STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Dianne S. Goodstein, Circuit Court Judge

Case No. 2013-000167

William A. Cudd #280216 Appellant,

vs.

William R. Byars, Jr., Director, S. C. Dept. of Corrections; and Alan Wilson Attorney General for South Carolina

Respondents.

APPELLANT'S FINAL REPLY BRIEF

Date April 1, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE LOWER COURT ERR TO DETERMINE THAT THE SAVINGS CLAUSE OF THE OMNIBUS CRIME REDUCTION SENTENCING ACT PROHIBITS RETROACTIVE APPLICATION OF THOSE PORTIONS OF THE STATUTE WHICH ARE REMEDIAL OR PROCEDURAL IN NATURE?

II. DID THE CIRCUIT COURT ERR TO DISMISS APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS BASED ON A DETERMINATION THAT GRANT OF THE WRIT WOULD NOT RESULT IN THE APPELLANT'S IMMEDIATE RELEASE?

STATEMENT OF THE CASE

On December 3, 2001, the Appellant pled guilty in Dorchester County, South Carolina, to manufacturing marijuana. The Court sentenced the Appellant to a determinate sentence of fifteen (15) years, and he was remanded to the State Department of Corrections. The Appellant's sentence was to be completed after service of eighty-five percent (85%) and without parole.

After legislative action culminated in passage of the Omnibus Crime Reduction and Sentencing Act, Appellant filed a Petition For Habeas Corpus Relief with the Dorchester County Court of Common Pleas on June 25, 2011. The foundation of Appellant's habeas petition rested in the remedial nature of the criminal statute under which the Appellant was sentenced. The Petition was denied on December 20, 2012.

On January 10, 2013, the Appellant served the Notice of Appeal with the Respondents and this Court.

On February 5, 2013 we served our Initial Brief.

On March 6, 2013, we received the Respondent's Initial Brief.

THE SAVINGS CLAUSE OF THE OMNIBUS CRIME REDUCTION AND SENTENCING ACT DOES NOT PROHIBIT RETROACTIVE APPLICATION OF THOSE PORTIONS OF THE STATUTE WHICH ARE REMEDIAL OR PROCEDURAL IN NATURE

The Respondent argues that the Legislative intent as expressed in the Omnibus Crime Reduction and Sentencing Act clearly demonstrates that amendments to criminal penalties are not to apply retroactively. However the Respondent's argument fails on two fronts. First, the process through which the Respondent arrives at an interpretation of Legislative intent is in error. Second, the Respondent fails to recognize the distinction between substantive amendments to a statute, and those provisions which are procedural or remedial in nature.

Though the Omnibus Crime Reduction and Sentencing Reform Act (Reform Act) is composed of sixty six (66) distinct sections, the Respondent's interpretation of the entire Reform Act is derived from a single section: Section 65, the Savings Clause. If read in isolation, the Savings Clause does imply the Reform Act should not receive retrospective application. However, discrete sections of a statute are not intended to be read out of context in order to discover the overall intent of the Legislature. In regard to the Reform Act, an accurate interpretation of Legislative intent can be obtained only when the statute as a whole receives a practical, reasonable, and fair interpretation consistent with the purpose, design, and policy of Legislators. The true intent of the Legislature may be gleaned from Section 66 of the Reform Act, the Time Effective, and Section One of the Reform Act, which states the lawmakers' goals in passage of the Reform Act.

Section 66 of the Reform Act sets out the dates on which the Reform Act

becomes effective. Section 66 states that those provisions dealing with driver's licenses become effective on January 1, 2011, and the remaining provisions of Part I of the Reform Act becomes effective upon signature of the Governor. The provisions of Part II [of the Reform Act] take effect on January 1, 2011, **for offenses occurring on or after that date.** The Legislature intended that portions of Part I of the Reform Act should be applied retrospectively, and therefore purposely omitted the restrictive language attached to the effective date of Part II of the Reform Act. If the Legislature intended no part of the Reform Act to be viewed as remedial or procedural, they would have concluded the second sentence of Section 66 with the words " . . . for offenses occurring on or after that date."

Section I of the Reform Act is a Legislative declaration of the goals and intent of lawmakers in the bill's enactment. The language employed in the Legislature"s declaration of intent is clear, precise, and unequivocal: Reduce crime, use resources efficiently, reduce recidivism rates, and preserve public safety. If an isolated reading of the Savings Clause governs interpretation of the entire Reform Act, the Legislature's goals and intent in its passage are defeated. Conversely, if the Legislature's stated intent in passage of the Reform Act is given credence, as it should be, then the Savings Clause must be subordinated to the Legislature's will, as expressed in Section One.

In interpreting any statute, a statute as a whole must receive a practical, and fair interpretation. Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the Statute's operation. State v. Blackmon, 304 S.C. 270,403 S.E.2d 660 (1991). Moreover, a court should not consider

a particular clause or provision in a statute as being construed in isolation, but should read it in conjunction with the purpose of the statute and the policy of the law. State v. Gordon 365S.C.143, 588 S.E.2d 105 (2003).

