

Table of Contents

Jurisdictional Statement	5
Statement of Facts	6
Introduction.....	6
Background.....	6
Sentencing History	6
Execution of Sentences and Probation.....	7
Proceedings in the Circuit and Appellate Courts	8
Proceedings before this Court	10
Points Relied On.....	11
Argument	12
Standard for Mandamus	12
Point I: The order sentencing Mr. Beaver to a third term of probation was illegal and void under Missouri Revised Statute § 559.036.3	13
Point II: The Department of Corrections should be ordered to set Mr. Beaver's conditional release date as April 15, 2005	15
Conclusion	22

Table of Authorities

Cases

<u>Murphy v. State</u> 873 S.W.2d 231 (Mo. 1994).....	11
<u>Parton v. Atkins</u> , 641 S.W.2d 129 (Mo. App. W.D. 1982).....	12
<u>State ex rel. Brown v. Combs</u> , 994 S.W.2d 69 (Mo. App. W.D. 1999)..	8, 10, 13, 14
<u>State ex rel. Bunker Resource Recycling & Reclamation, Inc. v. Mehan</u> , 782 S.W.2d 381 (Mo. 1990)	11
<u>State ex rel. Gater v. Burgess</u> , 128 S.W.3d 907 (Mo. App. W.D. 2004)	11
<u>State ex rel. Haley v. Groose</u> , 873 S.W.2d 221 (Mo. 1994)	11
<u>State ex rel. Light v. Sheffield</u> , 768 S.W.2d 590 (Mo. App. 1989).....	13
<u>State ex rel. Wright v. Dandurand</u> , 973 S.W.2d 161 (Mo. App. 1998)	13
<u>Winslow v. Nixon</u> , 93 S.W.3d 795 (Mo. App. E.D. 2002).....	12

Statutes

Mo. Const. Art. V, §4	5
Mo. Rev. Stat. § 217.655.....	12
Mo. Rev. Stat. § 217.785.....	19
Mo. Rev. Stat. § 319.015.....	17
Mo. Rev. Stat. § 557.036.....	17
Mo. Rev. Stat. § 558.011.....	11, 13, 15, 16, 17, 18

Mo. Rev. Stat. § 558.031..... 19

Mo. Rev. Stat. § 559.036..... 9, 11, 13, 14, 15

Other Authorities

14 CSR 80-2.040 17

Mo. S. Ct. R. 84.225

Jurisdictional Statement

Petitioner Eric A. Beaver brings this action in mandamus to obtain an order compelling the Missouri Department of Corrections' Division of the Board of Probation and Parole ("Parole Board") to correct Mr. Beaver's conditional release date on the basis that, due to an illegal order imposing a third term of probation on him, Mr. Beaver has not received proper credit for the prison time he has served. This Court has the power to grant such writ under Article V, Section 4 of the Missouri Constitution.

Mr. Beaver previously sought and on July 1, 2003, was denied relief on a petition entitled Petition for Writ of Habeas Corpus filed pro se in the Circuit Court of Buchanan County. On December 29, 2003, the Missouri Court of Appeals for the Western District also denied Mr. Beaver's petition. Therefore, adequate relief in this case cannot be afforded by a lower court. Mo. S. Ct. R. 84.22(a).

Mr. Beaver timely appealed to this Court, which treated the Petition as one for a Writ of Mandamus and entered the Preliminary Writ on March 30, 2004. The State then filed its Return to the Preliminary Writ on or about April 28, 2004, necessitating this briefing.

Statement of Facts

Introduction. Mr. Beaver's Petition for Writ relates to the effect of Mr. Beaver's being placed on probation three times, and the prison time credits Mr. Beaver has earned on three Driving While Intoxicated charges. This Brief provides a prose account of Mr. Beaver's sentencing history and prison time; however, the section addressing Point II contains a detailed chart summarizing Mr. Beaver's prison time credits.

Background. Eric Beaver owned Beaver Construction, a construction business that among other work rehabbed a number of historic homes and buildings in the area around St. Joseph, Missouri.

Sentencing History. In April 1997, Mr. Beaver was arrested in Buchanan County, Missouri, and charged with two counts of Driving While Intoxicated. (Ex. C & M.)¹ Mr. Beaver pled guilty to these two counts, Counts CR397-654 and CR397-675 (the "Concurrent Cases"), and on May 23, 1997, the Circuit Court sentenced Mr. Beaver to five years on each charge. (Ex. D, E, N & O.) The sentences for the two charges were to be served concurrently. (Ex. D & E.)

¹ All citations to Exhibits are to those exhibits filed in this Court with the Petition for Writ of Habeas Corpus in March 2003.

