

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1777

GEORGE LOPEZ

VERSUS

CYNTHIA HEBERT, RECORDS DEPARTMENT SUPERVISOR,
C. PAUL PHELPS CORRECTIONAL CENTER; WARDEN R. HENDERSON
AND LINDA RAMSEY

Judgment Rendered: APR - 1 2010

APPEALED FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 566,407, DIVISION 8

THE HONORABLE WILLIAM A. MORVANT, JUDGE

George Lopez
Dequincy, Louisiana

Plaintiff/Appellant
George Lopez In Proper Person

Debra A. Rutledge
Baton Rouge, Louisiana

Attorney for Defendant/Appellee
James M. LeBlanc, Secretary of
Department of Public Safety and
Corrections

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

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McDONALD, J.

The petitioner in this matter, George Lopez, appeals a judgment from the Nineteenth Judicial District Court, affirming the final agency decision of the Department of Public Safety and Corrections (DOC) and dismissed Mr. Lopez's request for judicial review with prejudice at petitioner's cost.

Initially, we note that Mr. Lopez filed a motion to supplement the record, which was considered by another panel of this court. This court denied that motion in part because exhibits B, E, and F were found to be in the record. Otherwise, the panel referred to the merits panel Mr. Lopez's request that the record be supplemented to include exhibits A, C, and D (master prison record dated 7.8.036 [sic], master prison record dated 1.31.06, and master prison record dated 11.29.06 respectively). We deny the motion, because these prison records are not necessary to resolve the issues before us.

Mr. Lopez was sentenced pursuant to La. R.S. 15:529.1 to serve twenty-two years with the DOC after conviction of a violation of Louisiana's Controlled Dangerous Substance Law, in March 1992. He was released on parole in 2002, after serving eleven years of his sentence, consistent with his choice to earn good time rather than incentive pay when he began serving his prison term.

In April 2003, Mr. Lopez was charged with violating the conditions of parole by absconding from supervision in August 2002, until he was returned from the state of North Carolina on March 19, 2003. Parole was revoked on May 8, 2003, and Mr. Lopez was returned to prison. Subsequently, Mr. Lopez was advised that he was not eligible to earn good time, because the interpretation of the law by DOC under which he was given the option to earn good time rather than incentive pay had been changed due to recent court decisions.

Mr. Lopez filed an Administrative Remedy Procedure (ARP), questioning the finding that he was ineligible to receive good time. His ARP was reviewed and

the relief requested was denied. Thereafter, he filed a petition for judicial review in the district court. The commissioner's report recommended that the final decision rendered by the agency in Mr. Lopez's case be affirmed and that his request for judicial review be dismissed with prejudice. Judgment so ordering was rendered by the district court on June 29, 2009.

Mr. Lopez appeals that judgment. We have considered the argument submitted in the traversal filed following the commissioner's report, in which Mr. Lopez asserted that the finding of ineligibility for good time was an unconstitutional *ex post facto* law and also a breach of his contract with DOC (the original option for good time form). After careful review of the record and jurisprudence, we conclude as follows.

When Mr. Lopez was sentenced in 1992, DOC did not consider the out-of-state convictions that were the basis for his habitual offender status as prohibiting eligibility for good time. Now, DOC considers habitual offender adjudications based on out-of-state predicate offenses for purposes of La. R.S. 15:571.3. Therefore, Mr. Lopez's prior convictions in Texas and North Carolina prohibit eligibility for good time, pursuant to La. R. S. 15:571.3 C (1), (2), and (3). This change in interpretation does not violate the constitutional prohibition against *ex post facto* laws.

The analysis for a determination of *ex post facto* laws was thoroughly reviewed by the supreme court in *Olivieri v. State*, 00- -0172, 00- -1767 (La. 2/21/01), 779 So.2d 735, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001). As the commissioner noted and the supreme court concluded, the operative factor in determining whether a law falls within the ambit of the *ex post facto* clause is whether the law can be considered "punishment" or alters the definition of criminal conduct. *Oliveiri*, 779 So.2d at 743. Neither of these factors are present here, and in fact, there is no change in the law at issue, only a change in

the interpretation of the law existing in 1992, when Mr. Lopez was originally sentenced.

The Good Time Rate Option Form signed by Mr. Lopez, exercising an option offered by DOC pursuant to La. R.S. 15:571.3, provides that the signer “acknowledge that the department may void this option at any time, in the event that it is determined that I am ineligible to receive good time at this particular rate.” Therefore, the determination by DOC that Mr. Lopez was not eligible to earn good time would not constitute a breach of contract, even if it were legally permissible for DOC to enter into contracts with prisoners concerning terms of their imprisonment.

Based on the foregoing, we affirm the judgment appealed, and issue this opinion in compliance with Uniform Rules, Courts of Appeal, Rule 2-16.1.B. Costs are assessed to George Lopez.

MOTION TO SUPPLEMENT DENIED; JUDGMENT AFFIRMED.