

Circuit Court for Baltimore City
Case # 98128904/CH769

IN THE COURT OF APPEALS OF MARYLAND

No. 39

September Term, 1998

SECRETARY, DEPARTMENT OF PUBLIC
SAFETY AND CORRECTIONAL SERVICES AND
COMMISSIONER, DIVISION OF CORRECTION

v.

VINCENT HENDERSON

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell

JJ.

Concurring and Dissenting Opinion by Chasanow, J.
in which Bell, C.J., & Rodowsky J. join

Filed: October 8, 1998

I cannot join the majority opinion for several reasons. First, a majority of the Court acknowledges they joined in but at the time did not realize the implications of two of this Court's opinions: *Md. House of Correction v. Fields*, 348 Md. 245, 703 A.2d 167 (1997), and *Beshears v. Wickes*, 349 Md. 1, 706 A.2d 608 (1998). Those same members of the Court endorsed the clarification of the method of calculating good-conduct credits for inmates released on parole or mandatory release (hereinafter referred to collectively as "parole") because it was more beneficial than the prior method to inmates who recidivate by committing non-violent crimes. Now, however, they decline to follow the same method of calculation because it is less beneficial than the disapproved method of calculating good-conduct credits for inmates who recidivate and commit violent crimes and serious drug distribution crimes (hereinafter I will collectively refer to these crimes as "violent crimes"). It seems to me that the method of calculation described in *Wickes* that lets non-violent offenders out sooner, but also keeps parole-violating violent offenders in longer, is a desirable result. Second, the majority requires two totally different constructions of "term of confinement" as it pertains to sentences for crimes committed while on parole because two different constructions are necessary to assure that both non-violent, as well as violent offenders who commit crimes while on parole, serve the least possible time for their new crimes. Third, had the Parole Commission not exercised its discretion to revoke Henderson's parole when he committed a new crime,¹ Henderson would have been serving only one

¹Maryland Code (1957, 1997 Repl. Vol., 1997 Supp.), Article 41, § 4-511 provides in pertinent part:

“(c) *Action authorized by member.* — If the Commission

sentence and would have had a mandatory release date of February 25, 2002, but because the Parole Commission also revoked Henderson's parole, he is serving two sentences and, therefore, according to the majority, his mandatory release date is over 4 ½ years earlier, July 7, 1997. I doubt that the Parole Commission will be pleased to find out that, by revoking Henderson's parole after his new sentence, it was decreasing, not increasing, the time he would serve and was mandating that he be released 4 ½ years earlier than if his parole was not revoked. Finally, the majority purports to be construing Maryland Code (1957, 1996 Repl. Vol., 1997 Supp.), Article 27, § 700,² but its construction is directly contrary to another section of that same statute not cited by the majority.

The Division of Correction read our two opinions in *Fields* and *Wickes, supra*, and understood both the clearly set forth holding that sentences for crimes committed while out on parole were to be treated as new terms of confinement and the implications that these two cases had on the method of calculating good-conduct credits for inmates who commit and are sentenced for crimes committed when they are on parole. We stated quite clearly that a sentence for a crime committed by an inmate while out on parole is a separate sentencing event and a separate term of confinement. We even gave explicit examples of how the

member finds, from the evidence, that the parolee has violated a condition of his parole, the Commission member may take the action that he considers appropriate, including:

(1) Revocation of the order of parole.”

²Unless otherwise indicated, all statutory references are to Md. Code (1957, 1996 Repl. Vol., 1997 Supp.), Art. 27.

calculations were to be made. *Wickes*, 349 Md. at 10-12, 706 A.2d at 612-13. The Division used that new method to recalculate the sentences of Fields, Wickes, Henderson and many other inmates. Non-violent parole violators benefited from the new method of calculation while violent parole violators fared worse under the new method of calculation. Those inmates like Fields and Wickes, who committed and were sentenced for non-violent crimes while out on parole, received good-conduct credits at the rate of ten days per month on their new terms of confinement and new earlier release dates than under the former method, but those inmates like Henderson, who committed violent crimes while out on parole, received only five days per month on their new terms of confinement and could not carry over diminution credits from their prior terms of confinement, resulting in later release dates. The majority now says that a sentence for a crime committed while out on parole is a new term of confinement only for some but not all parole violators. There are no bases in statutory language, law, or logic for holding that the same statute requires a new sentence for a post-parole crime to be a different term of confinement if the sentence is for a non-violent crime, but part of the same term of confinement if the new sentence is for a violent crime.

