STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-2027

KC MYERS,
Plaintiff,

v.

JAMES BAKER, Interim Commissioner,
Vermont Department of Corrections,
Defendant.

RULING ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

"For nearly 40 years, Vermont had a system of statutory good time that permitted offenders to receive reductions in their sentences for maintaining good behavior and participating in programming while in the custody of the Commissioner of Corrections. This good time system was repealed in 2005." 2019, No. 56, § 1(a)(1). In 2018, a process was set in motion that eventually culminated in the adoption of a new good time program. See *id*. § 1(a)(2). That program now exists as an earned time program in an administrative rule adopted by the Department of Corrections. Vt. Admin. Code 12-8-38. In this case, Plaintiff KC Myers, a Vermont inmate, claims that the DOC ceased making the program available to him for purposes of his burglary sentence in violation of the Ex Post Facto Clause of the United States Constitution, U.S. Const. art. I, § 10.[1] The parties have filed cross-motions for partial summary judgment addressing this issue.[2]

The U.S. Supreme Court has described the purpose of the Ex Post Facto Clause as follows:

> The ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation.

[1] Mr. Myers is serving two sentences: one for lewd and lascivious conduct with a child (L&L) and one for burglary. The L&L conviction long predates the adoption of the earned time program, and he does not claim any ex post facto violation regarding that crime. His argument is limited to his subsequent burglary crime.

[2] Mr. Myers has brought two additional claims that, by agreement of the parties, are not now at issue.

Weaver v. Graham, 450 U.S. 24, 28–29 (1981) (footnotes and citations omitted). To be prohibited by the clause, the law must be retrospective and it must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 430 (1987). The "question can be recast as asking whether [the provision at issue] applies to prisoners convicted for acts committed before the provision's effective date." *Weaver*, 450 U.S. at 31. The prohibtion applies to legislative acts whether adopted by the legislature or through formal agency rulemaking. *Prater v. U.S. Parole Com'n*, 802 F.2d 948, 954 (7th Cir. 1986). The burden of proof is on the claimant, Mr. Myers. See *Calif. Dep't of Corrections v. Morales*, 514 U.S. 499, 510 n.6 (1995) (noting "the settled rule that a claimant must bear the risk of nonpersuasion as to the existence of an alleged constitutional violation").

Mr. Myers argues that the court need look no further than *Weaver* to find an ex post violation here. In that case, the U.S. Supreme Court clearly found the retroactive alteration to a "good time" or "gain time" program to be both retroactive and disadvantageous for ex post facto purposes. *Weaver*, 450 U.S. at 33. The State argues that (1) it has not misinterpreted or misapplied its earned time rule or the statute requiring its promulgation, and (2) there can be no ex post facto violation in this case because the earned time program cannot increase the sentence minimum or maximum imposed by the sentencing court.

Before addressing Mr. Myers' argument, the State's arguments may be quickly dispatched. There is no claim by Mr. Myers that the DOC has misinterpreted any rule or statute, so establishing that it has not done so is irrelevant. The State's apparent argument that only a legislative act that increases a formal sentence minimum or maximum may violate the clause is simply wrong. The *Weaver* Court itself expressly explained that the "reduced opportunity to shorten . . . time in prison," as by changes to a good time program, is a substantial disadvantage for ex post facto purposes. *Id*. at 33–34.

It is thus apparent that if Mr. Myers would have had access to the DOC's earned time program on the date of the commission of his burglary crime, and the DOC subsequently changed the program to eliminate or reduce his access to it, then doing so very well may violate the Ex Post Facto Clause. Curiously, however, the parties never establish in the evidentiary record when the earned time program first became effective. A simple chronology of the material facts, to the extent available, however, strongly implies that no such violation has occurred in this case.

Vermont's old good time system was repealed in 2005. On June 10, 2019, Act 56 became effective. 2019, No. 56, § 9. Act 56 first added 28 V.S.A. § 818. 2019, No. 56, § 2. Section 818 directed the DOC "[o]n or before July 1, 2020, . . . [to] file a proposed rule pursuant to 3 V.S.A. chapter 25 implementing an earned good time program" and set forth certain standards for such a program. At the time, § 818(b)(2)(C)(5) clearly said, "The program shall become effective upon the Department's adoption of final proposed rules pursuant to 3 V.S.A. § 843 [referring to Vermont Administrative Procedures Act]."

On July 13, 2020, the legislature extended the deadline for the DOC's proposed rule to September 1, 2020, and it changed the standards for the program substantially. 2019, No. 148 (Adj. Sess.), § 14; see also *id.* § 24(a) as to effective date. The September 1, 2020 proposal was intended to be in the form of an emergency rule to take effect on January 1,

2021, and as a concurrent, proposed permanent rule. Accordingly, § 818(b)(2)(C)(5) was deleted.

On April 26, 2021, the legislature again modified the standards for the program, this time disallowing credit for those inmates serving sentences for disqualifying offenses. 2021, No. 12, § 2; see also *id*. § 3 as to effective date. L&L with a child is a disqualifying offense.

The two dates that matter for purposes of Mr. Myers' ex post facto claim are when the burglary occurred and when the earned or good time program became effective. Mr. Myers committed the crime of burglary while on parole on August 17, 2019. About 2 months earlier on June 10, 2019, the legislature had directed the DOC to propose a good time program by rule. There is, however, no indication in the record that any such rule was either proposed or adopted on or before August 17, 2019.

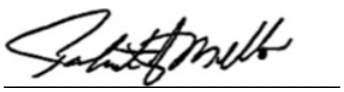
The history of the administrative rule, at least as described by Westlaw editors, shows that the first time the program became effective was on January 1, 2021, the effective date of the emergency rule required by Act 148. That rule then was repealed on May 12, 2021, and the permanent rule was adopted on June 12, 2021.

It appears clear, then, that there can be no ex post facto violation in this case simply because there was no good or earned time program in effect at the time of Mr. Myers' burglary. Mr. Myers has the burden of proving his ex post facto claim. His summary judgment briefing does not satisfy that burden. The record supports awarding summary judgment to the State on the basis described. However, because the parties did not expressly address the issue of the date when the program first became effective, the court first will give Mr. Myers 15 days to address this issue.

Order

For the foregoing reasons, if Mr. Myers disagrees with the court's conclusion as to the effective date of the earned time program, he may brief that issue within 15 days. If he does, the State may respond within 10 days, and the court then will take the matter under advisement. If he does not, the court clerk will enter the court's ruling as follows: Mr. Myers' motion for partial summary judgment is denied, and the State's motion is granted on the basis set forth above.

SO ORDERED this 12th day of April, 2022.



Robert A. Mello
Superior Judge