RENDERED: June 5, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0625-MR

LEON ALCORN — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 96-CI-01865

DEPARTMENT OF CORRECTIONS — APPELLEE

OPINION
AFFIRMING

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BEFORE: BUCKINGHAM, GARDNER and KNOX, JUDGES.

KNOX, JUDGE. Leon Alcorn, acting pro se, appeals from an order of the Franklin Circuit Court entered on January 30, 1997, dismissing his petition for declaratory judgment brought pursuant to Kentucky Revised Statute (KRS) 418.040. We affirm.

Alcorn is an inmate currently residing at the Northpoint Training Center. Alcorn was first incarcerated in September 1976. He was released on parole in June 1988, but returned to prison in November 1988 for violating parole after being convicted of second-degree assault, and being a first-degree persistent felony offender. During his period of incarceration, Alcorn earned good-time credit, but he also had

good-time credit forfeited. In September 1993, Alcorn was reviewed by prison authorities for an award of meritorious good time pursuant to KRS 197.045(3)[1] and the related prison policies. The Department of Corrections states that Alcorn was denied under the existing Corrections Policies and Procedures (CPP) 15.3, which became effective on June 7, 1993. On December 27, 1996, Alcorn filed a petition for declaratory judgment seeking an order from the circuit court directing the prison authorities to consider his application for meritorious good time under the prior prison policies. On January 27, 1997, the Department of Corrections filed a response asserting that Alcorn would not have been eligible for meritorious good time even under the most recent prior policy effective as of August 6, 1990. On January 30, 1997, the circuit court summarily denied the motion and dismissed the action. This appeal followed.

Alcorn contends that his September 1993 application for meritorious good time should have been handled under the prior prison policies in effect in 1976 and 1989, rather than the amended policy effective as of June 1993. He argues that he

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[1] KRS 197.045(3) states as follows:

> An inmate may, at the discretion of the commissioner, be allowed a deduction from a sentence not to exceed five (5) days per month for performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs. The allowance shall be an addition to commutation of time for good conduct and under the same terms and conditions and without regard to length of sentence.

received meritorious good time under the prior policies during his incarceration, and applying the revised policy constituted a violation of the federal constitution's prohibition on ex post facto laws. Alcorn maintains that he was harmed because under the older policies, he was eligible for meritorious good time if he had no good time forfeited for a ninety (90) day period, whereas the June 1993 policy only provided for an award of meritorious good time on a yearly basis. Alcorn relies on the case of Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), to support his claim that the new policy violated the ex post facto clause.

The United States Constitution, Article I Sections 9 and 10 and the Kentucky Constitution, Section 19, prohibit ex post facto laws. The prohibition against ex post facto laws in the federal constitution was included to restrain state legislatures from "enacting arbitrary or vindictive legislation" and to assure that legislative enactments give "fair warning of their effect", thus allowing the public to rely on them. See Miller v. Florida, 482 U.S. 423, 429-30, 107 S. Ct. 2446, 2450-51, 96 L. Ed. 2d 351 (1987). The prohibition applies "only to penal statutes which disadvantage the offender affected by them." See Collins v. Youngblood, 497 U.S. 37, 41, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30 (1990); Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995). The settled definition of an ex post facto law is one,

> which punishes as a crime an act previously committed, which was innocent when done;

> which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time that the act was committed . . . .

Collins, 497 U.S. at 42, 110 S. Ct. at 2719 (quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68, 70 L. Ed. 2d 216 (1925)); see also Blondell v. Commonwealth, Ky., 556 S.W.2d 682, 683 (1977).

Two critical elements must be present for a penal law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. at 29, 101 S. Ct. at 964. See also Lattimore v. Corrections Cabinet, Ky. App., 790 S.W.2d 238, 239 (1990). More recent cases, however, have reiterated that the proper focus of the ex post facto inquiry is whether the relevant change "alters the definition of criminal conduct or increases the penalty by which a crime is punishable," rather than an "ambiguous sort of disadvantage" or "a prisoner's opportunity to take advantage of provisions for early release." California Department of Corrections v. Morales, 514 U.S. 499, 506 n.3, 115 S. Ct. 1597, 1602 n.3, 131 L. Ed. 2d 588 (1995); Lynce v. Mathis, ___ U.S. ___, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997). The ex post facto issue is a matter of "degree", and there is no violation if the change "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." Morales, 514 U.S. at

