

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JAMES TELFER,

Petitioner,

v

File No. 03-22545-AW
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF
CORRECTIONS, PAROLE BOARD,

Respondent.

Lynn B. D'Orio (P48042)
Attorney for Petitioner

Chester S. Sugierski, Jr. (P21129)
Assistant Attorney General
Attorney for Respondent

DECISION AND ORDER

On December 2, 1993, the Petitioner, James Telfer, was sentenced to 2 years confinement in the Michigan Department of Corrections on a felony firearms violation, 3 to 10 years for breaking and entering and 1 year for fleeing and eluding. He received 72 days credit on the felony firearm sentence. The breaking and entering and fleeing and eluding sentence were ordered to be served concurrent to each other and consecutive to the felony firearm sentence.

The felony firearm sentence became the first sentence in the Petitioner's string of consecutive sentences followed by the 3 to 10 years consecutive sentence for breaking and entering. The 1 year sentence for fleeing and eluding being concurrent with the breaking and entering sentence is not relevant to any sentence calculations.

While confined, the Petitioner was convicted of aggravated stalking. On December 16, 1996, he was sentenced to 1 to 5 years to be served consecutive to his other sentences, pursuant to MCL 768.7a. This became the third sentence in the string of consecutive sentences.

In April of 1999, the Petitioner was paroled. In May of 1999, while on parole, the Petitioner was arrested and charged with fleeing and eluding. On August 16, 1999, he was sentenced to a consecutive term of 3 to 5 years, pursuant to MCL 768.7a. This sentence became the fourth sentence in the string of consecutive sentences.

The Petitioner is currently confined at the Pugsley Correctional Facility in Grand Traverse County. On January 2, 2003, he filed a complaint for a writ of habeas corpus in this Court.¹

ISSUE

The Petitioner contends that the Parole Board should have terminated some of his consecutive sentences pursuant to MCL § 791.234(5) and Policy Directive 03.01.135 and that failure to do so (1) is arbitrary and capricious and violates his due process rights; (2) constitutes a radical jurisdictional defect; and (3) violates the separation of powers clause of the Michigan Constitution. The Petitioner does not seek discharge from confinement but only that the sentences in his consecutive string of sentences on which he has served the maximum be terminated.

APPLICABLE STATUTORY PROVISIONS

MCL 768.7a(1) provides, in relevant part:

A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state.

MCL § 791.234 provides, in relevant part, as follows:

¹ Because of the public importance of the question raised herein, the Court chooses to disregard the fact that Petitioner filed a complaint for writ of habeas corpus rather than bringing his claim properly by way of mandamus.

(3) If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(4) If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(5) If a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served.

Policy Directive 03.01.135 provides, in relevant part, as follows:

- EE. If a prisoner is serving concurrent sentences, each non-controlling sentence shall be terminated upon completion of the maximum sentence less applicable regular good time or disciplinary credits which could be earned, even if the prisoner is not eligible for discharge.
- FF. If a prisoner is serving consecutive sentences, none of the sentences which are part of the consecutive string shall be terminated until all sentences in that string have been served. If a prisoner is serving two or more consecutive strings, consecutive sentences in the non-controlling strings shall be terminated upon completion of the appropriate maximum sentence, less applicable credits which could be earned. However, if a sentence is consecutive to more than one consecutive string, that sentence shall remain active until the controlling string has been served, even though the other sentences in the non-controlling strings are terminated.
- GG. Whenever a prisoner's sentence is terminated, a Certificate of Discharge/Sentence Termination/Sentence Discharge by Court Order shall be

issued by the Warden or, for prisoners serving their sentences in another jurisdiction or at MYC, the Records Administrator, OPRMIS, or designee.²

MCL 800.33(11) provides, in relevant part, as follows:

. . . If a prisoner is serving consecutive sentences for separate convictions, his or her good time or disciplinary credits shall be computed and accumulated on each sentence individually and all good time or disciplinary credits that have been earned on any of the sentences shall be subject to forfeiture . . .

ANALYSIS

The Petitioner claims that MCL § 791.234, as implemented by Policy Directive 03.01.135, is unconstitutional because it delegates to the Parole Board the legislative power to determine the maximum sentence that will be imposed for a particular criminal offense in violation of the separation clause of the Michigan Constitution. Const1963, art 3, § 2.

It has long been established that the Legislature is without authority to delegate its legislative powers to an administrative agency. See *King v Concordia Fire Ins Co*, 140 Mich 258; 103 NW 616 (1905); *Michigan CR Co v Michigan RR Comm*, 160 Mich 355; 125 NW 549 (1910). The reason for this prohibition is grounded in two distinct concepts. First, the Constitutional requirement concerning the separation of powers precludes the Legislature from delegating its power to make law. Const1963, art 3, § 2. Secondly, Due Process requires that the exercise of legislatively conferred powers be carried out in a manner which is neither arbitrary nor capricious. *Westervelt v Natural Resources Comm*, 402 Mich 412; 263 NW2d 564 (1978); *Osius v City of St Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956).

