

SUPREME COURT OF FLORIDA

Blankenship v. Dugger

521 So. 2d 1097 (Fla. 1988) · No. No. 71024 · Decided March 10, 1988

SUMMARY

The Florida Supreme Court denied Joseph C. Blankenship's petition for a writ of habeas corpus challenging the application of administrative gain-time statutes to him. The court held that section 944.598 had never been implemented and therefore created no entitlement or liberty interest, while section 944.276 did not violate the Ex Post Facto Clause or due process protections.

CASE DETAILS

COURT	Supreme Court of Florida
WRITING FOR THE COURT	Per Curiam; McDonald, C.J.; Overton, J.; Ehrlich, J.; Shaw, J.; Barkett, J.; Grimes, J.; Kogan, J.
JURISDICTION	Florida
DECIDED	March 10, 1988
DOCKET	No. 71024
DISPOSITION	writ_denied
PROCEDURAL POSTURE	State prisoner petition for writ of habeas corpus challenging the application of Florida's administrative gain-time statute on ex post facto and due process grounds.
STANDARD OF REVIEW	The court reviewed the legal sufficiency of the habeas corpus petition and the asserted constitutional claims de novo.
PRECEDENTIAL VALUE	Published Florida Supreme Court opinion; precedential.
PARTIES	Joseph C. Blankenship, Petitioner v. Richard L. Dugger, Respondent

TOPICS

- post-conviction relief
- ex post facto
- due process
- statutory interpretation
- administrative law

PRACTICE AREAS

- post-conviction relief
- habeas corpus
- constitutional law
- corrections law
- statutory interpretation

QUESTIONS PRESENTED

1. Whether application of Florida Statutes section 944.276 to a prisoner whose crimes predated its enactment violated the Ex Post Facto Clause.
2. Whether section 944.598 created a protected right to administrative gain time even though the statute was never implemented.
3. Whether the Department of Corrections' implementation of section 944.276 rather than section 944.598 deprived Blankenship of a protected liberty interest without due process of law.

HOLDINGS

1. Section 944.276 did not violate the Ex Post Facto Clause because section 944.598 was never implemented and therefore did not create a right to administrative gain time that section 944.276 could take away.
2. The administrative gain-time provisions at issue were procedural and did not create substantive rights to gain time based on the possibility that prison overcrowding would trigger their operation.
3. Section 944.598 did not create a protected liberty interest because it was never implemented, and Blankenship had no right to require its implementation.
4. Blankenship could not claim a liberty interest under section 944.276 because the statute expressly excluded inmates convicted of sexual battery and other specified offenses.

KEY QUOTATIONS

“This argument must fail, if for no other reason than because section 944.598 has never been implemented and, therefore, cannot be said to have created any rights for petitioner.” (521 So. 2d at 1099)

“Moreover, since these statutes are procedural in nature, as contrasted to the substantive statute considered in Weaver v. Graham, they do not create substantive rights.” (521 So. 2d at 1099)

“Section 944.598 did not create a liberty interest because it was never implemented, and petitioner had no right to require it to be implemented.” (521 So. 2d at 1100)

FACTUAL BACKGROUND

Blankenship was convicted and sentenced in 1985 for crimes committed in 1984, including sexual battery. Florida section 944.598, enacted in response to prison overcrowding, had never been implemented, while section 944.276 was implemented in 1987 and excluded prisoners convicted of sexual battery from administrative gain time. Blankenship argued that section 944.276 retroactively deprived him of gain time that he would have received under section 944.598 and thereby violated the Ex Post Facto Clause and due process.

PROCEDURAL HISTORY

Blankenship filed an original petition for writ of habeas corpus in the Supreme Court of Florida, invoking the court's jurisdiction under article V, section 3(b)(9) of the Florida Constitution. The Supreme Court denied the petition and published the opinion because other inmates might file similar petitions.

DISPOSITION

CASES CITED

- Weaver v. Graham, 450 U.S. 24, 29 (1981)
- Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)
- Wolff v. McDonnell, 418 U.S. 539 (1974)

OPINION

PER CURIAM.

521 So. 2d 1097 (1988) Joseph C. BLANKENSHIP, Petitioner, v. Richard L. DUGGER, etc., Respondent. No. 71024. Supreme Court of Florida. March 10, 1988. *1098 Joseph C. Blankenship, in pro. per. Robert A. Butterworth, Atty. Gen., and Marjorie Fallon Smith, Asst. Atty. Gen., Tallahassee, for respondent. PER CURIAM. Petitioner, a state prisoner, files this petition for writ of habeas corpus, seeking to invoke this Court's jurisdiction under article V, section 3(b)(9) of the Florida Constitution.

We deny the petition, but because other inmates may file similar petitions, we are publishing this opinion to spare the needless expense of time and money. The petition involves administrative gain time under two statutes passed in response to prison overcrowding.

The first, section 944.598, was originally enacted in 1983.[1] Upon certification by the Department of Corrections that the state prison population has reached ninety-eight percent of capacity and verification by the Governor, the statute calls for the sentences of prisoners to be reduced in increments until the population is decreased to ninety-seven percent.

