NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1716

STEVEN F. MCLELLAND

VERSUS

JERRY GOODWIN, WARDEN
AND JAMES M. LEBLANC, SECRETARY

Judgment Rendered: APR 2 6 2013

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 599,755

The Honorable R. Michael Caldwell, Judge Presiding

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Steven F. McLelland **Homer, Louisiana**	**Plaintiff/Appellant** ***Pro Se***
Susan Wall Griffin **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellee** **Louisiana Department of Public Safety and Corrections,** **James M. LeBlanc, Secretary**

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BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

GJ concurs in result

THERIOT, J.

Steve McLelland, an inmate in the custody of the Louisiana Department of Public Safety and Corrections ("DPSC"), appeals the judgment of the Nineteenth Judicial District Court, affirming DPSC's final administrative decision denying the relief McLelland requested through an administrative remedy procedure ("ARP"). For the following reasons, we affirm.[1]

FACTS AND PROCEDURAL HISTORY

On November 19, 2002, McLelland was convicted of two counts of aggravated incest[2] and one count of attempted aggravated rape[3]. He received fifteen (15) years at hard labor for each count of aggravated incest, to run consecutively with each other, and twenty-five (25) years at hard labor for attempted aggravated rape, to run concurrently with sentence for the aggravated incest convictions. His total sentence, before any computation for good time credit, was thirty (30) years at hard labor.

On November 22, 2010, McLelland filed his first ARP, complaining that DPSC had incorrectly computed his good time credit toward his date of release. He claimed that under Louisiana Legislative Act 138,[4] he was to receive 30 days' credit for every 30 days actually served on his consecutive 15 year sentences, thereby requiring him to serve 15 years of his 30 year sentence. He claimed that prison staff had advised him originally that he was to serve his 30 year sentence under Act 138, but that afterward he was

[1] The Commissioner of the 19th JDC noted in his screening recommendation that all of the parties named by McLelland as defendants except for the Secretary of DPSC should be dismissed, since only DPSC is a proper party in actions regarding judicial review of ARPs. La. R.S. 15:1177(A)(1)(b). Accordingly, the court dismissed with prejudice all the named defendants except for DPSC.

[2] La. R.S. 14:78.1.

[3] La. R.S. 14:42, 27.

[4] The computation of "good time" credit is set out in La. R.S. 15:571.3, which has been amended numerous times since its enactment. One of those amendments, 1991 La. Acts, No. 138, § 1 (Act 138), effective January 31, 1992, provided that prisoners could earn diminution of sentence, to be known as "good time," at the rate of thirty days of good time for each thirty days served in actual custody. A later amendment, 1995 La. Acts, No. 1099 (Act 1099), effective January 1, 1997, provided that an inmate convicted a first time of a crime of violence could earn diminution of sentence at a rate of three days for every seventeen days in actual custody. The date of the commission of the crime controls the computation of the diminution of sentence. See *State ex rel. Bickman v. Dees*, 367 So.2d 283, 287 (La.1978).

advised he would not be released until his concurrent 25 year sentence was served, which was subject to the time reduction of Legislative Act 1099, incorporated into La. R.S. 15:574.4(B). Act 1099 provides that for any conviction of a crime of violence, eighty-five percent of the sentence must be served, after which the offender can receive a diminution of the remainder of the sentence. McLelland's conviction of attempted aggravated rape is a crime of violence enumerated under La. R.S. 14:2(B). McLelland claimed that since the 30 year sentence is longer, it is the controlling sentence for his release date.

In response to the first ARP, the prison advised that his 25 year sentence is in fact the controlling sentence because according to Act 1099, McLelland is required to serve a minimum 21.25 years, whereas for his 30 year sentence he is only required to serve 15 years, since aggravated incest is not a crime of violence and is controlled by Act 138. DPSC concurred in the denial when McLelland filed his second ARP. McLelland subsequently filed a petition for judicial review of the rulings on his ARP with the 19th JDC. The court adopted the commissioner's recommendation, reiterating the same reasons DPSC had given in its denial and affirmed DPSC's decision. McLelland then timely filed this appeal.

STANDARD OF REVIEW

Inmates aggrieved by a decision rendered by DPSC may seek judicial review pursuant to La. R.S. 15:1177. The standard of review is set forth in La. R.S. 15:1177(A)(9), as follows:

> The court may reverse or modify the decision only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) In violation of constitutional or statutory provisions.
> (b) In excess of the statutory authority of the agency.
> (c) Made upon unlawful procedure.

(d) Affected by other error of law.
(e) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
(f) Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

Victorian v. Stalder, 1999-2260, p. 5-6 (La. App. 1 Cir. 7/14/00), 770 So.2d 382, 384-385.

DISCUSSION

Louisiana Revised Statutes 15:574.4(B), effective January 1, 1997, requires inmates convicted of a crime of violence on or after the effective date to serve 85% of their sentence prior to being deemed parole eligible. *Holmes v. Louisiana Dept. of Public Safety and Corrections,* 2011-2221, p. 2-3 (La. App. 1 Cir. 6/8/12), 93 So.3d 761, 763, *writ denied,* 2012-1788, (La. 12/14/12), 104 So.3d 436. The statute provides that "a person convicted of a crime of violence and not otherwise ineligible for parole *shall* serve at least eighty-five percent of the sentence imposed." (*Emphasis added.)* Although McLelland could be parole eligible for his aggravated incest sentences after 15 years, he is still required to serve 21.25 years for his attempted aggravated rape charge before becoming parole eligible. While McLelland counts two consecutive 15 year sentences as a 30 year sentence, he also received a 25 year sentence for a crime of violence. Mr. McLelland must serve at least 85% of the sentence for attempted aggravated rape, therefore that sentence controls his release date.

Under La. R.S. 15:571.3(B)(1)(a), "every inmate in the custody of [DPSC] who has been convicted of a felony... and sentenced to a number of years or months, may earn... a diminution of sentence by good behavior."

McLelland received two consecutive sentences of 15 years for crimes that are not defined as crimes of violence under La. R.S. 14:2(B). However, La.R.S. 14:574.4(B)(1) makes it mandatory that McLelland serve 85% of his sentence for attempted aggravated rape, which is a crime of violence, the minimum time of imprisonment being 21.25 years, served concurrently with the sentences for aggravated incest. Thus, the shortest amount of time McLelland would physically serve in prison is 21.25 years.

CONCLUSION

The computation of McLelland's release date as interpreted by the prison, DPSC, and the 19th JDC is correct. McLelland cannot be released on parole pursuant to La. R.S. 15:571.3(A) until he can be released pursuant to La. R.S. 574.4(B)(1).

DECREE

The ruling of the 19th JDC affirming DPSC's decision to deny McLelland's ARP is affirmed. All costs in this appeal are assessed to the appellant, Steven McLelland.

AFFIRMED.