NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1955

GERALD COLE

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL.

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 528,613, Division "D"
Honorable Janice Clark, Judge Presiding

Gerald Cole
Kinder, LA

Plaintiff-Appellant
In Proper Person

William L. Kline
Baton Rouge, LA

Attorney for
Defendants-Appellees
Louisiana Department of Public Safety and Corrections, et al.

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered November 2, 2007

PARRO, J.

An inmate in the custody of the Department of Public Safety and Corrections (DPSC) appeals from a judgment dismissing his petition for judicial review of an administrative decision concerning his eligibility for parole and ordering the assessment of a strike against the petitioner for filing a frivolous suit. For the following reasons, we affirm the dismissal of the inmate's petition and vacate that portion of the judgment ordering an assessment of a strike.

Factual Background and Procedural History

On December 12, 2000, Gerald W. Cole (Cole) was convicted of manslaughter, a violation of LSA-R.S. 14:31, for a homicide that occurred on February 22, 1998. He was sentenced on January 18, 2001, to a term of imprisonment of 25 years, without the benefit of parole, with credit for time served. His sentence was subsequently amended on appeal to provide that only the first five years of his sentence would be served without the benefit of parole. State v. Cole, 01-0731 (La. App. 4th Cir. 5/29/02) (unpublished opinion) (relying on LSA-C.Cr.P. art. 893.3 as it existed in February 1998, which did not mandate that the entire sentence imposed for manslaughter be served without benefit of parole).[1] Afterwards, Cole sought to have his master prison record amended to reflect his new parole eligibility date.

Being unsuccessful, Cole sought an administrative review relative to his eligibility for parole. Cole urged that LSA-C.Cr.P. art. 893.3 as it existed at the time the crime was committed specifically enumerated that parole restrictions for manslaughter could only be restricted for a specified period of time not to exceed five years as it was not considered a crime of violence. DPSC denied Cole's request, finding that inmates who are serving a sentence for a crime of violence that was committed on or after January 1, 1997, and who are otherwise eligible for parole, must serve 85 percent of their sentences before receiving any parole consideration.

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[1] On appeal, the court noted that parole restriction for manslaughter could only be restricted "for a specified period of time not to exceed five years." See LSA-C.Cr.P. art. 893.3(C) as it existed in 1998.

From DPSC's denial of his request, Cole filed a petition for judicial review with the district court. After considering the matter, the commissioner for the district court recommended that the final agency decision be affirmed and that Cole's petition be dismissed with prejudice. Furthermore, the commissioner recommended that Cole be assessed a strike for filing a frivolous suit. After reviewing Cole's traversal of the commissioner's recommendation, the district court affirmed the final agency decision, dismissed Cole's suit with prejudice, and assessed a strike against Cole. Cole appealed.

Eligibility for Parole Consideration

The gist of Cole's argument is that his parole eligibility is governed solely by LSA-C.Cr.P. art. 893.3 as it existed when he committed the crime in question. He urged that 1995 La. Acts, No. 1099, §1, effective January 1, 1997, which in pertinent part amended and reenacted LSA-R.S. 15:571.3(A)(1) and (B) and 574.4(A)(1) and (B), is inapplicable to the issue of his parole eligibility.

Before it was amended by 1999 La. Acts, No. 575, § 1, LSA-C.Cr.P. art. 893.3 provided:

> A. If the court finds by clear and convincing evidence that a firearm was actually used by the defendant in the commission of the felony for which he was convicted, the court shall impose the maximum sentence of imprisonment provided by law if the maximum sentence is less than five years and shall impose a sentence of at least five years if the maximum sentence exceeds five years.
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> B. A sentence imposed under this provision shall not be suspended and shall be imposed in the same manner as provided in the felony for which the defendant was convicted.
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> C. The court may order that a defendant sentenced under this provision shall not be eligible for parole for a specified period of time not to exceed five years.
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> D. If the court finds that a sentence imposed under provisions of this Article would be excessive, the court shall state for the record the reasons for such finding and shall impose the most severe sentence which is not excessive.
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> E. (1)(a) Notwithstanding any other provision of law to the contrary, if the defendant commits a felony with a firearm as provided for in this Article, and the crime is considered a violent felony, the court shall impose a minimum term of imprisonment of ten years.
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> (b) A "violent felony" for the purposes of this Paragraph is: first degree murder, second degree murder, aggravated rape, aggravated

sexual battery, aggravated kidnapping, aggravated burglary, carjacking, or armed robbery.

(2) A sentence imposed under this Paragraph shall be without benefit of parole, probation or suspension of sentence.

