

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0241

PAUL MASSEY

VERSUS

LOUISIANA DEPARTMENT OF
PUBLIC SAFETY & CORRECTIONS

Judgment rendered NOV 01 2013

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 606,221
Honorable William A. Morvant, Judge

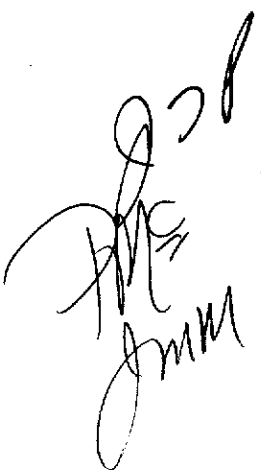
OVERTON T. HARRINGTON, JR.
GRETNA, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
PAUL MASSEY

DEBRA A. RUTLEDGE
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANT-APPELLEE
LOUISIANA DEPARTMENT OF PUBLIC
SAFETY AND CORRECTIONS

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.



PETTIGREW, J.

Paul Massey, an inmate in the custody of the Department of Public Safety and Corrections ("DPSC"), appeals a judgment that affirmed DPSC's final decision in an administrative remedy procedure and dismissed his petition for judicial review of that decision. We affirm.

BACKGROUND

According to the record, Massey committed the offenses of indecent behavior with a juvenile and attempted molestation of a juvenile on August 9, 1994. However, he was not convicted until February 7, 2007, and was sentenced on March 2, 2007. The record reflects that Massey had not previously earned or been credited with any good time. At some point after his sentencing, Massey began to question the correctness of DPSC's calculation and ultimate denial of his "good time" diminution of sentence eligibility status. Massey filed a request for relief pursuant to La. R.S. 15:1177, seeking petition for judicial review of the final agency decision rendered under Administrative Remedy Procedure ("ARP") No. PCC-2011-302, in which he challenged DPSC's denial of his "good time" eligibility. Massey argued that he was entitled to earn good time based on the law that was in effect when the crime was committed. See former La. R.S. 15:571.3, as amended by 1991 La. Acts, No. 138, § 1, effective January 31, 1992 (Act 138).¹ He alleged that to apply a later version of the statute, albeit the law in effect when he was convicted and sentenced, violates his right against *ex post facto* application of laws.²

DPSC reviewed Massey's ARP according to the procedures provided by law and denied his request for relief at each step. Massey then filed his petition for judicial review

¹ The computation of "good time" credits is set out in La. R.S. 15:571.3, which has been amended numerous times since its enactment. One of those amendments, Act 138, provided that prisoners could earn diminution of sentence, to be known as "good time," at a rate of thirty days of good time for each thirty days served in actual custody.

² DPSC's denial of good time in the instant case was based on 2006 La. Acts, No. 572, § 1 (Act 572), which amended La. R.S. 15:571.3(B)(2)(b) to provide, as follows:

If a person is convicted of or pleads guilty to ... R.S. 14:81 (indecent behavior with juveniles), [or] ... R.S. 14:81.2 (molestation of a juvenile) ... and is sentenced to imprisonment for a stated number of years or months, the person shall not be eligible for diminution of sentence for good behavior.

in the Nineteenth Judicial District Court (19th JDC); it was assigned to a commissioner for evaluation and to make a recommendation to the district court judge.³ DPSC filed a response to his petition and attached the entire administrative record. The commissioner reviewed the record and determined that, based on applicable law, the DPSC decision should be affirmed and Massey's petition for judicial review should be dismissed. On June 1, 2012, after a *de novo* review of the record and the commissioner's recommendation, the district court judge signed a judgment incorporating the commissioner's recommendation. Massey then appealed to this court, presenting the same arguments concerning the unconstitutional *ex post facto* application of the law.