On November 30, 1997, Mr. Beaver was arrested for Driving While Intoxicated. On January 16, 1998, he pled guilty to a third charge of Driving While Intoxicated, Count CR 3972425-01 (the “Consecutive Case”). Mr. Beaver was sentenced to five years incarceration on the Consecutive Case. (Ex. W & X.) The sentence on the Consecutive Case was to be served consecutive to the concurrent sentences from the earlier Concurrent Cases. (Ex. W & X.)

Execution of Sentences and Probation. On May 23, 1997, the Circuit Court first executed Mr. Beaver’s sentence in the Concurrent Cases. Mr. Beaver completed a 120-day Institutional Treatment Program (“ITP”) that lasted until September 12, 1997. The Circuit Court then granted Mr. Beaver five years probation on the Concurrent Cases. (Ex. F & P.)

Mr. Beaver’s first term of probation was revoked on January 16, 1998, and his five-year sentences for the Consecutive Cases were again executed. (Ex. G & Q.) On that same day, Mr. Beaver pled guilty to the Consecutive Case, Count CR3972425-01, and was sentenced to a consecutive five-year term of incarceration. (Ex. W & X.) Mr. Beaver was then committed to a second 120-day Institutional Treatment Program.

After Mr. Beaver completed the second Institutional Treatment Program on or about May 15, 1998, the Circuit Court for a second time

sentenced Mr. Beaver to probation. (Ex. H, R & Y.) This second term of probation was to last four years. (Ex. H, R & Y.)

Mr. Beaver was then detained on July 8, 1999. (Ex. E & O.) On August 23, 1999, the Circuit Court for a second time revoked Mr. Beaver's probation and executed Mr. Beaver's sentence. (Ex. J, O, T, & AA.)

On December 22, 1999, Mr. Beaver completed his third Institutional Treatment Program, and the Circuit Court for a third time sentenced Mr. Beaver to probation, this time for three years. (Ex. K, U, & BB.)

Mr. Beaver's third term of probation was revoked on September 4, 2001. (Ex. L, V, & CC.) Mr. Beaver has been incarcerated at the Western Reception Diagnostic Correction Center ("WRDCC") in St. Joseph, Missouri, since September 4, 2001.

Proceedings in the Circuit and Appellate Courts. Mr. Beaver filed his petition, a pro se petition entitled Petition for Writ of Habeas Corpus, in the Circuit Court of Buchanan County on or about May 23, 2003. Mr. Beaver challenged a number of issues, including the fact he had been sentenced to a third term of probation. Mr. Beaver's Petition named as defendants William Burgess, Superintendent of WRDCC, and Denis Agniel, Chairman of the Missouri Department of Correction's Division of the Board of Probation and Parole (collectively "Respondents").

On July 1, 2003, the Circuit Court issued an order that in part stated Mr. Beaver had improperly been sentenced to three terms of probation on the Concurrent Cases. The Circuit Court's Order in relevant part states:

The record clearly shows that the sentencing court sentenced petitioner to three terms of probation in Buchanan County cases CR397-0654 and CR397-0675. The sentencing court lacked authority to sentence petitioner to a third term of probation under Mo. law § 559.036.3 RSMo. 2000; State ex. rel. Brown v. Combs, 994 S.W.2d 69, 71 (Mo. App., W.D. 1999). The court's placing petitioner on a third term of probation was thus improper. This order placing petitioner on a third term of probation thus was void. Combs, 994 S.W.2d at 73.

(Judgment Overruling Petition for Writ of Habeas Corpus, Ex. DD at 2-3, Appendix at A2-3.)

Having declared the third order placing Mr. Beaver on probation "void," the Circuit Court stated that the sentencing court's order revoking Mr. Beaver's probation the second time should be given its full effect. The Circuit Court noted this earlier order executed Mr. Beaver's sentence and committed Mr. Beaver to the Missouri Department of Corrections. Thus, the Circuit Court found that Mr. Beaver's sentence "must be deemed to have

continued to run after the date that the court attempted to place him on a third term of probation,” and that Mr. Beaver was “entitled to credit against his sentences in [the Concurrent Cases] for the time that he was on the illegal third term of probation, i.e. from and after December 22, 1999, until his sentence of five years expired.” (Ex. DD at 3, A-3.)

The Circuit Court denied Mr. Beaver’s Petition, however, because Mr. Beaver had not shown that his detention at the time of the filing was unlawful. (Ex. DD at 4, A-4.)