A 1986 amendment changed the triggering figure to ninety-nine percent and the target figure to ninety-eight percent. Neither the Department of Corrections nor the Governor has ever taken the steps necessary to activate the reduction of sentences under this section.

In 1987 the Legislature enacted chapter 87-2, Laws of Florida, which became section 944.276,[2] and which was implemented almost immediately by the granting of gain *1099 time. This statute is similar to section 944.598, as amended, with two pertinent differences: (1) section 944.276 has a ninety-eight percent triggering figure and a ninety-seven percent target figure, and (2) section 944.598 grants administrative gain time to all inmates eligible to receive gain time, while section 944.276 excludes prisoners convicted of certain serious felonies.

Petitioner was convicted and sentenced in 1985 for crimes which occurred in 1984. He is precluded from administrative gain time under section 944.276 because of his conviction for sexual battery. He contends that section 944.276 is an ex post facto law as applied to him.

The argument runs like this: The fact that section 944.276 gain time has been granted since early in 1987 proves that the prison population has reached ninety-eight percent. Under the original version of section 944.598, he would be entitled to the administrative gain time that is being granted pursuant to section 944.276.

Thus, he asserts that the latter section took away what section 944.598 would have given him. In order for a criminal law to be declared *ex post facto*, it must apply to events occurring before it existed and must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981). An *ex post facto* law is one that allows for prosecution and conviction for actions that were lawful at the time of their commission, or imposes a punishment more severe than that assigned by law when the crime occurred, or changes the proof necessary to convict.

Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). Petitioner maintains that section 944.276 imposes greater punishment than that set out by law at the time he committed his crime because it takes away gain time that would have automatically accrued to him under section 944.598 as originally enacted. This argument must fail, if for no other reason than because section 944.598 has never been implemented and, therefore, cannot be said to have created any rights for petitioner.

Thus, it is irrelevant which version of section 944.598 was in existence when the crimes were committed or whether any version of it was in effect. As section 944.598 does not apply, section 944.276 governs the case. Petitioner's argument that his case is controlled by *Weaver* is misplaced.

In *Weaver* the Supreme Court of the United States declared that a Florida law that reduced gain time was *ex post facto* as applied to prisoners whose crimes were committed before the law was changed. Initially, it should be observed that *Weaver* is not on point; it dealt with "good time," i.e., time off a prisoner's sentence awarded for exhibiting good behavior.

The statutes at issue here award gain time purely for the administrative convenience of the Department of Corrections. Moreover, since these statutes are procedural in nature, as contrasted to the substantive statute considered in *Weaver v. Graham*, they do not create substantive rights. A retrospective statute may work to a person's disadvantage so long as it does not deprive the person of any substantial right or protection.

See *Dobbert*, 432 U.S. at 293-94, 97 S.Ct. at 2298-99. Under *Weaver*, prisoners entering the correctional system do have a statutory right under section 944.275, Florida Statutes (1985), to "good time" gain time, and it will automatically accrue to them if their behavior meets certain standards.

However, when petitioner's crimes were committed, there was no guarantee that the prison population would ever reach ninety-eight percent of capacity while he was incarcerated. Petitioner

had no control over the factors that would lead to the Department of Corrections granting administrative gain time. Petitioner also argues due process violations under both the federal and state constitutions, claiming that section 944.598 gave him a liberty interest, and the Department of Corrections, by implementing section 944.276 and not the older statute, took this interest away without due process of law.

See *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). We disagree. Section 944.598 did not create a liberty interest because it was never implemented, and petitioner had no right to *1100 require it to be implemented. Petitioner cannot claim a liberty interest under section 944.276 because he is excluded from its ambit due to the nature of the crime he committed.

Because the petitioner has not demonstrated that he is being incarcerated in violation of law, the petition is hereby denied. It is so ordered. McDONALD, C.J., and OVERTON, EHRlich, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur. NOTES [1] Section 944.598, Florida Statutes (1983), read in pertinent part: (1) The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 98 percent of the lawful capacity of the system for males or females, or both.

In conveying this information, the secretary of the department shall certify the rated design capacity, maximum capacity, lawful capacity, system maximum capacity, and current population of the state correctional system. When the Governor verifies such certification by letter, the secretary shall declare a state of emergency.

(2) Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time, in 5-day increments, as may be necessary to reduce the inmate population to 97 percent of lawful capacity of the system.

[2] 944.276 Administrative gain-time. (1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates: (a) Are serving a minimum mandatory sentence under s. 775.082(1) or s. 893.135; (b) Are serving the minimum mandatory portion of a sentence enhanced by s. 775.087(2); (c) Were convicted of sexual battery or any sexual offense specified in s. 917.012(1) and has [sic] not successfully completed a program of treatment pursuant to s. 917.012; or (d) Were sentenced under s. 775.084.

(2) The authority granted to the secretary shall continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary shall cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

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