DISCUSSION

Article I, § 10 of the United States Constitution and Article I, § 23 of the Louisiana Constitution prohibit applying criminal laws *ex post facto*. As noted by the commissioner in his report to the district court judge, this court has previously addressed the analysis to be used when evaluating a claim of an *ex post facto* violation. In **Williams v. Creed**, 2007-0614 (La. App. 1 Cir. 12/21/07), 978 So.2d 419, writ denied, 2008-0433 (La. 10/2/09), 18 So.3d 111, Williams, like Massey herein, argued that the law in effect at the time of commission of the offense controlled the good time eligibility on his sentence. **Williams**, 2007-0614 at 5-6, 978 So.2d at 423-424.⁴ The **Williams** court concluded as follows:

Traditionally, Louisiana courts have held that in order for a criminal or penal law to fall within this prohibition, the law had to be passed after the date of the offense, relate to that offense or its punishment, and alter the situation of the accused to his disadvantage. State ex rel. Olivieri v. State, 00-0172 (La. 2/21/01), 779 So.2d 735, 743-44, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001). However, the Louisiana Supreme Court narrowed the focus of *ex post facto* analysis in Louisiana in the Olivieri case. While the court recognized that, in previous *ex post facto* analysis, Louisiana jurisprudence had broadly focused on whether the change in a law operated to the disadvantage of an accused, the

³ The office of commissioner of the 19th JDC was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. La. R.S. 13:713(C)(5).

⁴ Although the authoring judge may not agree with the legal analysis of **State ex rel. Olivieri v. State**, 2000-0172 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001), he is constrained to follow same.

Olivieri court adopted the current federal approach to *ex post facto* analysis, which focuses on whether any change in the law altered the definition of criminal conduct or increased the penalty by which the crime was punishable. Olivieri, 779 So.2d at 743-44; State v. Smith, 794 So.2d 41, 45 (La. App. 5th Cir.5/30/01), *writ denied*, 01-1921 (La.6/7/02), 817 So.2d 1145.

....

Having reviewed the cited jurisprudence, we note that all the cases cited by Williams-as well as many other cases-unequivocally support his argument. However, none of these cases were decided after the Olivieri court narrowed the principles to be used in an *ex post facto* analysis. Moreover, our research has revealed no reported cases applying the Olivieri *ex post facto* analysis to the issue before this court, namely, whether the application of a version of LSA-R.S. 15:571.3 that was amended after commission of the offense, but before conviction of the offense, and which removed the eligibility for early release that was available to the defendant through good time at the time the offense was committed, violates the prohibition against a change in the law that increases the penalty by which the crime is punishable. Therefore, this is a *res nova* issue for this court.

....

Having reviewed the cases cited by Williams, as well as many other cases applying an *ex post facto* analysis to situations involving the numerous amendments to the good time statute, we conclude that this line of cases does not comply with the narrower Olivieri criteria. After Olivieri, the only relevant issues regarding a legislative change are "whether any such change alters the definition of criminal conduct or increases the penalty by which the crime is punishable." Olivieri, 779 So.2d at 744. In other words, in a post-sentence context, once a sentence has been imposed on a defendant, any change in the law that later occurs cannot be applied to that defendant to increase that sentence or penalty. Anything other than or less than this is not protected by the *ex post facto* clauses in the United States and Louisiana Constitutions.

In the matter before us, the definition of the criminal conduct committed by Williams was not changed by the amendment to the good time statute that occurred after he committed that crime. The only question, therefore, is whether that change could be applied to Williams in such a way that it increased the penalty by which his crime as a multiple offender was punishable. The district court imposed on him a sentence or penalty of twenty-five years for the second count of attempted aggravated rape. The court advised that, pursuant to the plea agreement, the sentence would not be increased, even if the state filed a multiple offender charge against Williams. After Williams was charged as a multiple offender, the original sentence on the second count was vacated, and a new sentence was imposed, based on the multiple offender adjudication. That sentence was also twenty-five years. There was no increase in the penalty imposed on him. Rather, the change in the good-time statute simply removed the opportunity to take advantage of provisions for early release.

Williams, 2007-0614 at 4-9, 978 So.2d at 422-425.

In the matter before us, as in **Williams**, the definition of the criminal conduct committed by Massey was not changed by the amendment to La. R.S. 15:571.3 that occurred after he committed the crimes for which he was convicted and sentenced. Nor did the application of the amended versions of La. R.S. 15:571.3 increase the penalty by which his crimes were punishable. Therefore, the application of Act 572 to Massey did not violate the *ex post facto* provisions of the Louisiana and United States Constitutions.

CONCLUSION

After a thorough review of the record and relevant jurisprudence, we find no error of law or abuse of discretion by the district court. Accordingly, we affirm the district court's June 1, 2012 judgment and assess all costs associated with this appeal against Paul Massey.

AFFIRMED.