Mr. Beaver sought relief from the Missouri Court of Appeals for the Western District, filing his petition entitled Petition for a Writ of Habeas Corpus on December 24, 2003. (Ex. EE, A-7.) But on December 29, 2003, the Western District summarily denied Mr. Beaver’s Petition for Writ of Habeas Corpus. (Ex. EE, A-7.)

Proceedings before this Court. Mr. Beaver timely filed his Petition with this Court on or about February 4, 2004. This Court requested the State’s Suggestions in Opposition to be filed on or before March 15, 2004, and the State timely filed objections on that date.

On March 30, 2004, this Court entered a Preliminary Order characterizing Mr. Beaver’s Petition as a Petition for Writ of Mandamus and preliminarily ordering the Missouri Department of Corrections to change

Mr. Beaver's conditional release date to February 7, 2005. (A-9) The State of Missouri opposed the Preliminary Writ on April 28, 2004, and this Court appointed the undersigned counsel on May 13, 2004.

Points Relied On

I. Petitioner Eric Beaver is entitled to an order that the Respondents must give Mr. Beaver prison time credit for all time since the second revocation of his parole and execution of his sentence, because the order sentencing Mr. Beaver to a third term of probation was illegal and void in that Missouri Revised Statute § 559.036.3 does not allow a circuit court to sentence an inmate to a third term of probation as the sentencing court attempted in the present case.

State ex rel. Brown v. Combs, 994 S.W.2d 69, 71 (Mo. App. W.D. 1999)

II. Petitioner Eric Beaver is entitled to an order that Respondents must set his conditional release date as April 15, 2005, because Missouri Revised Statute § 558.011.4 mandates that Mr. Beaver be released after he has served no more than two-thirds of the two five-year consecutive sentences (2433 days) in prison, and April 15, 2005, would be the 2433 day of Mr. Beaver's prison term once Mr. Beaver is credited for all time since

the void order of December 22, 1999, attempted to place Mr. Beaver on a third term of probation.

Argument

Standard for Mandamus.

“A writ of mandamus may issue in cases where the ministerial duties sought to be coerced are simple and definite, arising under conditions admitted or proved and imposed by the law.” State ex rel. Bunker Resource Recycling & Reclamation, Inc. v. Mehan, 782 S.W.2d 381, 389 (Mo. 1990). Mandamus is the appropriate tool to compel the Department of Corrections to give Mr. Beaver appropriate credit for jail time and to set the appropriate conditional release date. Murphy v. State 873 S.W.2d 231, 232 (Mo. 1994). Where appropriate, a court may – as has been done in this case – treat a petition for writ of habeas corpus as a petition for writ of mandamus. State ex rel. Haley v. Goose, 873 S.W.2d 221, 223 (Mo. 1994); State ex rel. Gater v. Burgess, 128 S.W.3d 907, 909 (Mo. App. W.D. 2004).

The agency to be compelled, the Department of Corrections and in particular its Parole Board, is a party because the petition has been filed against the chairman of the Department’s Division of the Board of Probation and Parole. See Mo. Rev. Stat. § 217.655 (“The board of probation and parole shall be responsible for determining whether a person confined in the

department shall be paroled or released conditionally as provided by section 558.011, RSMo.”) (emphasis added). To the extent Respondents may wish to argue that naming the chair does not suffice to bring the Parole Board before this Court, they should be estopped from doing so because (1) Respondents have apparently defended suits naming the Parole Board chair, including this case, for at least twenty-two years without protest and (2) Respondents have also taken affirmative action on behalf of the Parole Board chair in such cases. See, e.g., Parton v. Atkins, 641 S.W.2d 129, 130 n.1 (Mo. App. W.D. 1982) (“No issue is raised as to the propriety of an action against the Board of Probation & Parole brought against the Chairman of the Board only.”); Winslow v. Nixon, 93 S.W.3d 795, 796 (Mo. App. E.D. 2002) (Parole Board’s chair among others appealed a grant of equitable relief related to Missouri Sex Offenders Program).

I. Petitioner Eric Beaver is entitled to an order that the Respondents must give Mr. Beaver prison time credit for all time since the second revocation of his parole and execution of his sentence, because the order sentencing Mr. Beaver to a third term of probation was illegal and void in that Missouri Revised Statute § 559.036.3 does not allow a circuit court to sentence an inmate to a third term of probation as the sentencing court attempted in the present case.

Mr. Beaver and Respondents do not appear to dispute the law or facts in the present case. All parties agree that Mr. Beaver could not be sentenced to a third term of probation on the Concurrent Cases. Missouri Revised Statute § 559.036.3 states: “The court may, upon revocation of probation, place an offender on a second term of probation.” (emphasis added).

