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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001982-MR

DAVID B. JENNINGS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-01143

DEBBIE KAYS, DEPARTMENT OF CORRECTIONS,
COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: David B. Jennings, pro se, has appealed from an order entered by the Franklin Circuit Court on September 9, 2004, which denied his petition for declaratory judgment concerning his claim for good-time credits. Having concluded

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

that KRS 197.045(4)² does not operate as an ex post facto law as applied to Jennings, we affirm.

Jennings was convicted on May 6, 2002, of sodomy in the second degree³ for a crime occurring on January 1, 1998. He is currently serving a ten-year sentence at the Northpoint Training Center in Burgin, Kentucky. On August 13, 2004, Jennings filed a petition for declaratory judgment pursuant to CR⁴ 57 in the Franklin Circuit Court seeking a declaration that KRS 197.045(4) is an unconstitutional ex post facto law. On

² KRS 197.045(4), which was enacted on July 15, 1998, provides:

Until successful completion of the sex offender treatment program, a sex offender may earn good time. However, the good time shall not be credited to the sex offender's sentence. Upon the successful completion of the sex offender treatment program, as determined by the program director, the offender shall be eligible for all good time earned but not otherwise forfeited under administrative regulations promulgated by the Department of Corrections. After successful completion of sex offender treatment program, a sex offender may continue to earn good time in the manner provided by administrative regulations promulgated by the Department of Corrections. Any sex offender, as defined by KRS 197.410, who has not successfully completed the sex offender treatment program as determined by the program director shall not be entitled to the benefit of any credit on his sentence. A sex offender who does not complete the sex offender treatment program for any reason shall serve his entire sentence without benefit of good time, parole, or other form of early release. The provisions of this section shall not apply to any sex offender convicted before July 15, 1998, or to any mentally retarded sex offender.

³ KRS 510.080.

⁴ Kentucky Rules of Civil Procedure.

September 9, 2004, the trial court entered an order dismissing Jennings's petition. This appeal followed.

Jennings claims that KRS 197.045(4) as applied to him operates as an unconstitutional ex post facto law because the offense for which he stands convicted was committed prior to the effective date of KRS 197.045(4). We conclude that the case before us is similar to Martin v. Chandler,⁵ where the defendant, like Jennings, committed a sexual offense prior to the effective date of KRS 197.045(4), and was convicted of the offense after the effective date. Martin also argued that applying KRS 197.045(4) to him violated the ex post facto law, but our Supreme Court disagreed and stated as follows:

The United States Constitution prohibits the states from "pass[ing] . . . any ex post facto law," and the Kentucky Constitution similarly states that "[n]o ex post facto law . . . shall be enacted[]" [footnotes omitted].

Although the Latin phrase ["]ex post facto["] literally encompasses any law passed ["]after the fact["] . . . ["][i]t is settled . . . that any statute 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 when the act was committed, is prohibited as ex post facto" [footnote omitted].

⁵ 122 S.W.3d 540 (Ky. 2003).

In Weaver v. Graham, [450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)] the United States Supreme Court held that a retrospective change in the number of automatic "gain-time" credits provided for Florida inmates violated the Ex Post Facto Clause. The Court explained that the United States Constitution's ex post facto prohibition was designed "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Thus, "[c]ritical to relief under the Ex Post Facto Clause is . . . the lack of fair notice . . . when the legislature increases punishment beyond what was prescribed when the crime was consummated." In reliance upon dicta found in Weaver v. Graham, this inquiry has, at times, been articulated in terms of whether an offender has been somehow "disadvantaged" by a change in the law after the crime was consummated. The United States Supreme Court, however, has subsequently identified the "disadvantaged" language as dicta and has framed the appropriate inquiry as whether a retrospective change results in increased punishment:

Our opinion[] in . . . Weaver . . . suggested that enhancements to the measure of criminal punishment fall within the ex post facto prohibition because they operate to the "disadvantage" of covered offenders. See . . . Weaver, 450 U.S., at 29, 101 S.Ct. 960. . . . But that language was unnecessary to the result in [that case] and is inconsistent with the framework developed in Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). After Collins, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of

"disadvantage," . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable [footnote omitted].