Statutes are, however, presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *People v Rogers*, 429 Mich App 77, 94; 641 NW2d 595 (2001). The presumption of constitutionality may justify a narrow construction or even construction against the

² A controlling string is that string of consecutive sentences having the longest maximum term.

natural interpretation of the statutory language. *People v FP Books & News (On Remand)*, 210 Mich App 205, 209; 533 NW2d 362 (1995); *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 137; 521 NW2d 336 (1994). Thus, this Court must review the Corrections Code to see if the Section 34 can be construed in such a way as to render it valid or whether it violates the “delegation” doctrine.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Stanaway*, 446 Mich. 643, 658, 521 N.W.2d 557 (1994). The Legislature is presumed to have intended the meaning it plainly expressed. Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Dep't of Social Services v Brewer*, 180 Mich App 82, 84; 446 NW2d 593 (1989). *People v Roseburgh*, 215 Mich App 237, 239; 545 NW2d 14 (1996).

A consecutive sentence may be imposed only if specifically authorized by statute. *People v Chambers*, 430 Mich 217, 222; 421 NW2d 903 (1988). The Petitioner was sentenced consecutively as mandated by MCL 750.227b(2) (felony firearm) and as mandated by MCL 768.7a(1) because he committed a crime (aggravated stalking) during his incarceration and he committed yet another crime (fleeing and eluding) while on parole.

The primary purpose of the consecutive sentencing statute is to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing. *People v Smith*, 423 Mich 427, 450; 378 NW2d 384 (1985); *People v Kirkland*, 172 Mich App 735, 736-737; 432 NW2d 422 (1988). “The consecutive sentencing statute should be construed liberally in order to achieve the deterrent effect intended by the Legislature.” *Id* at 737; 432 NW2d 422. See also, *People v Phillips*, 217 Mich App 489, 499-500; 552 NW2d 487 (1996); *People v Dukes*, 198 Mich App 569, 570; 499 NW2d 389 (1993); and *People v Weatherford*, 193 Mich App 115, 118; 483 NW2d 924 (1992).

Deterrence, however, is not the sole legislative purpose of the consecutive sentencing provision of § 7b. The Michigan Supreme Court noted in *People v Chambers*, 430 Mich 217, 229; 421 NW2d 903 (1988), that “[the] purpose of consecutive sentencing is to ‘enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.’” Quoting *People v Smith*, 423 Mich 427, 445; 378 NW2d 384 (1985). However, “[t]he effect of consecutive sentences is not to increase the maximum punishment prescribed for the

second offense but merely [to postpone] the time at which the second sentence will commence.” *People v Bonner*, 49 Mich App 153, 160; 211 NW2d 542 (1973).

In *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991), the Court of Appeals held that each consecutive sentence must be viewed individually: “The fact that they exceed the maximum allowable punishment for either of the [individual] offenses when viewed in the aggregate does not render them excessive. The consecutive nature of the sentences does not change the maximum statutory penalty for [any] of the offenses.”

None of the Petitioner’s sentences exceeds the maximum sentence permitted by statute. The fact that they exceed the maximum allowable punishment for any one of his offenses when viewed in the aggregate does not render them excessive. The consecutive nature of the Petitioner’s sentences does not change the maximum statutory penalty for any one of the offenses. See, *People v Harden*, 434 Mich 196, 201; 454 NW2d 371 (1990).

For felons such as the Petitioner who have been convicted of more than one offense for which the Legislature has seen fit to require consecutive sentencing, the Legislature has devised a scheme by which the sentences are aggregated and are subject to the same forfeiture provisions as any other felon serving a like sentence for a single offense. MCL 800.33(11). In this way the deterrent and enhancement purposes of the legislation are achieved. Further, the Department of Corrections acts according to law and no delegation of law making power has occurred.

The Legislature has not delegated the power to determine the maximum sentence for any given offense to the Parole Board. Instead, the Legislature has relied upon the Michigan Department of Corrections to develop policy directives to administratively implement and effectuate the provisions and purposes of the Corrections Code regarding consecutive sentences.

In conclusion, the Petitioner contends that whenever the Parole Board does not terminate a sentence in a consecutive string when the maximum sentence for that individual offense, less applicable credits, has been served, the Parole Board is effectively legislating a new maximum punishment. This contention is unfounded.

The Petitioner’s attempt to analogize his situation to the case of *Lickfeldt v Dep’t of Corrections*, 247 Mich App 299; 636 NW2d 272 (2001) ignores the fact that the outcome in *Lickfeldt* hinged on the specific language of the statute that makes prison escape a felony. MCL 750. 193(1). That statute has no application here and the statutory language that was determinative in *Lickfeldt* is not present in the statutes involved in this case. As a matter of fact,

the *Lickfeldt* Court clearly limited its holding to cases involving consecutive sentences for prison escape when it said: “[T]he broader statutory context does not require [the same] result for every sentence in the plaintiff’s consecutive string.”

CONCLUSION

The Petitioner is not entitled to the relief requested. His petitioner for a writ is denied.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____