RENDERED: AUGUST 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002540-MR

TIMOTHY L. BROWN — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE
ACTION NO. 07-CI-00887

JOHN REES, KY. DEPARTMENT OF
CORRECTIONS, COMMISSIONER — APPELLEE

AND NO. 2007-CA-002541-MR

RICHARD COX — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE
ACTION NO. 07-CI-00889

JOHN REES, KY. DEPARTMENT OF
CORRECTIONS, COMMISSIONER — APPELLEE

AND NO. 2007-CA-002542-MR

JAMES CATLETT APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE
ACTION NO. 07-CI-00944

JOHN REES, KY. DEPARTMENT OF CORRECTIONS, COMMISSIONER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

CAPERTON, JUDGE: Timothy L. Brown (Brown), Richard Cox (Cox), and James Catlett (Catlett) bring this appeal from three separate judgments of the Franklin Circuit Court, entered November 5, 2007, whereby the court entered an order dismissing the three inmates' petitions for declaration of rights. Subsequent motions to alter, amend or vacate the November 5, 2007, judgments were denied. After a thorough review, we affirm.

[1] Retired Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice Pursuant to Section 110 (5)(b) of the Kentucky Constitution.

Brown, Cox, and Catlett (collectively the "Appellants") filed three separate but essentially identical claims that the Department of Corrections (the Department) had violated their protected liberty interest in failing to award them meritorious good time credit (MGT), that the Department had violated the prohibition against ex post facto laws by applying KRS 197.045(4) to the appellants', that the court erred in ruling that the Appellants' had received the statutory good time credits, and that the Appellants' equal protection rights were violated when the Department awarded good time to a fellow inmate. For judicial efficiency we shall address all three appeals in one opinion.

We do not agree with the Appellants' that MGT is a protected liberty interest entitled to due process protection. This Court addressed this issue in *Anderson v. Parker*, 964 S.W.2d 809 (Ky.App. 1997) and decided that because the award of MGT is discretionary, it does not qualify as a protected liberty interest. Therefore, the Department may use its discretion in awarding MGT and is not constrained to continue to grant an inmate MGT even if they had previously awarded an inmate MGT.

The Appellants' next argument that the Department had violated the prohibition against ex post facto laws by applying KRS 197.045(4) to the Appellants' likewise fails to provide relief. KRS 197.045(4) expressly provides that sex offenders convicted after July 15, 1998, must complete a sex offender treatment program (SOTP) to have their good time credit applied. The Appellants' convictions were prior to July 15, 1998, making the statutory requirement

inapplicable to them. However, a review of Appellants' resident record cards indicates that the Department did not apply the provisions of KRS 197.045(4) to Appellants' MGT. To the contrary, MGT was awarded to them after the enactment of the statute.

Further, the record contains a letter from the Department explaining the decision not to award MGT to Brown. The letter correctly states that MGT is discretionary. Kentucky Corrections Policies and Procedures 15.3 authorizes the award of MGT which is defined as, "a good time credit that may be awarded for performing duties of outstanding importance in connection with institutional operations and programs." *Anderson v. Parker*, 964 S.W.2d 809, 810 (Ky.App. 1997)(emphasis in original). As such, both the availability and amount of MGT awarded under this section falls within the Department's discretion. While KRS 197.045(4) does not require the inmates to participate in such a program in order for any good time he earns to be credited to his sentence, the refusal to participate in an SOTP certainly may be a factor in the determination of whether he should be awarded additional MGT pursuant to KRS 197.045(3), contrary to what the Appellants' assert. Further, KRS 197.045(4) does not violate the ex post facto prohibition as it does not enhance the sentence.[2] *See Martin v. Chandler,* 122 S.W.3d 540 (Ky. 2003). Therefore, this argument also fails.

We also disagree that the court erred in ruling that the inmates had received the statutory good time credits. A review of the resident record cards

[2] We note that the application of MGT to an inmate actually decreases the amount of time to be served.

shows that Appellants' have been awarded and/or are eligible for the statutory good time credits. While the Appellants' argue that they are entitled to ten (10) days per month served under KRS 197.045(1) our case law serves to illuminate the calculation method under the statute. In *Martin* the Court determined:

> Appellant's suggestion that the "good time allowance" constitutes an "up-front" credit for the maximum amount of KRS 197.045(1) non-educational good time erroneously assumes that every well-behaved inmate is entitled to the statutory maximum of ten (10) days per month of such credit. However, unlike the KRS 197.045(1) educational good time credit, which is mandatory FN8 (but not implicated in this case), the KRS 197.045(1) non-educational good time credit is akin to the KRS 197.045(3) meritorious good time credit FN9 in that both its availability and amount is a matter for the KDOC's discretion. As such, Appellant had no vested right nor reasonable entitlement to any KRS 197.045(1) non-educational good time credit. Because it is not possible to make a prospective determination of how an inmate will conduct himself or herself during a term of imprisonment, the thirty (30) month "good time allowance" reflected on Appellant's KDOC Resident Record Card is simply the maximum amount of KRS 197.045(1) non-educational good time that Appellant could possibly receive. Of course, even actually-awarded KRS 197.045(1) non-educational good time is subject to the KDOC's ability to "forfeit any good time previously earned by the prisoner or deny the prisoner the right to earn good time in any amount." And, Appellant's "good time allowance" in entry 6 is properly understood not as an actual credit on his sentence but rather as a maximum-amount "place-holder," which, if subtracted from the maximum expiration date, allows the KDOC to calculate Appellant's minimum expiration date.
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> *See* Brenn O. Combs, Understanding Sentence Calculation and Application, 25 (No. 5) THE

> ADVOCATE 30, 31 (Sept. 2003) ("Although statutory good time is only 'earned' when the month has been served, as a practical matter an allocation of the statutory good time credit applicable to the inmate's sentence is placed on his Resident Record Card in advance.") As a prison sentence is reduced from the front end by service and from the back end by statutory good time, the two (2) ends will meet somewhere in the middle. Thus, an inmate with a ten (10) year (or one hundred and twenty (120) month) sentence who receives a maximum KRS 197.045(1) statutory good time award of ten (10) days for each month will serve seven (7) years and six (6) months (or ninety (90) months) because, after serving ninety (90) months and receiving thirty (30) months of 197.045(1) statutory good time credit [90 months of service x 10 days of KRS 197.045(1) statutory good time per month = 900 days or 30 months], he or she would have served out the sentence by reaching the minimum expiration date.

Id. at 543-545 (internal citations omitted).

Based on our review of the record and *Martin,* the trial court did not err in determining that Appellants' had received the proper amount of statutory good time credit.

Last, the Appellants' argue that their equal protection rights were violated when the Department awarded good time to a fellow inmate. This issue is unpreserved as it is brought up for the first time on appeal. "It is a matter of fundamental law that the trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court." *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky.App. 2003). We do note that the arguments asserted by Appellants' fail to make out an equal protection claim. As the Sixth Circuit stated, "the plaintiff could not make out a

violation of his equal protection rights simply by showing that other inmates were treated differently. He would have to show that he was victimized because of some suspect classification, which is an essential element of an equal protection claim." *Newell v. Brown,* 981 F.2d 880, 887 (6th Cir. 1992) (internal citations omitted). Therefore, we do decline to find a violation of Appellants' equal protection rights.

We find no error in the judgments of the Franklin Circuit Court and accordingly affirm.

ALL CONCUR.

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