. . .
The authority most germane to the issue now before the Court, however, is Lozier v. Commonwealth, [32 S.W.3d 511 ([Ky.App.] 2000)] in which the Court of Appeals addressed the constitutionality of KRS 197.045(4), the same enactment at issue here. Lozier referenced the Weaver v. Graham dicta, but recognized the proper context of the "disadvantage" language by quoting Weaver v. Graham for the proposition that "the ex post facto prohibition . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." The Lozier Court correctly held that KRS 197.045(4) did "not operate as an ex post facto law as applied to the appellant" because it did not increase Lozier's sentence [footnotes omitted] [emphasis added].

. . .
[A]t the time that Appellant committed his crimes, there was no promise from the Commonwealth of Kentucky that, if convicted and sentenced to prison, Appellant could satisfy his sentence prior to its maximum expiration date simply by maintaining good conduct during his confinement. Other jurisdictions addressing ex post facto challenges to retrospective changes to discretionary good time schemes have concluded that the risk that an inmate might be deprived of good time credits that he or she might otherwise had received is "too attenuated and speculative to constitute an ex post facto violation" [emphases original].

. . .

The discretionary nature of Kentucky's good time statutes dictates a similar result here. Stated in the plainest terms, although KRS 197.045(4) has been applied retrospectively in Appellant's case, the statute's additional requirement for Appellant's eligibility to earn discretionary good time credits towards his sentence is not an "increase in punishment" prohibited by the Ex Post Facto Clause [emphasis original]. . . .

In support of his position, Jennings relies on the United States Supreme Court cases of Weaver, supra, and Miller v. Florida.⁶ However, we conclude the case before us is distinguishable from both Weaver and Miller. In Weaver, the defendant was charged with and convicted of murder in the second degree in 1976. In 1978 the Florida Legislature repealed the previous formula for deducting gain-time credits from the sentences of prisoners and replaced it with a more stringent formula. Thus, Weaver had two years' worth of accumulated gain-time credits reduced retroactively. In the case at bar, Jennings was not sentenced until after the effective date of KRS 197.045(4), therefore he did not lose any credits he had previously earned through the retroactive application of the statute.

⁶ 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

Further, in Miller, the defendant was convicted in August 1984 of sexual battery with slight force, burglary with an assault, and petit theft. On April 25, 1984, when the offenses were committed, the sentencing guidelines adopted in October 1983, were still in effect. However, the Florida Supreme Court proposed several revisions to the sentencing guidelines, and on July 1, 1984, new guidelines became effective. Therefore, Miller was sentenced pursuant to the newly-enacted guidelines, and pursuant to the new guidelines, his sentence was increased from five and one-half years to seven years.

The United States Supreme Court determined that applying the newly-enacted guidelines to Miller was unconstitutional as a violation of the ex post facto provision because the new guidelines imposed a punishment for the crimes that was greater than the punishment at the time the crimes were committed. Contrastly, Jennings's sentence would not be lengthened if he did not earn any good-time credits. Further, upon completion of the sex offender treatment program, Jennings will receive credit for any good time he has earned. Thus, if Jennings completes the sex offender program, his sentence will not be adversely affected by the withholding of good-time credits he has previously earned.

While KRS 197.045(4) is being applied retroactively in this case, unlike Weaver, Jennings is not receiving a greater punishment. Unlike the Florida statute in Miller, the statute in the case before us merely required Jennings to successfully complete a sex offender treatment program in order to receive good-time credits. This statutory requirement does not unconstitutionally impose a harsher punishment on Jennings.

Having concluded that the case before us is not distinguishable from Martin, we hold that KRS 197.045(4) does not operate as an ex post facto law as applied to Jennings. Accordingly, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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