

FILED

November 10, 1999

Cecil Crowson, Jr.
Appellate Court Clerk
IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CARL EUGENE JORDAN,)
)
)
Petitioner/Appellant,) Davidson Chancery No. 98-2241-I
)
VS.) Appeal No. M1999-00540-COA-R3-CV
)
DONAL CAMPBELL, Commissioner,)
)
)
Respondent/Appellee.)

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE
THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

CARL E. JORDAN, pro se
Nashville, Tennessee

PAUL G. SUMMERS
Attorney General and Reporter
MICHAEL E. MOORE
Solicitor General
REBECCA MILLER WARFIELD
Assistant Attorney General
Nashville, Tennessee
Attorneys for Appellee

**AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

ALAN E. HIGHERS, J.

CONCUR:

DAVID R. FARMER, J.

HOLLY KIRBY LILLARD, J.

Carl E. Jordan, a *pro se* inmate, (Jordan) has appealed from the trial court's grant of a dismissal to the Commissioner of the Tennessee Department of Correction, (TDOC) in this action regarding the application of sentencing guidelines. Based upon the following, the trial court's grant of TDOC's motion¹ is reversed in part and affirmed in part.

Facts and Procedural History

This cause of action was originally commenced on July 24, 1998, in the Chancery Court of Davidson County, Tennessee. On that date, Jordan filed a Petition for Declaratory Judgment seeking review of the TDOC's denial of his request for a declaratory order regarding his parole dates. Jordan argued that he is entitled to sentence reduction credits because the TDOC erroneously applied a written waiver, Class X felony status, imposing a 35% release eligibility date. Jordan claimed that TDOC's error in calculating his sentence resulted in a violation of his rights of due process and equal protection. The trial court dismissed Jordan's petition on TDOC's motion. Jordan bases his claim for relief on the following facts.

_____ Jordan is an inmate at Riverbend Maximum Security Institute in Nashville,

Tennessee. He is presently serving a thirty-five year sentence for aggravated rape, second degree murder, and armed robbery. Jordan and a co-conspirator committed these crimes on July 11, 1980. Jordan pled guilty to the above charges and was sentenced to forty years at forty percent pursuant to Tenn. Code Ann. § 40-28-301² (repealed).

At the time Jordan committed these crimes, they were classified as Class X felonies pursuant to Tenn. Code Ann. § 39-1-702. Therefore, on January 23, 1981, when Jordan began serving his sentence, he was subject to the Class X Felony Act of 1979. Tenn. Code Ann. § 39-1-701 et. seq. (repealed). As a Class X felon, Jordan's sentence could not be reduced by good credit, honor or incentive credit, or any other sentence credit of any sort. Tenn. Code Ann. § 39-1-703(2) (repealed).

The statute under which Jordan was sentenced, Tenn. Code Ann. § 40-28-301, was partially repealed and amended in 1985. The new amendment stated: "Notwithstanding the provisions of this chapter to the contrary, a person convicted of a Class X felony shall be eligible to receive prisoner performance sentence credits (PPSC) as provided by Tennessee Code Annotated, 41-21-230 to reduce the expiration date of such person's sentence. The provisions of this subsection shall not affect the release classification eligibility date of Class X offenders." Tenn. Code Ann. § 40-28-301(l) (repealed); see also Tenn. Code Ann. § 41-21-230.

In addition, a new statute that dealt generally with sentence reduction credits was enacted in 1985. Tenn. Code Ann. § 41-21-236. This statute allowed Class X felons whose crimes were committed on or after December 11, 1985, to earn prisoner sentence reduction credits (PSRC) that would affect release eligibility and sentence expiration dates. Class X felons such as Jordan, whose crimes were committed prior to December 11, 1985, had to sign a written waiver in order to be eligible under the statute. Tenn. Code Ann.

§ 41-21-236(c)(3). The waiver waived the felon's right to serve the sentence under the law in effect at the time the crime was committed. Id.

In February of 1986, Jordan signed a waiver to earn PSRCs as required under Tenn. Code Ann. § 42-21-236(c)(3). The effect of this waiver was to make Jordan subject to the Criminal Sentencing Reform Act of 1982, rather than the Class X Felony Act. Pursuant to the Criminal Sentence Reform Act, Jordan's release eligibility date was recalculated from forty percent to thirty-five percent of his forty year sentence. Tenn. Code Ann. § 40-35-101 et. seq. (repealed).

On May 2, 1986, Jordan's guilty plea was vacated by the Court of Criminal Appeals. The court remanded Jordan's case to the trial court for trial or for the entry of new pleas. On September 20, 1986, Jordan again pled guilty to aggravated rape, second degree murder, and armed robbery. He was then sentenced to thirty-five years, to be served concurrently. According to Jordan, he chose to forgo trial based on an agreement with the assistant district attorney prosecuting his case. Under this agreement, Jordan would enter pleas to the charges if his new sentence was imposed under the law³ in effect prior to the Class X Felony Act of 1979.

In November 1986, after Jordan began serving under the new sentence, he received a sentence summary sheet from the TDOC. According to the summary, Jordan's waiver under his previous sentence pursuant to Tenn. Code Ann. § 42-21-236(c)(3) was applied to his new sentence. The new sentence was calculated under both the Class X Felony Act of 1979 and the Criminal Sentence Reform Act of 1982. Under both these methods, Jordan's release eligibility date was based on a thirty-five year sentence at thirty-five percent. The sentence was not calculated under the statutes in effect prior to the Class X Felony Act.

