

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0377

EDDIE GENE EVANS

VERSUS

BURL CAIN, WARDEN

Handwritten initials: JAW

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 544,803, Section 24
Honorable R. Michael Caldwell, Judge Presiding**

**Eddie Gene Evans
Waupun, WI**

**Plaintiff-Appellant
In Proper Person**

**William Kline
Baton Rouge, LA**

**Attorney for
Defendant-Appellee
Burl Cain, Warden
Louisiana State Penitentiary**

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered October 31, 2008

PARRO, J.

An adult offender appeals the judgment of the district court that dismissed his petition for judicial review of administrative remedy procedure number LSP-2005-4004 for failure to timely seek judicial review in the district court. For the following reasons, we amend and affirm, as amended, on different grounds.

Factual and Procedural Background

On June 4, 1985, Eddie Gene Evans (Evans) was sentenced to imprisonment of 35 years at hard labor without the benefit of probation, parole, and suspension of sentence for an armed robbery committed on October 25, 1984.¹ Under the applicable laws, the full term of his imprisonment would expire on October 25, 2019; however, with good time credits in effect at that time, he could have become eligible for release, as if on parole, on May 8, 2008. On November 16, 1994, Evans signed a "Good Time Rate Option and Approval Form" signifying that he wanted to receive good time at the rate of 30 days for every 30 days in actual custody pursuant to LSA-R.S. 15:571.3. Evans' request was approved on November 29, 1994, with his eligibility to receive good time at that rate effective on June 4, 1985. On January 10, 2003, Evans was released from the custody of the Louisiana Department of Public Safety and Corrections (DPSC), as if on parole, by diminution of sentence in accordance with LSA-R.S. 15:571.5.

Shortly after his release, while in the state of Wisconsin where the supervision of his parole had been transferred, Evans was arrested and charged with committing an armed robbery with the threat of force on April 30, 2003, to which he pled no contest and received a 20-year sentence. His Wisconsin sentence contemplated that he would be confined to prison in Wisconsin for seven years, followed by a period of 13 years extended supervision. On April 22, 2003, the Louisiana Board of Parole issued a

¹ He was also sentenced to three years for aggravated battery, with that sentence to run concurrent with the other sentence.

warrant for Evans' arrest for a parole violation. By letter dated June 9, 2004, the Warrant-Fugitive and Extradition Unit of the Louisiana Probation and Parole Office of DPSC notified the Wisconsin authorities of the issuance of the warrant and requested notice 30 days prior to Evans' scheduled release so that DPSC could arrange to assume custody of Evans at that time.

On December 28, 2005, while an inmate in the custody of the Wisconsin Department of Corrections confined to the Waupun Correctional Institution, Evans filed a request for administrative remedy procedure review with DPSC challenging the propriety of his 2003 release, urging that his participation in the double good time program was improper. The final decision on Evans' request was made by DPSC on April 24, 2006.² On June 5, 2006,³ Evans signed the petition for judicial review that was filed with the district court on June 30, 2006.⁴ In his petition for judicial review, Evans alleged that he filed an initial petition for judicial review on May 31, 2006, which was returned to him on June 1, 2006, because it was not in proper form.

After examining the documentation of record, the commissioner determined that Evans' May 31, 2006 and June 5, 2006 petitions were untimely. Based on this finding, the commissioner recommended that Evans' suit be dismissed without service on the defendant in accordance with the screening requirements of the Louisiana Corrections Administrative Remedy Procedure Act and LSA-R.S. 15:1177(A). After adopting the commissioner's report as its reasons, the district court dismissed, without prejudice, Evans' suit for failure to timely seek judicial review. Evans appealed.

Discussion

Louisiana Revised Statute 15:1177(A) provides, in pertinent part:

² In an attachment to his petition, Evans alleged that the agency's final decision (second step response) was made on May 9, 2006.

³ Although the date of June 6, 2006, is noted by Evans' signature, the appropriate date is that stated by the Wisconsin notary who witnessed Evans' signature.

⁴ A pro se offender's petition for judicial review of a DPSC final decision is considered to be filed as of the time the inmate deposited his legal mail with prison authorities, using proper procedures for prison mail. See Shelton v. Louisiana Dept. of Corrections, 96-0348 (La. App. 1st Cir. 2/14/97), 691 So.2d 159, 163; see also Tatum v. Lynn, 93-1559 (La. App. 1st Cir. 5/20/94), 637 So.2d 796, 797-99.

Any offender who is aggrieved by an adverse decision ... by the Department of Public Safety and Corrections ... rendered pursuant to any administrative remedy procedures under this Part may, **within thirty days after receipt of the decision**, seek judicial review of the decision only in the Nineteenth Judicial District Court [Emphasis added.]

The 30-day time period in which to seek judicial review provided for in LSA-R.S. 15:1177(A) is peremptive rather than prescriptive. Carter v. Lynn, 93-1583 (La. App. 1st Cir. 5/20/94), 637 So.2d 690, 691. If an adult offender fails to file an action for judicial review in the district court within 30 days after he received his final agency decision, his right to relief ceases to exist. See Id.