The majority's opinion is consistent with *Fields* and *Wickes* in its explanation of the history of § 700 and the interpretation of that statute as applied in *Fields* and *Wickes*. The majority strains to manufacture a way to make the *Fields* and *Wickes* decisions inapplicable to recidivists who commit violent crimes on parole in order to let those violent recidivists out earlier than our express language in the *Wickes* decision would allow. I do not believe this inconsistent construction that benefits violent multiple offenders was the intent of the

legislature, and I know it is contrary to the express language of *Wickes* and was neither the intent of the author of the *Fields* and *Wickes* opinions nor at least two additional members of the Court.

The majority holds that, when an inmate is released on parole and commits a new and nonviolent crime, the *Fields* and *Wickes* decisions are applicable and the second sentence commences a new term of confinement, but when the parolee commits a violent crime *Fields* and *Wickes* are not applicable and the second sentence is not a new term of confinement. What is the rationale for this dual construction of the same statute? That, if we apply *Fields* and *Wickes* to those who commit violent offenses while on release, they will serve more time than they would have served under the prior disapproved construction. Either a new sentence for a crime committed while on parole is a new term of confinement or is not a new term of confinement. The *Fields* and *Wickes* construction of “term of confinement” should apply to all inmates, not just those whose new crimes were nonviolent. There is no basis for the novel approach of giving the same statute and the same issue of whether post-parole sentences are part of the same or different terms of confinement two different interpretations.

When Henderson was released on parole in 1991, he committed another crime, a drug distribution offense, which is one of those crimes the statute classifies along with violent crimes and that I have collectively called violent crimes. That sentence was in 1994. He received ten years for that new offense, consecutive to the sentences he was serving prior to his parole. Under *Fields* and *Wickes* this is a new term of confinement. The new ten-year

term of confinement was for a violent offense, so Henderson could only receive five days per month good-conduct credits or 600 days, which meant that he would not be eligible for parole until February 25, 2002. That is the way we said good-conduct credits should be calculated in *Fields* and *Wickes* since the new sentence was a new term of confinement. The actual reason why the old disapproved method of calculation gives Henderson a 4 ½ year earlier release date of July 7, 1997, is because if there is only a single term of confinement encompassing both sentences, then the effect is that some of the diminution credits Henderson earned on his pre-parole sentence are credited to reduce his new post-parole sentence. According to the majority, instead of getting the five days per month or 600 days of diminution credits (less than two years) on the drug distribution offense he committed while on parole, Henderson actually receives well over 2,000 days of diminution credits (over 6 ½ years according to the majority) on that new sentence because he gets additional use of the pre-parole diminution credits to reduce his post-parole sentence. In effect, while Henderson was in prison and on parole he was earning 4½ years diminution credits that could be applied to a post-parole crime he had not yet committed.

Inmates should not have a kind of savings account where they can bank sentencing diminution credits to be used to reduce the time they will be sentenced to for future crimes they will commit when they are released from prison on parole. Henderson should not be able to store up over 4 ½ years of diminution credits earned before and during his parole and apply them to a sentence for a crime he committed *after* he was paroled. I thought it was only in the game of Monopoly that one could acquire in advance a “get out of jail free” card.

Finally, and perhaps most importantly, the majority dismisses the fact that, within the same statute the Court is construing, the legislature made clear its disapproval of what the majority is doing by letting Henderson's pre-parole diminution credits reduce his post-parole sentence. The same statute that the majority is construing states that an inmate who is released on parole or mandatory supervision and who commits and is sentenced for a crime while released should not receive carried over credit for pre-parole diminution credits on the new post-parole sentence. Thus, the majority's construction of § 700(k) is not only contrary to the express language in *Fields* and *Wickes*, it is contrary to the express language of § 700(k). Section 700(k) provides in pertinent part:

“Effect of parole violation on deductions. — (1) Except as provided in paragraph (2) of this subsection, if an inmate is convicted and sentenced to imprisonment for a crime committed while on parole and the parole is revoked, diminution credits that were allowed prior to the inmate's release on parole may not be applied toward the inmate's term of confinement upon return to the Division of Correction.

