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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-372

Filed: 6 December 2016

Rowan County, No. 15 CVS 777

MARLOW WILLIAMS, Plaintiff,

v.

FRANK L. PERRY, in his official capacity as Secretary, North Carolina Department of Public Safety, and PAUL G. BUTLER, JR., in his official capacity as Chairman of the North Carolina Post-Release supervision and Parole Commission, Defendants.

Appeal by Plaintiff from order and judgment entered 6 November 2015 by Judge Lindsay R. Davis, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 20 September 2016.

Plaintiff Marlow Williams, pro se.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for Defendants.

STEPHENS, Judge.

Plaintiff Marlow Williams appeals from summary judgment dismissing his complaint for declaratory judgment and injunctive relief against Frank L. Perry, secretary of the North Carolina Department of Public Safety (“the Department”), and Paul G. Butler, Jr., chairman of the North Carolina Post-Release Supervision and

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Parole Commission (“the Parole Commission”). Williams argues that the trial court erred by concluding as a matter of law that (1) his forty-year sentence for robbery with a dangerous weapon begins at the expiration of his life sentence for first-degree murder, and (2) N.C. Gen. Stat. § 1371(a) does not entitle him to parole after serving twenty years of his life sentence. We affirm.

Factual and Procedural Background

The undisputed evidence tends to show the following:

Williams was convicted in July 1993 of first-degree murder and robbery with a dangerous weapon for crimes which he committed in 1992 or 1993. He was sentenced under the Fair Sentencing Act to life in prison for the murder conviction and forty years for the robbery conviction, to be served consecutively.

On 13 January 2013, Williams completed the minimum term of twenty years in prison on his life sentence. He filed a grievance with the Department on 13 January 2015 requesting that the Department instruct the Parole Commission to “commence [his] second sentence.” The Department received and rejected the grievance. Williams then sent a handwritten “emergency grievance” to the director of prisons on 20 January 2015 attempting to exhaust his administrative remedies, because the Department did not “accept and file [his] grievance.” This emergency grievance was received by the Division of Prisons on 22 January 2015.

The same day, the Parole Commission sent a letter to Williams stating:

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Please be advised that [your robbery] sentence will not commence as it runs after your [l]ife sentence, which has no expiration date. Unless you are sooner paroled by the NC Parole Commission, you will spend your natural life in prison If you are paroled, you will be paroled from both sentences.

Williams sent a final handwritten letter to the director of prisons on 2 March 2015 stating that he had not received notice of any action taken on the emergency grievance, he considered his administrative remedies exhausted, and he would proceed to file this lawsuit.

Williams filed this civil action on 15 April 2015 seeking (1) a declaratory judgment that N.C. Gen. Stat. § 15A-1355(a) is valid and mandates that his forty-year robbery sentence begin to run upon completion of the twenty-year minimum term on his life sentence, (2) an injunction compelling the Department and the Parole Commission to treat his forty-year robbery sentence as having commenced upon completion of the twenty-year minimum term on his life sentence, (3) a declaratory judgment that N.C. Gen. Stat. § 15A-1371(a) is valid and renders Williams eligible for parole upon completion of the twenty-year minimum term on his life sentence, (4) a declaratory judgment that his United States and North Carolina rights of due process and equal protection are being violated by Defendants' application of the sentencing and parole statutes, and (5) an injunction to enforce Williams's constitutional rights. Perry and Butler filed a joint answer on 22 May 2015. Williams

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moved for summary judgment on 25 June 2015, and Perry and Butler filed a cross motion for summary judgment on 18 September 2015. No facts were disputed.

Both motions for summary judgment were heard during the 2 November 2015 civil session of the Rowan County Superior Court, the Honorable Lindsay R. Davis, Jr., Judge presiding. Judge Davis granted summary judgment for Defendants Perry and Butler, dismissing all of Williams's claims for relief on 6 November 2015. Williams filed a notice of appeal to this Court on 16 November 2015.

Discussion

On appeal, Williams argues that the trial court erred in its conclusions that (1) Williams's forty-year robbery sentence does not begin to run until the expiration of his life sentence for murder, and (2) N.C. Gen. Stat. § 15A-1371(a) does not require that Williams be eligible for parole after completion of the twenty-year minimum term on his life sentence. Williams further argues that these errors resulted in a violation of his due process and equal protection rights under the United States Constitution and the North Carolina Constitution, and that the Department's and the Parole Commission's determination of Williams's parole eligibility date violates the *ex post facto* prohibition in the North Carolina Constitution. We disagree.