Although the record discloses that DPSC issued its second step response on April 24, 2006, the documentation of record does not reveal the date on which Evans received the final agency decision. The commissioner, in reasons adopted by the district court, seemingly relied on the date on which the DPSC's final decision was rendered in determining the timeliness of the petitions for judicial review that were filed by Evans. Such reliance constituted legal error since the 30-day period set forth in LSA-R.S. 15:1177(A) is not triggered until the inmate **receives** DPSC's final decision. Accordingly, we conclude that the record does not support a finding that April 24, 2006, was the date on which the applicable 30-day peremptive period commenced to run. Furthermore, from the record, we are unable to determine if Evans' petition for judicial review was, or was not, timely filed within the applicable peremptive period.⁵ Therefore, the dismissal of Evans' suit for lack of jurisdiction was improper.

In his petition for judicial review, Evans objected to his having been released on good time parole in 2003 under the "double good time" statute that allowed an offender, who was previously only earning good time at a rate of 15 days a month, to be eligible to earn 30 days of good time a month.⁶ Evans claimed that he was not eligible for any kind of release on parole by virtue of his armed robbery conviction. He

⁵ In his brief to this court, Evans stated that he received the agency's decision on May 5, 2006. If such is the case, his June 5, 2006 signing of the petition for judicial review would not have been timely.

⁶ Since the district court dismissed Evans' petition as untimely, it did not reach the merits of the legal basis of his objection. Nonetheless, the commissioner had analyzed this issue in making recommendations to the district court.

argued that because he was erroneously released, he cannot now be held responsible under the good time parole revocation law that requires service of the balance of the sentence from the date of release. Based on this argument, he urged the district court to reinstate his original anticipated good time parole date of May 8, 2008. In considering this argument, the commissioner for the district court noted:

His original good time release date, estimated under the old good time law effective in 1985, as 2008, was moved up under the double good time law to January 10, 2003. Without objection or correction, the Petitioner accepted his release to good time parole, which was in effect until his full term release date--presumably 2019 (in accordance with R.S. 15:571.5).

Shortly after this release, he was convicted in Wisconsin of another armed robbery and sentenced to 7 years. By virtue of R.S. 15:574.10 and the Petitioner's new felony conviction, the Petitioner's Louisiana parole was automatically revoked. R.S. 15:571.5 C therein required that he serve his balance of his full term due as of the date of release—which would have left him with approximately 16 years from 2003 left to serve on the 35 year sentence.

The Petitioner now complains that since he was originally convicted in this state of Armed Robbery, he was never parole eligible under Louisiana law, and thus, he seeks to have his original good time release date of 2008 maintained, without any factual or legal basis. The Petitioner argues that he was never eligible (as an armed robber) for parole—*good time parole* or otherwise. He is legally incorrect as to "good time parole eligibility", because armed robbery does not prohibit *good time parole eligibility* by virtue of R.S. 15:571.3-5, even though it does prohibit ordinary parole. In fact, if the Court follows the Petitioner's argument that he was never eligible for good time parole to its "logical" conclusion, then he cannot be entitled to the 2008 release date he demands, because that *too*, by his own admission, is an early release date based on good time credits, and R.S. 15:571.5 requires that early release to be under supervision, as well, "as if on parole". Therefore, considering his own argument that he cannot be placed on parole of any kind because of his crime, he could not be released early before the full service of his sentence—2019, which obviously, is not what the Petitioner seeks as a remedy herein. Consequently, his complaint states no cause of action for which relief is available, and it must be dismissed because it cannot be cured by amendment.

[T]he Petitioner was sentenced to 35 years in 1985; the [DPSC] calculated his full term date 2019, to be some 34 years thereafter. Clearly, he has not served his entire sentence or even close to it, and he could not be eligible for early release of any kind without the benefit of the good time statutes—which after 1982 required supervision in all cases "as if on parole." Since the Petitioner argues he cannot be released on parole of any kind, he defeats his own claim for release in 2008, even assuming *arguendo*, that he could be released on that date based on good time accumulation.

Therefore, as to the merits, the Petitioner's claim is a waste of this Court's time and resources. Good time parole supervision is the law and

was the law in 1985. All who are eligible for early release from prison who are not otherwise parolable, must accept supervision pursuant to R.S. 15:571.5 if they are to be released before the full term date. If released, and parole is subsequently revoked, no credit is given for time on the street, and the prisoner must serve the balance of the sentence due as of the date of release—in this case, 2003. There is no legal basis for the Petitioner's assertion that he is statutorily ineligible for good time or that his previous release should be nullified and he should once again be released in 2008 on the contention that since he was not entitled to the prior release, it is a nullity and he cannot be held accountable for accepting it without complaint. [Footnotes omitted.]

Based on these findings, the commissioner recommended to the district court that Evans' petition be dismissed without service on the defendant and with prejudice at his costs.

After a thorough review of the record, we find no error in the commissioner's reasoning as to the merits of the issues raised in Evans' petition. Therefore, we amend the district court judgment to dismiss Evans' petition **with** prejudice. As amended, the judgment is affirmed. All costs of this appeal are assessed to Eddie Gene Evans.

AFFIRMED AS AMENDED.