Beginning in January of 1998, Jordan filled out referral forms to his case manager at the TDOC. The subject of these forms was Jordan's complaint regarding the recalculation of his parole dates. Jordan claimed that TDOC had erroneously applied the Class X Felony Act to his sentence. In addition, Jordan claimed that his release eligibility date at thirty-five percent was not correct. Finally, Jordan claimed that the written waiver under his old sentence should not have been reapplied to the new sentence without his permission, and therefore should be rescinded.

After receiving an unsatisfactory response to his efforts, Jordan filed a Petition for Declaratory Order with the TDOC. The order sought recalculation of Jordan's parole dates under the law in effect prior to the Class X Felony Act. In addition, Jordan reasserted his claims that his earlier written waiver should not apply and that a thirty-five percent release eligibility date was not correct. On July 10, 1998, Jordan's Petition for Declaratory Order was denied by the TDOC.

Subsequently, Jordan filed a Petition for Declaratory Judgement seeking the trial court's review of TDOC's denial of his request for a declaratory order. In response, TDOC filed a Rule 12 Motion to Dismiss for failure to state a claim upon which relief can be granted. TENN. R. CIV. P. 12.02(6); (R. at 102). The trial court granted TDOC's motion. Jordan filed a timely notice of appeal.

On appeal, Jordan asserts that the trial court erred by granting TDOC's motion for failure to state a claim upon which relief can be granted.⁴

Analysis

We find it appropriate to note that neither Jordan nor TDOC directly address the

application of thirty-five percent to Jordan's sentence. On appeal, neither party presented this Court with factual or legal contentions regarding this issue. Accordingly, we limit our review to the issues of Jordan's Class X felony status and the application of his written waiver to his new sentence.

As a preliminary matter, we must determine the proper scope of review for this case. In the trial court, there was some confusion regarding whether TDOC's motion was treated as a Motion to Dismiss under Rule 12 or as a Motion for Summary Judgment under Rule 56. See TENN. R. CIV. P. 12.02(6); TENN. R. CIV. P. 56. TDOC originally filed a 12.02(6) Motion to Dismiss for failure to state a claim upon which relief can be granted. In response, Jordan filed a request for findings of material and undisputed facts pursuant to Rule 56, as allowed under Rule 12. Thereafter, both parties filed findings of fact with the court. In addition, Jordan filed a sworn affidavit. The trial court's order disposing of this case was granted as a Motion to Dismiss. Subsequently, Jordan filed an appeal based on the trial court's grant of TDOC's Motion for Summary Judgment. It appears that this matter was treated as a Motion for Summary Judgment because the trial court considered material outside of the pleadings. Knierman v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). For this reason, we must consider this motion under the summary judgment standard.

A Motion for Summary Judgment can be granted only when there is no genuine issue of material fact relevant to the claim or defense contained in the motion and the moving party is entitled to judgment as a matter of law on the undisputed facts. Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991). The court must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inference in the nonmoving party's favor. Byrd v. Hall, 847 S.W.2d at 210-211

(Tenn. 1993). Under this standard, we find that Jordan did raise a genuine issue of material fact concerning the reapplication of his waiver under Tenn. Code Ann. § 40-21-236. Accordingly, the trial court should not have granted TDOC's motion.

Class X Felony Status

We find Jordan's claim regarding his Class X felony status without merit for the following reasons. The Class X Felony Act was in effect when the underlying crimes were committed in 1980, when Jordan was initially sentenced in 1981, and when Jordan was resentenced in 1986. Despite any agreement Jordan purports to have made, there is no factual or legal support for his contention that his sentence should be imposed under pre-Class X Felony Act law. Pursuant to Tenn. Code. Ann. § 39-1-105 (repealed), which was in effect from 1968 to 1989, Jordan must be prosecuted under the law in effect at the time his crimes were committed.⁵ Therefore, we find no equal rights or due process violation based on Jordan's status as a Class X felon. Assuming all of Jordan's factual allegations and the inferences drawn from those allegations are true, TDOC is entitled to judgment as a matter of law on this issue. The trial court was correct in granting TDOC's motion on this issue.

Reapplication of Waiver

The remaining issue is whether the reapplication of Jordan's written waiver was appropriate. Jordan signed the waiver while serving a sentence that was later vacated. Thereafter, the waiver was reapplied under Jordan's new sentence. The record contained no proof indicating that Jordan signed a new waiver or consented to reapplication of the old waiver. In a prior opinion, we have held that due process requires that the prisoner be fully

informed before a waiver under Tenn. Code Ann. § 40-21-236 is applied. Crowder v. Tennessee Dep't of Corrections, No. 01A01-9203-CH-00105, 1992 WL 207761, *4 (Tenn. App. Aug. 28, 1992). Since we are unable to determine whether Jordan was so informed, the matter is remanded for further consideration by the trial court.

Conclusion

Based upon the foregoing, the judgment of the trial court is hereby affirmed in part, reversed in part, and remanded. Costs on appeal are taxed to TDOC for which execution may issue, if necessary.

HIGHERS, J.

CONCUR:

FARMER, J.

LILLARD, J.