508-09, 115 S. Ct. at 1603. While the Supreme Court declined to articulate a dividing line for identifying ex post facto changes, it clearly indicated that "speculative", "attenuated" and "conjectural" effects on punishment are insufficient under any threshold to constitute constitutional violations. Id. Moreover, an amendment that merely "alters the method to be followed" under the statute, rather than affecting its substantive standards, does not implicate the ex post facto clause. Id. at 508, 115 S. Ct. at 1602; Dolbert v. Florida, 432 U.S. 282, 293-94, 97 S. Ct. 2290, 2298, 53 L. Ed. 2d 344 (1977). Finally, the party challenging the enactment has the burden of establishing that the measure of punishment has increased in order to prove the existence of a constitutional violation. Morales, 514 U.S. at 510 n.6, 115 S. Ct. at 1603 n.6; Hamm v. Latessa, 72 F.3d 947, 959 (1st Cir. 1995).

In Weaver v. Graham, supra, the Court held that a statute unilaterally reducing the amount of statutory good-time credits a prisoner could earn to reduce his sentence was barred by the ex post facto prohibition. Other cases have recognized, however, that the ex post facto clause does not prevent prison administrators from adopting and enforcing reasonable regulations that are consistent with good prison administration, safety and efficiency. See Jones v. Murray, 962 F.2d 302, 309 (4th Cir. 1992); Ewell v. Murray, 11 F.3d 482, 485 (4th Cir. 1993). ("Reasonable prison regulations are not frozen at the time of each inmate's conduct, but rather, they may be subject to

reasonable amendments as necessary for good prison administration, safety and efficiency, without implicating ex post facto concerns.") As the court stated in Gaston v. Taylor, 946 F.2d 340, 343 (4th Cir. 1991)(en banc):

> [C]hanges in a prisoner's location, variation of daily routine, changes in conditions of confinement (including administrative segregation), and denials of privileges - matters which every prisoner can anticipate are contemplated by his original sentence to prison - are necessarily functions of prison management that must be left to the broad discretion of prison administrators.

See also Morales, 514 U.S. at 508-09, 115 S. Ct. at 1603 (stating minor changes in prison regulations that might create speculative, attenuated risk of affecting prisoner's actual term of confinement would not normally implicate ex post facto prohibition). A prisoner is not entitled to have his sentence carried out under the identical legal regime throughout his incarceration. See Morales, 514 U.S. 510 n.6, 115 S. Ct. at 1603 n.6 (citing Gibson v. Mississippi, 162 U.S. 565, 590, 16 S. Ct. 904, 910, 40 L. Ed. 1075 (1896)); Dominique v. Wold, 73 F.3d 1156, 1163 (1st Cir. 1996).

In 1974, the General Assembly amended KRS 197.045 to authorize, in addition to regular good time, the award of meritorious good time of up to five days per month of incarceration for inmates performing exceptional meritorious services or duties of outstanding importance in conjunction with institutional operations and programs. The granting of an award of meritious good time was discretionary with the Corrections

Commissioner. Shortly thereafter, the Bureau of Prison promulgated a policy regulation delineating the procedural and eligibility requirements for the award of meritorious good time.

The first element under the ex post facto analysis involves retroactivity. In Weaver v. Graham, the Supreme Court held that the major inquiry for determining retroactivity is "whether the law changes the legal consequences of acts completed before its effective date." 450 U.S. at 31, 101 S. Ct. at 965. The Court held that a change in the statutory good time of prisoners altered the legal consequences of their convictions by changing the quantum of their punishment. 450 U.S. at 32-33, 101 S. Ct. at 966. Therefore, the statute reducing statutory good time had a retroactive effect by applying to prisoners convicted for acts committed prior to the effective date of the new statute, and therefore, it was subject to ex post facto analysis. The Court in Weaver suggested that laws affecting the quantum of punishment could be associated with the sentence received by the prisoner. 450 U.S. at 32-33, 101 S. Ct. at 966. Applying the June 1993 policy on meritorious good time to Alcorn constituted a retroactive application of a law for purposes of the ex post facto prohibition. While both Alcorn and the Department of Corrections refer to the CPP policy of August 1990 in their briefs, the more applicable policy for ex post facto analysis is the CPP 15.3 provision that became effective on May 14, 1987 and was in effect in November 1988 when Alcorn last