By Act 575 of 1999, LSA-C.Cr.P. art. 893.3(E)(1)(b) was amended to include manslaughter as a "violent felony," and LSA-C.Cr.P. art. 893.3(E)(1)(a) was amended to provide for a minimum sentence of 20 years for the discharge of a firearm during the commission of an enumerated "violent felony."[2]

The imposition of a harsher sentence than that prescribed at the time the offense was committed constitutes a violation of the *ex post facto* clauses of both the federal and state constitutions. State v. Taylor, 34,823 (La. App. 2nd Cir. 7/11/01), 793 So.2d 367, 369; State v. Marts, 98-0099 (La. App. 4th Cir. 5/31/00), 765 So.2d 438, 441. With the crime in question having occurred on February 22, 1998, Cole is correct in stating that his sentencing was governed by the pre-1999 version of LSA-C.Cr.P. 893.3. In 1998, a person convicted of manslaughter was to be imprisoned at hard labor for not more than 40 years. LSA-R.S. 14:31(B). Under the applicable version of LSA-C.Cr.P. art. 893.3, if a firearm was actually used, a minimum sentence of five years was required, which could not be suspended and had to be imposed in the same manner as provided in the felony for which the defendant was convicted. In addition, the offender would not be eligible for parole for a specified period of time not to exceed five years.

Cole's sentence of 25 years at hard labor was within the statutory range for the crime of manslaughter. LSA-C.Cr.P. art. 893.3 required that the sentence not be suspended. Article 893.3 authorized the trial court to order that a defendant sentenced under this provision shall not be eligible for parole for a specified period of time not to exceed five years. Cole's sentence as amended by the appellate court complied with these statutory requirements. Accordingly, there was no *ex post facto* application of the 1999 amended version of LSA-C.Cr.P. art. 893.3 in this case.

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[2] In LSA-C.Cr.P. art. 893.3(E)(1)(b), "aggravated sexual battery" was changed to "second degree sexual battery" by 2004 La. Acts, No. 676, § 3.

Cole maintained that because his amended sentence was for 25 years, without the benefit of parole for the first five years, he became eligible for parole upon the expiration of the first five years. He argued that DPSC violated his rights by denying him eligibility at that time. What Cole failed to distinguish is the difference between parole eligibility, which is determined by the sentence, and eligibility for parole consideration, which is dependent on meeting certain criteria and conditions specified by statute. See Bosworth v. Whitley, 627 So.2d 629, 634 (La. 1993). It is clear that an inmate who has parole eligibility set forth under his sentence may not be eligible for parole consideration under statutory law. Lay v. Louisiana Dept. of Correction-Stalder ex rel. Ieyoub, 98-0592 (La. App. 1st Cir. 4/1/99), 734 So.2d 782, 785, writ denied, 99-1173 (La. 9/17/99), 747 So.2d 1102. Thus, although the district court was required to sentence Cole under the terms of the sentencing statute for the crime he had committed (LSA-R.S. 14:31 and LSA-C.Cr.P. 893.3 (1994)), Cole's parole eligibility is to be determined by the DPSC's Board of Parole pursuant to LSA-R.S. 15:574.4(B)(1995).[3] See St. Amant v. 19th Judicial District Court, 94-0567 (La. 9/3/96), 678 So.2d 536; see also State v. Lanieu, 98-1260 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 96, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962; State v. Miller, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459.

Generally, LSA-R.S. 15:574.4(B)(1995) denied parole eligibility to a person convicted of a crime of violence and not otherwise ineligible for parole unless he had served at least 85 percent of the sentence imposed. Pursuant to LSA-R.S. 14:2(13)(d)(1995),[4] manslaughter was listed as a crime of violence. Thus, the imposition of LSA-R.S. 15:574.4(B)(1995) under the facts of this case does not constitute a violation of the *ex post facto* clause.

Strike

On appeal, Cole also challenges the district court's assessment of a "strike." Louisiana Revised Statute 15:1187 provides for the assessment of strikes against an

[3] See 1995 La. Acts, No. 1099, §1, effective January 1, 1997.

[4] The 1995 amendment of LSA-R.S. 15:574.4(B) was in effect on the date of the offense. See 1995 La. Acts, No. 1223, § 1.

inmate if he has brought a civil action or appeal in a state court that was dismissed on a ground that it was frivolous, was malicious, failed to state a cause of action, or failed to state a claim upon which relief may be granted, unless the inmate is under imminent danger of serious physical injury. However, the Prison Litigation Reform Act (PLRA), when read in its entirety, is clear that it is intended to apply only to suits with respect to the conditions of confinement or the effects of actions by government officials on the lives of inmates, but not to post-conviction relief or habeas corpus proceedings challenging the fact or duration of confinement in prison. Manuel v. Stalder, 04-1920 (La. App. 1st Cir. 12/22/05), 928 So.2d 24, 27; Frederick v. Ieyoub, 99-0616 (La. App. 1st Cir. 5/12/00), 762 So.2d 144, 149-50, writ denied, 00-1811 (La. 4/12/01), 789 So.2d 581; see LSA-R.S. 15:1181(2). Because Cole is challenging the duration of his custody and not a condition of his confinement, we conclude that the PLRA's strike provisions do not apply in this case. As such, the district court erred in assessing a strike against Cole. Accordingly, we vacate that portion of the district court's judgment that assessed the strike.

Decree

For the foregoing reasons, that portion of the district court's judgment dismissing Cole's petition with prejudice is affirmed, and that portion of the judgment that assessed the strike is vacated. Costs of this appeal are assessed to Gerald Cole.

AFFIRMED IN PART; VACATED IN PART.