Section 559.036.3 expressly allows a court to order only a second term of probation. No statute – not § 559.036.3 nor any other statute – permits a court to sentence Mr. Beaver to a third (or subsequent) term of probation.

Missouri courts have consistently held that a court may “take advantage of Section 559.036.3’s permission to revoke and impose a new term of probation only once.” State ex rel. Brown v. Combs, 994 S.W.2d 69, 71 (Mo. App. W.D. 1999) (emphasis added) (citing State ex rel. Light v. Sheffield, 768 S.W.2d 590, 592 (Mo. App. 1989), and State ex rel. Wright v. Dandurand, 973 S.W.2d 161, 162 (Mo. App. 1998)).² If a court revokes probation a second time, “it has no authority under this or any other provision to impose a third period of probation.” Id. Instead, once a court revokes probation a second time, it must either “order execution of the . . . sentence previously imposed” or “mitigate any sentence of imprisonment by

² Brown was authored by the Hon. Laura Denvir Stith before she joined this Court.

reducing the prison or jail term by all or part of the time the defendant was on probation.” Id. Missouri law does not allow a court to sentence to an offender to any period of probation for an offense after a second term of probation is revoked.

Respondents concede this point. In their Suggestions in Opposition filed March 15, 2004, Respondents admit: “The record clearly shows that the sentencing court sentenced petitioner to three terms of probation in [the Consecutive Cases]. The sentencing court lacked authority to sentence petitioner to a third term of probation. § 559.036.3 RSMo. 2000; State ex rel. Brown v. Combs, 994 S.W.2d 69, 71 (Mo. App. W.D., 1999).” (Suggestions in Opposition to the Petition for Writ of Habeas Corpus, filed Mar. 15, 2004, in this Court, at 3.) Respondents further admit that the order placing Mr. Beaver on a third term of probation was “improper” and “void.” Id. (citing Combs, 994 S.W.2d at 73).

II. Petitioner Eric Beaver is entitled to an order that Respondents must set his conditional release date as April 15, 2005, because Missouri Revised Statute § 558.011.4 mandates that Mr. Beaver be released after he has served no more than two-thirds of the two five-year consecutive sentences (2433 days) in prison, and April 15, 2005, would be the 2433 day of Mr. Beaver’s prison term once Mr. Beaver is

**credited for all time since the void order of December 22, 1999,
attempted to place Mr. Beaver on a third term of probation.**

Since Respondents admit that the order placing Mr. Beaver on a third term of probation was “void,” the sole remaining task is to correct Mr. Beaver’s conditional release date. This requires only a determination of the date on which Mr. Beaver has served two-thirds of the full consecutive terms to which he has been sentenced. As set forth below, Mr. Beaver earned 493 days of prison term credit prior to December 22, 1999, and thus should be conditionally released on or before April 15, 2005, the day on which Mr. Beaver earns 2433 days of prison time credit.

A prison term in Missouri consists of two components, a “prison term and a conditional release term.” Mo. Rev. Stat. § 558.011.4(1). Under Missouri Revised Statute § 558.011.4, Mr. Beaver should at most serve two-third of each of his five-year consecutive sentences in prison because the “conditional release term” of his sentences shall be one-third of each sentence. Subsection 558.011.4 in relevant part states:

4. (1) A sentence of imprisonment for a term of years . . . shall consist of a prison term and a conditional release term. The

conditional release term of any term imposed under section 557.036, RSMo , shall be:

(a) One-third for terms of nine years or less; Mo. Rev. Stat. § 558.011.4(1). Under § 558.011.4, Mr. Beaver can be required to serve no more than $\frac{2}{3}$ of each five-year sentence. An inmate is to be held until he or she completes all prison time on consecutive sentences, and then is released to serve all conditional release time. See 14 CSR 80-2.040.4 (“An inmate with a consecutive sentence shall be held until the inmate completes the prison term of the consecutive sentence(s). The conditional release terms taken together shall constitute the time to be served on conditional release.”). Therefore, Mr. Beaver must be placed on conditional release after he has served $\frac{2}{3}$ of the combined period of the two five-year sentences, or $\frac{2}{3}$ of ten years.

