, diminution of sentence shall be: (1) for each month commencing on the first day of his arrival at the facility there shall be a reduction of five days from the sentence; (2) when more than one year of a sentence has elapsed less the reduction of sentence as provided in subdivision (1) of this section, then from that time there shall be a reduction of seven days for each month of the sentence; (3) when more than two years of a sentence has elapsed less the reduction of sentence as provided in subdivisions (1) and (2) of this section, then from that time there shall be a reduction of nine days for each month of the sentence; and, (4) when three or more years of sentence has elapsed, less the reduction of sentence as provided in subdivision (1)- (3) of this section, then from that time there shall be a reduction of ten days for each month of the sentence."

⁷*Nardini v. Willin*, 245 A.2d 164 (Del. 1968).

⁸*Id.* at 166

time credit at a rate of ten days per month for each of the thirty six months of his most recent three year sentence. This equates to 360 days good time credit.

8. Petitioner's reliance upon *Nardini* is misplaced. The Petitioner in *Nardini* was imprisoned for a violation of parole, not a violation of probation. One who violates a condition of his parole is imprisoned for the remainder of the original sentence from which he was granted parole.⁹ Accordingly, the computation of good time credits accounts for the time served on that same sentence prior to the release on parole. And the clock continues to tick, for purposes of calculating good time credits, from the first day of incarceration on the sentence to the last day of the sentence; it does not stop ticking when the defendant is released on parole. A violation of probation, however, often results in a new sentence.¹⁰ In such instances, the defendant's previous sentence is revoked and the Court may order that the defendant serve some or all of the previously suspended Level 5 time.¹¹ Accordingly, the "first day of his arrival at the facility," for purposes of computing good time credits,

⁹See e.g. *State v. Dorsey*, 1995 WL 862118 (Del. Super.)(defendant found guilty of violating parole and ordered to serve "balance of sentence from which [he was] paroled"); *Hall v. Carr*, 692 A.2d 888, 890 (Del. 1997)("the Board revoked Hall's parole, ordered him to serve balance of his original 1990 sentence, and forfeited his previously accrued good time credit").

¹⁰See *State v. Moore*, 2001 WL1012273 (Del. Super.)(upon finding defendant guilty of violating the terms of his probation, "[t]he Court revoked the sentence [] and imposed a new sentence"); *Parker v. State*, 1996 WL 47079 (Del. Supr.)(trial court properly "revoke[d] probation and impose[d] a new sentence" resulting from a violation of probation); *Brown v. State*, 1999 WL 971078 (Del. Supr.)(“Having determined that Brown had violated his probation for a third time, the Superior Court properly exercised its discretion to impose a new sentence, as it had done in connection with Brown's two previous probation violations”); *Dewey v. Messick*, 2000 WL 33115819 (Del. Super.)(“DOC treats a violation of probation as a separate action and the sentence thereon as a sentence separate from any originally imposed on the underlying crime or imposed on any previous violations of probation”).

¹¹Del. Code Ann. tit 11, §4334 (c) (2001).

commences when the defendant begins his new Level 5 sentence(s) for violation of probation. A review of the prior orders violating Mr. Clyne's probation reveals that in each instance his prior sentence was revoked and he was resentenced by the Court. *Nardini* does not apply.

9. Based on the foregoing, assuming continued good behavior, Petitioner would be entitled to the following relief:

- a. Two hundred fifty two days of good time credit on his thirty six month sentence representing: (i) five days per month for the first twelve months of incarceration; (ii) seven days per month for the next twelve months; and (iii) nine days per month for final twelve months;
- b. Fifty three days of previously earned meritorious good time credit;
- c. Some additional meritorious good time credit for continued participation in the Key West program;
- d. Forty five days of time previously served between July 12, 1999 and July 26, 1999 and August 6, 1999 and September 6, 1999; and
- e. One hundred thirty three days of good time credit for time served variously during the period from March 21, 1997 through July 5, 2000 representing: (i) in 1997, thirty days good time credit (six months at five days per month); (ii) in 1999, sixty three days good time credit (seven months at nine days per month); and (iii) in 2000, forty days good time credit (four months at ten days per month).

10. As of today, Mr. Clyne has seven hundred eighteen days (718) remaining of a one thousand ninety five (1095) day sentence. This calculation does not take into account time previously served and earned good time, including meritorious good time he has earned for continued participation in the Key West program and/or other rehabilitative programs.¹² The Department indicates that the Key West program requires six to nine months to complete. Mr. Clyne has completed only sixty days.¹³ When Mr. Clyne's good time credits and time served are factored into the equation, it is clear that Mr. Clyne will not have adequate Level 5 time remaining to complete Key. His short term release date will arrive well before he completes the program.¹⁴ In-patient treatment at Level 4 will not solve the problem; Mr. Clyne would earn good time at Level 4 just as he would at Level 5.¹⁵ While the Court is authorized by statute to tack on an additional six months of transitional probation to the maximum sentence allowed for the underlying crime,¹⁶ it is not inclined to do so in this case. The primary goal of the Court's December 10, 2001 sentencing order was to get Mr. Clyne the treatment he needs to overcome his addiction and return to a productive

¹²Del. Code Ann. tit 11, §4384 (repealed July 17, 1989, but still applicable to non-TIS sentences).

¹³Despite the fact that the Court ordered Mr. Clyne to enter the Key program back in December, 2001, he was not given "bed space" in the program until May 15, 2002. This five month delay in the implementation of the Court's sentence is unfortunate and underscores the critical need for additional resources within the Department to accommodate acute drug and alcohol treatment as a component to an overall rehabilitative plan.

¹⁴"A defendant's short term release date is the date of release after credit is given for any 'good time' earned." *Cooper v. Johnson*, C.A. No. 96M-02-31, Toliver, J. (Del. Super. May 12, 1998)(ORDER at 5 n.4).

¹⁵*Walt v. State*, 727 A.2d 836, 839-40 (Del. 1999).

¹⁶Del. Code Ann. tit. 11, §4204 (l)(2001).

status. Because of the unanticipated delays in accomplishing this goal thus far - - delays not attributable to any fault of Mr. Clyne - - it appears that the most prudent course is to flow Mr. Clyne down to Level 3 so that he can complete a treatment program within the time remaining on his sentence. The remaining Level 5 time, and the Court's willingness to order that Mr. Clyne serve the balance of it should he fail to complete treatment, hopefully will serve as an incentive to ensure that the treatment component of the Court's sentence will be realized.¹⁷ Based on the foregoing, the Court will modify its July 15, 2002, sentence as follows:

As to Cr. A. No. 9610-1593, effective July 10, 2001, the defendant will be placed in custody of the Department of Corrections at supervision Level V for 2 years and 10 months (which accounts for time previously served but not credited to his sentence). This sentence is suspended immediately for Level III probation to include intensive drug and/or alcohol treatment in an appropriate program to be supervised by TASC. Upon successful completion of drug and/or alcohol treatment, the probation will be discharged as unimproved. All other original terms and conditions of probation continue to apply.

11. All prior sentencing orders in connection with this case are hereby **VACATED**.

12. The Department shall calculate good time credits in accordance with this Order and shall release Petitioner from incarceration forthwith.

¹⁷If this should occur, the Court's Level 5 sentence would be just shy of one year. Accordingly, no transitional probation would be required under these circumstances. *Id.*

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: Mr. John P. Clyne
Ophelia Waters, Deputy Attorney General
Department of Correction (by fax)