STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA LYNN LICKFELDT,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS, SCOTT CORRECTIONAL FACILITY WARDEN, and SCOTT CORRECTIONAL FACILITY RECORDS OFFICE SUPERVISOR,

Defendant-Appellant.

FOR PUBLICATION
August 31, 2001
9:10 a.m.

No. 224139
Washtenaw Circuit Court
LC No. 98-009388-AW

Updated Copy
November 9, 2001

Before: Neff, P.J, and O'Connell and R. J. Danhof*, JJ.

DANHOF, J.

Defendants appeal as of right a grant of summary disposition and writ of mandamus ordering them to immediately terminate plaintiff's sentences from her 1986 convictions. We affirm.

Plaintiff is a prisoner currently serving a string of consecutive sentences. Her initial conviction was in 1986 when she was sentenced to 3 1/2 to 14 years each for two counts of uttering and publishing, MCL 750.249. In 1987, she was sentenced for prison escape, a mandatory consecutive sentence, MCL 750.193. She has since added other sentences for subsequent crimes, some adding to her consecutive string under MCL 768.7a because she committed the crimes while she was on parole.

After plaintiff had served the fourteen-year maximum, adjusted for time served and good-time credit, she requested that defendants terminate her original sentences, arguing that termination is required by statute. This would reduce her security level and make her eligible for different facilities and programs that are not available at her security level. The trial court agreed with plaintiff that she had a statutory right to have the 1986 sentences terminated under MCL 750.193 and issued a writ of mandamus compelling defendants to comply. We agree that because of the specific language used in MCL 750.193(1), plaintiff's original sentences must be terminated.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The issuance of a writ of mandamus is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. *Baraga Co v State Tax Comm*, 243 Mich App 452, 454-455; 622 NW2d 109 (2000). Thus, if plaintiff has no clear right to termination or if defendants have discretion to terminate sentences, a writ of mandamus is inappropriate. We review a trial court's decision regarding a writ of mandamus for abuse of discretion. *In re MCI Telecommunications Complaint*, 460 Mich 396, 443-444; 596 NW2d 164 (1999).

The outcome of this case hinges on the language of the statute that makes prison escape a felony:

> A person imprisoned in a prison of this state who breaks prison and escapes, breaks prison though an escape is not actually made, escapes, leaves the prison without being discharged by due process of law, attempts to break prison, or attempts to escape from prison, is guilty of a felony, punishable by further imprisonment for not more than 5 years. *The term of further imprisonment shall be served after the termination, pursuant to law, of the sentence or sentences then being served.* [MCL 750.193(1) (emphasis added).]

Plaintiff 's sentence for this crime became the second in her string, consecutively following her 1986 sentences. This statute unambiguously requires the original sentences to be terminated before the person begins to serve the sentence for prison escape.

Although the Legislature's use of the word "termination" in MCL 750.193 is conclusive in the matter of plaintiff 's original sentence, we review defendants' arguments against mandated termination because the broader statutory context does not require this result for every sentence in plaintiff 's consecutive string.

Defendants argue that the consecutive sentencing statute, MCL 791.234, requires them to maintain the sentence string in its entirety, and that the Department of Corrections' policy directive, PD 03.01.135, implements this requirement. The consecutive sentencing statute reads in relevant part:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and *discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits*, unless the prisoner is paroled and discharged upon satisfactory completion of the parole. [MCL 791.234(3) (emphasis added).]

The policy directive at issue differs somewhat:

> OO. If a prisoner is serving on concurrent sentences, the non-controlling sentence(s) shall be terminated on the maximum minus regular good time or disciplinary credits which could be earned.
>
> PP. If a prisoner is serving on consecutive sentences, none of the sentences which are part of the consecutive string shall be terminated until all sentences in that consecutive string have been served. If a prisoner is serving two or more different consecutive sentence series, the non-controlling series of consecutive sentences shall be terminated on the appropriate maximum, as described above. However, if a sentence is consecutive to more than one series of sentences, that sentence shall remain active until the controlling consecutive series has been served, even though the other sentence(s) in the non-controlling consecutive series is terminated. [PD 03.01.135, § III.]

Controlling sentences are those that have the longest maximum of concurrent sentences; that is, for a prisoner sentenced concurrently to one to two years for one crime and three to fourteen for another, the latter is the controlling sentence. The length of plaintiff's consecutive string is controlled in part by her original fourteen-year maximum sentence from 1986.

Although defendants argue that PD 03.01.135 and MCL 791.234(3) are analogous, plaintiff correctly notes that the statute mentions only discharges, not terminations, and she does not request that she be "discharged" from any of her sentences. The statutes and case law support the distinction: prisoners are "discharged," and sentences are "terminated."[1] Furthermore, the consecutive sentencing statute clarifies the issue in a later subsection:

> If a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board *may terminate* the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served. [MCL 791.234(5) (emphasis added).]

Standing alone, MCL 791.234 distinguishes between "discharge" and "terminate," and clearly puts early termination at the discretion of defendants. When viewing it together with MCL 750.193 we find no conflict because discharge is different from termination and because although defendants must terminate the original sentence before imposing the prison escape sentence, they still have the discretion to terminate that sentence before the maximum. In contrast, defendants' policy directive concerns terminations, not discharges, and it squarely conflicts with MCL 750.193. PD 03.01.135 is therefore invalid to the extent that it modifies, extends, or conflicts with that statute. *Guardian Industries Corp v Dep't of Treasury*, 243 Mich App 244, 254; 621 NW2d 450 (2000); *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 243, n 26; 501 NW2d 88 (1993).

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[1] PD 03.01.135 parallels this language; its headings include "Discharge of Prisoners" and "Termination of Non-Controlling Sentences." See also, e.g., MCL 791.265g(e).

Our conclusion is further supported by MCL 768.7a, which mandates consecutive sentences for crimes committed by a person who has escaped from prison or who is on parole:

> (1) A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the *expiration* of the term or terms of imprisonment for which the person is serving or has become liable to serve in a penal or reformatory institution in this state.
>
> (2) If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the *expiration* of the remaining portion of the term of imprisonment imposed for the previous offense. [Emphases added.]

In this statute, the Legislature expressly used the term "expiration" rather than "termination." We presume that the phraseological distinction reflects a legislative intent to treat these concepts differently. *Tyler v Livonia Public Schools (On Remand)*, 220 Mich App 697, 701; 561 NW2d 390 (1996). We therefore conclude that all of plaintiff's sentences, except for the original sentences she was serving when she was convicted of prison escape, merely "expire" as they are completed, effectively moving the string along from sentence to sentence. MCL 768.7a does not require the termination of any earlier sentences, although under MCL 791.234(5), defendants may terminate those sentences at their discretion once the minimum terms have been served. This significantly differs from MCL 750.193(1), where the Legislature mandated that plaintiff's original sentences *must* terminate before she begins to serve her sentence for prison escape. Plaintiff has a clear statutory right to that termination; defendants have no discretion in the matter. Thus, the trial court correctly ordered defendants to terminate plaintiff's original sentence, which she was serving at the time of her conviction of prison escape.

The question remains whether the effective date of termination should be the statutory maximum or the individual's actual maximum with adjustments for credits. This issue was not raised by the parties and in this case is moot because the maximum possible term, fourteen years, has since passed. The trial court determined April 20, 1996, as the effective date because it found plaintiff submitted adequate and undisputed proof that her adjusted sentence would have ended on that date. We see no reason to find error in this determination.

Affirmed.

Neff, P.J., concurred.

/s/ Robert J. Danhof
/s/ Janet T. Neff