The Savings Clause does not bar retroactive application of portions of the Reform Act to the Appellant's case, because those portions of the Reform Act which the Appellant seeks to apply to his case are remedial or procedural in nature; not substantive. If a statutory change is primarily procedural, it will take precedence over prior law in such cases; if the change affects a penalty, the savings clause preserves the pre-repeal penalty. United States v. Blue Sea Line, 553 F2d 445, 448 (5th Cir. 1977). The Appellant does not seek to alter the substantive nature of his punishment. He was sentenced to fifteen (15) years imprisonment, and accepts the trial court's pronouncement. However, certain collateral consequences of the Reform Act are not substantive, but procedural and remedial.

The calculation of the percentage of accrued good time credits is a procedural mechanism; not a substantive change in the penalty imposed. Prior to enactment of the Reform Act, the Appellant was entitled to a 15% reduction in his sentence, based on his good behavior. After passage of the Reform Act, the Appellant was entitled to a 49% reduction in his sentence. The substantive nature of his sentence (15 years) remains the same, the only change occurring in the percentage of accrued good time credits.

The foregoing reasoning also applies to the Appellant's access to the parole program, work release program, and community supervision. The right to participate in these programs existed prior to passage of the Reform Act. However, the Reform Act

rolled back the amount of prison time which must be served in order to participate in those programs. In short, the Reform Act's effect on the Appellant's access to these programs was remedial; not substantive. The Reform Act did not create new rights or privileges which the Appellant seeks to invoke, but merely enlarges preexisting rights.

A statute is remedial and applies retroactively when it creates new remedies for existing rights, or enlarges the rights of persons under disability. Wiesart v. Stewart, 665 S.E.2d 187,379 S.C. 300 (S.C. App. 2008). Statutory changes that are procedural or remedial in nature apply retroactively. United States v. Vanella, 619 F.2d 384,386 (5th Cir. 1980). Changes in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases, including those on appeal from a lower court. Turner v. United States, 410 F.2d 837, 842 (5th Cir.1969).

THE CIRCUIT COURT ERRED TO DISMISS APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS BASED ON A DETERMINATION THAT GRANT OF THE WRIT WOULD NOT RESULT IN THE APPELLANT'S IMMEDIATE RELEASE

The Respondent has argued that, even if the Circuit Court found that the Omnibus Crime Reduction and Sentencing Reform Act (Reform Act) were retroactively applied to Appellant's case, it would not result in the Appellant's immediate release from custody. However, the Respondent has incorrectly interpreted the several statutes which control this question, and therefore Respondent's arguments must ultimately fail.

The statute under which the Appellant was convicted, and which was amended by the Reform Act, reads:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d), may have the sentence suspended and probation granted, and is **eligible for parole**, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.
>
> (S.C. Code §44-53-370(b) (2) emphasis added).

In an attempt to circumvent the intent of the Legislature in passage of the Reform Act, the Respondent relies on S. C. Code §24-13-150(A), which states,

> Notwithstanding any other provision of law . . . an inmate convicted of a 'no parole offense' as defined in Section 24-13-100 . . . is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.

The Respondent's interpretation of these two statutes is flawed in three respects. First, the offense under which the Appellant stands convicted, Section 44-53-370(b) (2), as amended by the Reform Act, no longer designates or defines the Appellant as "non parolable". Under the mandates of the Reform Act, the Appellant is now designated as ". . .and is eligible for parole". Consequently, one may not be both eligible for parole, and non-parolable. Therefore, S. C. Code §24-13-150(A) is not applicable to the Appellant.

Finally, if Section 44-53-370(b) (2) is read as the Respondent would have the statute read, the stated intent and goals of the Reform Act would be wholly negated. In the Reform Act's amendment of Section 44-53-370(b) (2) , the Legislature strove to ameliorate the rigors of conviction under that statute. This included access to parole, and access to a greater number of good conduct credit days.

The Respondent would subordinate the Reform Act's goals to Section 24-13-150 (A)'s "no parole" provision, which was not the intent of the Legislature. Under the Respondent's reading of the Reform Act, Appellant is eligible to receive a maximum of seventy-two (72) days per year in good-time credit days (S.C. Code §24-13-230(B)). Under the Reform Act's amended Section 44-53-370(b) (2), the Appellant would be eligible to receive up to a maximum of one hundred and eighty (180) days in good behavior, education and work credits.

CONCLUSION

Viewed from a perspective of intent, Section One of the Reform Act clearly states the purpose of the Reform Act's passage into law. Viewed from the perspective of the Reform act's practical application, it is equally clear that the calculation of good time credits and parole eligibility status are procedural mechanisms, affecting the remedy and not the substantive rights of the Appellant. Consequently, the Appellant's writ of habeas corpus must be granted.

Respectfully submitted,

March 15, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this FINAL BRIEF complies with Rule 211(b) SCACR.

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Dated: April 1, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served upon the Respondents a true copy of APPELLANT'S FINAL REPLY BRIEF by placing same into the United States Mail, first class postage affixed, and addressed as follows.

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Dated: April 1, 2013

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