returned to prison based on a new conviction.[2] Under the 1987 policy, institutional supervisory staff initiated recommendations to a three-member meritorious good time committee for review and recommendation. In order to actually obtain the meritorious good time award, in addition to the committee, it had to be approved by the prison superintendent, the deputy commissioner of institutions and the commissioner of corrections. CPP 15.3(C)(1987). In order to be eligible, an inmate could have no incident reports resulting in more than a warning by the prison disciplinary committee and he could have no existing forfeited statutory good time. CPP 15.3(A)(5)(1987). No inmate could be considered for an award if he had been considered within the previous ninety (90) days. CPP 15.3(C)(6)(1987).

Under the policy that became effective on June 7, 1993, the Department of Corrections altered the procedural and eligibility requirements for meritorious good time. For example, all inmates generally were automatically reviewed for an award on a yearly basis, unless they had lost non-restorable good time. CPP 15.3(V)(1)(1993). Unlike the prior policy, inmates who had outstanding good time loss subject to restoration remained eligible for meritorious good time, however, the amount of the award was subject to be decreased by five days for each month in which a major disciplinary violation was received. CPP

[2] A review of the meritorious good time policies in force in September 1976 and August 1990 reveals that they do not differ from the May 1987 policy in effect in November 1988 in substantial respects. Therefore, our analysis of the ex post facto issue would be similar utilizing any of these policies.

15.3(VI)(A) and (C)(1993). The Corrections Commissioner had discretion on the ultimate award of meritorious good time. CPP 15.3(VII)(E)(1993).

In September 1993, Alcorn was reviewed for a potential award of meritorious good time under the June 1993 policy and received no award. Alcorn's main complaint involves the change in the policy from a ninety (90) day review for eligibility to a yearly review. He implies that under the older policy he would have received an award of meritorious good time because he had a ninty (90) day period without a major disciplinary violation. Alcorn's evaluation of the prison policies is in error. Under the prior policy in effect in November 1988, Alcorn would have been ineligible for meritorious good time because he had five months of outstanding forfeited statutory good time that had not been restored. Alcorn's forfeited good time was not fully restored until January 1995.

In addition, Alcorn has not established the second element under ex post facto analysis because he has not shown that the application of the June 1993 policy increased the measure of punishment. First, the award of meritorious good time was completely discretionary with the Corrections Commissioner. The existence of discretion in the ultimate grant of good time does not necessarily preclude scrutiny under the ex post facto clause. See Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989); Fleming v. Oregon Board of Parole, 998 F.2d 721 (9th Cir. 1993). Nevertheless, the extent of discretion reserved by the prison

authorities is relevant to the issue of the new policy's speculative effects and to the requirement for fair notice of the changes created by a new policy. In fact, where the prison authorities have unfettered discretion in applying both prison policies, the analysis delineated in Morales indicates no ex post facto violation exists because of the speculative and attenuated nature of the possible effects of the change in policy. See Jones v. Georgia State Board of Pardons and Paroles, 59 F.3d. 1145 (11th Cir. 1995).

In the instant case, the provisions in both the May 1987 and June 1993 meritorious good time policies required a recommendation and approval by several prison officials including the Corrections Commissioner. While the completion of several requirements permitted inmates to be considered for meritorious good time, the prison officials apparently had unfettered discretion on whether to approve an award. Second, the June 1993 policy enlarged the eligibility standards by allowing inmates with some forfeited statutory good time to be considered for meritorious good time. For instance, Alcorn received a meritorious good time award in September 1994 despite having outstanding forfeited statutory good time. Alcorn's assertion that he would have received meritorious good time under the old policy that he did not receive under the new policy is erroneous given the requirement in the old policy that all previously forfeited statutory good time be fully restored before an inmate could be eligible for an award. Third, the change in the review

to a yearly period, rather than a ninety (90) day period appears to be more procedural than substantive. Alcorn has not demonstrated that the actual amount of meritorious good time available was less under the new procedure. As a result, Alcorn has not satisfied his burden of establishing that the measure of punishment had changed sufficiently to raise the possible existence of an ex post facto violation.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

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