(2) Paragraph (1) of this subsection does not apply to any diminution credits earned following the inmate's return to the Division of Correction.”

That statute, which went into effect in 1996, makes clear that, if a parolee commits and is sentenced for a new crime, the parolee cannot use diminution credits earned before parole to reduce the sentence for the crime committed while on parole. The wisdom of telling parolees they cannot store up diminution credits from their pre-parole sentences (in Henderson's case over 4 ½ years) to be applied to reduce future sentences for new crimes they may commit while out on parole seems obvious. That section shows that the legislature

did not intend § 700(k) to be construed as the majority construes it. The only reason why Henderson gets out in just over three years on a ten-year sentence for a crime he committed while out on parole is that the majority applies an additional 4 ½ years diminution credits from the sentence Henderson was serving prior to his release on parole in addition to the 600 days of good-conduct credits Henderson is entitled to as credit on the sentence for his post-parole violent crime. In clear contradiction to the legislative intent indicated in § 700(k), Henderson is allowed diminution credits earned prior to release on parole to reduce the sentence for a crime he later committed while on parole. Members of the Court may be free to ignore or disavow clear language they adopted in prior decisions, but they are not free to ignore or disavow clear legislative intent when construing a statute. At least the majority does recognize that after 1996, if a parolee like Henderson commits and is sentenced for a new crime, that post-parole sentence will constitute a new term of confinement. Thus, according to the majority, the 1992 good-conduct credit statute is to be construed as follows: If a parolee commits and is sentenced for a nonviolent crime after being released on parole, the new sentence and old sentence are separate terms of confinement. If a parolee commits and is sentenced for a violent crime while on parole before 1996, according to the majority, the legislature intended violent parole violators to carry over good-conduct credits from pre-parole sentences, and the pre-parole and post-parole sentences are one term of confinement, but after 1996, all parolees who commit crimes are treated the same and the pre-parole sentence and post-parole sentence are different terms of confinement. I sincerely doubt that is what the legislature intended. I respectfully dissent from the Court's opinion, but concur

in the result, albeit, for a different reason.

Henderson was released by the Division of Correction on mandatory release. At the time of his release, both the Division of Correction and Henderson believed he was entitled to mandatory release under the applicable statutes. Ten months later, as a result of our *Fields* and *Wickes* decisions, the Division of Correction came to the conclusion that Henderson was not entitled to mandatory release and determined to terminate Henderson's release. Based on an arrest warrant issued without any semblance of probable cause, Henderson was deprived of his liberty and reincarcerated by the Division of Correction without any prior notice and without being given any opportunity to contest the Division's unilateral action. This is improper. *See Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

The Division had two options and neither of them was entirely satisfactory, but I believe the one chosen was improper. The Division could have, and I believe should have, sought revocation of Henderson's mandatory release under one or more of the administrative hearing provisions: Md. Code (1957, 1997 Repl. Vol., 1997 Supp.), Art. 41, § 4-612(2)(c) (person under mandatory supervision is subject to rules and conditions applicable to parolees); § 4-612(e)(revocation of mandatory supervision); § 4-511B (modification of parole); and § 4-511 (revocation of parole). These procedures would provide Henderson with an opportunity to be heard as to why his mandatory release should not be terminated and perhaps to even argue for continuation of parole or home detention. Instead, the Division chose to treat its release of Henderson as a nullity and caused an escape warrant to

issue for Henderson's arrest. Although an escape warrant might have been proper if Henderson knew or even had some reason to suspect that his release was improper, that was not the situation in the instant case. At the time of Henderson's release, all parties believed the release was required. Henderson had done nothing that justified an escape charge. There is absolutely no probable cause for the escape warrant and no justification for using a baseless charge as a subterfuge to reacquire custody of a parolee instead of using the administrative procedure for a revocation of mandatory release which provides for a hearing for the parolee. Henderson is entitled to habeas corpus relief as a result of the improper procedure that returned him to prison.

Chief Judge Bell and Judge Rodowsky have authorized me to state that they join in the views expressed in this concurring and dissenting opinion.