Assuming that a “year” is 365 days, the Department of Corrections could incarcerate Mr. Beaver no more than $2433 \frac{1}{3}$ days, or $\frac{2}{3}$ of ten 365-day sentences.³ Therefore, it must only be determined how many days of

³ The only reference in Missouri law Mr. Beaver could locate to the number of days in a year suggests the Missouri General Assembly ignores leap years. Missouri Revised Statute § 319.015, part of the Underground Facility Safety and Damage Prevention Act, defines a “notification center”

prison time Mr. Beaver has already served, and what date would be the day 2433 of his prison term. Respondents cannot hold Mr. Beaver beyond this date: the only way the Department of Corrections could hold Mr. Beaver beyond this conditional release date would be if it sought to extend the prison term through the notice-and-hearing procedure set forth in Missouri Revised Statute § 558.011.5. The Department has done nothing to initiate this process. Moreover, seeking an extension of Mr. Beaver's prison term would be contrary to the Parole Board's prior actions in this case; the Parole Board has already made a separate discretionary determination that Mr.

as a center operating "three hundred and sixty-five days on a not-for-profit basis." The General Assembly must have intended that the notification center be open all the time, not that it would take February 29 as a holiday every fourth year. Thus, it appears the General Assembly ignores leap years.

If the leap year is recognized and each year of incarceration is deemed a 365.25-day year, Mr. Beaver could be incarcerated no more than 2435 days, or until February 23, 2004.

Beaver should serve only one-half the sentence for the Consecutive Case in prison.⁴

Mr. Beaver receives credit toward his sentence in either the Concurrent Cases or the Consecutive Case under the jail-time credit statute, Missouri Revised Statute § 558.031.1. This credit includes both time spent incarcerated at the Buchanan County jail and Institutional Treatment Programs. See Mo. Rev. Stat. § 217.785 (“Time spent in the institutional phase of [the Missouri postconviction drug treatment] program shall count as time served on the sentence.”). Respondents concede that both these credits are correct. (Suggestions in Opposition to the Petition for Writ of Habeas Corpus (Mar. 15, 2004), at 6.)⁵

⁴ The Parole Board should be estopped from revoking Mr. Beaver’s early release after this Court’s order of mandamus takes effect, but if necessary Mr. Beaver will relinquish his claim to the discretionary early release to obtain the correction of his conditional release date requested in this proceeding.

⁵ Mr. Beaver now does not contest that credits for prior jail and prison time would apply to the sentences for the Concurrent Cases until those sentences are served in full. Only then would any remaining time be

Prior to the entry of the void order sentencing Mr. Beaver to a third term of probation, Mr. Beaver had earned the following prison time credits:

Dates	Incarceration	Days of Credit
4/5/97 to 5/23/97	Buchanon County (Ex. (Ex. E & O.))	48 days ⁶
5/23/97 to 9/12/97	ITP 120 day program (Ex. E, F, O & P)	112 days
11/30/97 to 1/16/98	Buchanon County	47 days

credited to Mr. Beaver's sentence on the Consecutive Case. This position is consistent with that espoused by Respondents. (Cf. Suggestions in Opposition to the Petition for Writ of Habeas Corpus (Mar. 15, 2004), at 6.)

⁶ Because the two terms are concurrent, this Brief uses the sentence for the second case – which had three fewer days of pre-sentencing incarceration credited – to calculate the various prison sentences. Also, several dates of transfer reported by the Buchanon County Sheriff on Exhibits E and O are incorrect, because they report Mr. Beaver's transfer a week after he commenced an ITP, placing Mr. Beaver in two places at the same.

	(Ex. E & O.)	
1/16/98 to 5/15/98	ITP 120 day program (Ex. G, H, Q, & R)	119 days
7/8/99 to 8/23/99	Buchanon County (Ex. E & O)	46 days
8/23/99 to 12/22/99	ITP 120 day program (Ex. J, K, T, & U)	121 days
	<u>Total:</u>	493 days

As previously noted, Respondents concede that Mr. Beaver should receive credit time for time spent in the Buchanon County Jail and Institutional Treatment Programs. (Suggestions in Opposition to the Petition for Writ of Habeas Corpus (Mar. 15, 2004), at 6.) Therefore, the credits in this chart should not be in dispute.

Since the December 22, 1999, order is void, Mr. Beaver's prison sentence has been running since that date. Moreover, by December 22, 1999, Mr. Beaver had already served 493 days of his prison term on the Concurrent Cases. He had only 1940 days of prison time remaining on all three sentences. Calculating what day is 1940 days from December 22,

1999, it is easily determined that Mr. Beaver's conditional release date should be April 15, 2005.

Conclusion

Mandamus is the appropriate remedy to compel the Missouri Department of Correction's Division of the Board of Probation and Parole to correct Mr. Beaver's release date. Further, Respondents admit the relevant law, that the order placing Mr. Beaver on a third term of probation is void and the only remaining task is a ministerial one, for Respondents to correct Mr. Beaver's conditional release date. Accordingly, the writ of mandamus should be made final, and the Respondents should be ordered to correct Mr. Beaver's conditional release date to April 15, 2005.

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