1. Standard of Review

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (italics added) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

2. *Commencement of the Robbery Sentence*

Williams argues that N.C. Gen. Stat. § 15A-1354(b)(2) provides for his forty-year robbery sentence to begin running at the expiration of the twenty-year minimum term of his life sentence. Williams misinterprets this statute as well as N.C. Gen. Stat. § 14-87, the substantive statute governing robbery with a dangerous weapon.

A prisoner serving a life sentence must serve a minimum term of twenty years before he or she is eligible for parole. N.C. Gen. Stat. § 15A-1371(a), (a1) (Supp. 1991) (section 1371(a) amended 1993, 1994; section 1371(a1) repealed 1994).¹ “Sentences imposed [for robbery with firearms or other dangerous weapons] shall run consecutively with and shall commence at the expiration of any sentence *being served* by the person sentenced hereunder.” N.C. Gen. Stat. § 14-87(d) (1986) (repealed 1993) (emphasis added). For a defendant not serving a prison sentence at the time of his or her conviction for armed robbery, N.C. Gen. Stat. § 14-87 does not *require* sentences imposed simultaneously for two or more armed robbery convictions to run consecutively. *State v. Crain*, 73 N.C. App. 269, 271, 326 S.E.2d 120, 122 (1985).

¹ Per the custom of this Court, all statutory citations in this opinion are to the statutes in effect at the time of Williams’s conviction. Where the statutory language has not changed since his conviction, citation is to the current official code.

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However, the trial court *may* impose consecutive sentences. *Id.* A consecutive sentence “commences to run when the State has custody of the defendant following completion of the prior sentence.” N.C. Gen. Stat. § 15A-1355(a) (2015).

Section 15A-1354(b) mandates how consecutive sentences must be treated “for purposes of determining parole eligibility.” *Robbins v. Freeman*, 127 N.C. App. 162, 165, 487 S.E.2d 771, 773 (1997), *aff’d per curiam*, 347 N.C. 664, 496 S.E.2d 375 (1998).

In determining the effect of consecutive sentences . . . , the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents: (1) The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences; and (2) The minimum term, if any, consists of the total of the minimum terms of the consecutive sentences.

N.C. Gen. Stat. § 15A-1354(b) (1988) (amended 1994, 2011).

While Williams correctly points out that *Crain* holds that a sentence for armed robbery is only required to run consecutively to a prison sentence which the defendant is serving at the time of his conviction, he overlooks the discretion that the trial court maintains to impose consecutive sentences for simultaneous convictions regardless of whether the defendant is serving a prison sentence at the time of his conviction. *See Crain*, 73 N.C. App. at 271, 326 S.E.2d at 122. Williams was sentenced to a life sentence and a forty-year sentence to be served consecutively for simultaneous convictions of first-degree murder and robbery with a dangerous weapon. It was fully within the trial court’s discretion to make these sentences run consecutively.

Williams also correctly argues that the effect of the consecutive sentences is governed by N.C. Gen. Stat. § 15A-1354(b), but he misinterprets the statute. Williams contends that section 15A-1354(b) allows his forty-year robbery sentence to commence running after completion of the twenty-year minimum term of his life sentence. However, no language in the statute indicates that a consecutive sentence begins to run upon completion of the minimum term of the prior sentence.

Section 15A-1354(b) only addresses how consecutive sentences must be treated to determine parole eligibility. *See Robbins*, 127 N.C. App. at 165, 487 S.E.2d at 773. The statute does not address how consecutive sentences run in relation to one another. In contrast, section 15A-1355 plainly states that Williams's consecutive sentence will begin to run upon completion of his prior sentence. Thus, the Parole Commission correctly stated in its letter to Williams that his forty-year robbery sentence will not begin to run until completion of his prior life sentence. Williams's first argument is overruled.

3. Parole Eligibility

Williams argues that the trial court erred in its conclusion that nothing in N.C. Gen. Stat. § 15A-1371(a) requires him to be eligible for parole after completion of twenty years of his life sentence. Because Williams fails to take into account the minimum term on his robbery sentence, we disagree.

A prisoner whose sentence includes a minimum term of imprisonment . . . is eligible for release on parole only upon

completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less

N.C. Gen. Stat. § 15A-1371(a). “[W]hen the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years.” *Id.* “A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years.” § 15A-1371(a1). “[A] person convicted of robbery with firearms or other dangerous weapons shall serve a term of not less than seven years in prison” § 14-87(d).

Section 15A-1354(b) sets forth how consecutive sentences must be treated “for purposes of determining parole eligibility.” *Robbins*, 127 N.C. App. at 165, 487 S.E.2d at 773.

In determining the effect of consecutive sentences . . . , the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents: (1) The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences; and (2) The minimum term, if any, consists of the total of the minimum terms of the consecutive sentences.

§ 15A-1354(b). Consecutive sentences for armed robbery under N.C. Gen. Stat. § 14-87 must be aggregated as set forth in section 15A-1354(b) when determining parole eligibility. *Robbins*, 127 N.C. App. at 165, 487 S.E.2d at 773.

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Section 15A-1354(b) requires the Department² to treat Williams as being committed for a single term with a maximum prison sentence of life plus forty years, and a minimum term of twenty-seven years. Thus, the Department and the Parole Commission correctly calculated that Williams will be eligible for parole upon completion of the twenty-seven year aggregated minimum term of his consecutive sentences. To allow Williams parole after only twenty years would be to ignore the required minimum term for his robbery sentence in contravention of section 15A-1354(b). Williams's second argument is overruled.

4. Due Process and Equal Protection rights

Williams argues that the Department and the Parole Commission are violating his due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and article 1, section 19 of the North Carolina Constitution by (1) “abus[ing] their discretion by disregarding . . . the commencement of [Williams’s] consecutive sentence,” depriving him of a liberty interest in having the law correctly applied, and (2) extending Williams’s parole eligibility date by seven years. Williams cites no legal authority for these assertions and does not explain how the Department’s and the Parole Commission’s actions violated the rights he claims. These arguments are subject to dismissal on that basis

² The statute refers to the Department of Correction; however, on 1 January 2012, the North Carolina Department of Correction was consolidated into a newly established Department of Public Safety. Current Operations and Capital Improvements Appropriations Act of 2011, No. 145, § 19.1(a), 2011 N.C. Sess. Law 253, 535.

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alone. N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”); *State v. Davis*, ___ N.C. App. ___, ___, 768 S.E.2d 903, 912 (2015) (treating the defendant’s argument that admission of testimony violated his constitutional right to a fair trial as abandoned when no explanation of the nature of the constitutional right or citation to authority was provided), *modified and aff’d*, 368 N.C. 794, 785 S.E.2d 312 (2016).

Even if Williams’s conclusory statements can be interpreted as sufficient argument to preserve this issue, neither the Department nor the Parole Commission committed the acts which Williams argues are in violation of his constitutional rights. Thus, the trial court correctly concluded that Williams is not entitled to an injunction against the Department and the Parole Commission to enforce his due process and equal protection rights.

As discussed above, the Department and the Parole Commission correctly determined that Williams’s forty-year robbery sentence does not commence to run until completion of his life sentence for murder. This result was compelled by N.C. Gen. Stat. § 15A-1355, and is not a result of any discretion exercised by the Department or the Parole Commission. Further, even assuming *arguendo* that Williams could have a liberty interest in the proper application of state law as it related to his sentence, the Department and the Parole Commission have correctly applied the state law. Thus, Williams was not deprived of any such liberty interest.

The Department and the Parole Commission also correctly calculated that Williams will not be eligible for parole until completion of the twenty-seven year aggregate minimum term of his consecutive sentences. This eligibility determination was mandated by N.C. Gen. Stat. § 15A-1354(b) and has not changed since Williams was convicted. Therefore, the determination does not extend Williams's minimum term. Again, neither the Department nor the Parole Commission exercised any discretion in applying the statute.

Williams does not argue any other facts or law which would render the Department's and the Parole Commission's application of these statutes to Williams unconstitutional. Because neither the Department nor the Parole Commission had any discretion in calculating how Williams's sentences run, and because they did not extend his parole eligibility date beyond what is required by law, Williams's due process and equal protection arguments are overruled.

5. Ex Post Facto Clause of the North Carolina Constitution

Williams argues that the Department and the Parole Commission violated the *ex post facto* prohibition in article 1, section 16 of the North Carolina Constitution. This argument was not made to the trial court, and Williams does not present any law in support his argument. As a result, we do not consider this argument. *Hackos v. Goodman, Allen & Finetti, PLLC*, 228 N.C. App. 33, 40, 745 S.E.2d 336, 341 (2013) (treating the plaintiff's argument that the defendant was negligent as abandoned,

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because the plaintiff failed to support the conclusory assertion with argument or citation to legal authority as required by N.C.R. App. P. 28(b)(6)); *Grier v. Guy*, 224 N.C. App. 256, 261, 741 S.E.2d 338, 342 (2012) (dismissing the defendant's argument that a default judgment should be set aside based upon a legal ground not presented to the trial court), *disc. review denied*, 366 N.C. 563, 738 S.E.2d 381 (2013); *State v. Register*, 206 N.C. App. 629, 634, 698 S.E.2d 464, 469 (2010) (declining to consider the defendant's argument that he had a constitutional right to have his family present at his trial, because that argument was not made to the trial court). The order and judgment of the trial court is

AFFIRMED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).