## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE, : C.A. No. S14M-01-002 THG

Petitioner, :

v. :

DELAWARE BOARD OF PAROLE, :

Respondent. :

# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

### IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Def. ID# 1301013137

v.

JEFFREY W. BARNES :

### ORDER

DATE SUBMITTED: January 24, 2014

DATE DECIDED: January 24, 2014

Peggy J. Marshall, Esquire and Kathryn J. Garrison, Esquire, Department of Justice, 114 E. Market Street, Georgetown, DE 19947

Robert H. Robinson, Jr., Esquire, Office of the Public Defender, 14 The Circle, Georgetown, DE 19947

Ryan P. Connell, Esquire, Department of Justice, 820 N. French Street, 6th Floor, Wilmington, DE 19801

GRAVES, J.

Pending before the Court is a petition brought by the State of Delaware ("the State") seeking the issuance of a writ of mandamus to the Board of Parole directing the Board of Parole to reverse its decision to release defendant from Level 5 custody. This is my decision regarding several issues raised by the petition.

On May 24, 2013, defendant Jeffrey W. Barnes ("defendant") pled guilty to his fifth offense of driving under the influence. The Court sentenced him pursuant to 21 *Del. C.* § 4177(d)(5) and (8).<sup>2</sup> Pursuant to 21 *Del. C.* § 4177(d)(8), the Court could suspend half of defendant's minimum sentence of 3 years for probation once it imposed the conditions required of 21 *Del. C.* § 4177(d)(9).<sup>3</sup> Thus, the Court sentenced him to 5 years at Level 5, and suspended

- (d) Whoever is convicted of a violation of subsection (a) of this section shall:
  - (5) For a fifth offense occurring any time after 4 prior offenses, be guilty of a class E felony, be fined not more than \$10,000 and imprisoned not less than 3 years nor more than 5 years.

<sup>&</sup>lt;sup>1</sup>The State's Petition seeking a Writ of Mandamus originally was filed in the criminal matter, *State of Delaware v. Jeffrey W. Barnes*, Def. ID# 1301013137. It has since been filed as a civil action: *State of Delaware v. Delaware Board of Parole*, C.A. No. S14M-01-002. This decision will be docketed in both the criminal case and the civil case.

<sup>&</sup>lt;sup>2</sup>The applicable statutory provisions are:

<sup>(8)</sup> For the fifth, sixth, seventh offense or greater, the provisions of § 4205(b) or § 4217 of Title 11 or any other statute to the contrary notwithstanding, at least ½ of any minimum sentence shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind. The sentencing court may suspend up to ½ of any minimum sentence set forth in this section provided, however, that any portion of a sentence suspended pursuant to his paragraph shall include participation in both a drug and alcohol abstinence program and a drug and alcohol treatment program as set forth in paragraph (d)(9) of this section.

<sup>&</sup>lt;sup>3</sup>21 Del. C. § 4177(d)(9) provides in pertinent part:

defendant's Level 5 sentence after 18 months at Level 5 for 18 months at Level 3 probation.

Pursuant to a corrected order dated June 12, 2013, defendant was not required to report to Level 5 until June 21, 2013.

On December 17, 2013, the Board of Parole granted defendant parole. It placed him on Level 3 supervision. Defendant was released from Level 5 incarceration on or about December 18, 2013. As of that time, defendant had served not quite 6 months of his 18 months at Level 5.

The State of Delaware ("the State") filed an emergency motion to correct an illegal sentence, which is an inappropriate motion because the sentence was not illegal. That motion is denied as meritless. It then filed in the criminal matter a petition seeking a writ of mandamus directing the Board of Parole to rescind its decision releasing defendant on parole prior to his serving the 18 months required by 21 *Del. C.* § 4177(d)(5) and (8). A hearing on the matter was scheduled for December 27, 2013. Prior to that hearing, the Board of Parole reviewed its decision and conceded the State's position.

Defendant appeared at the December 27, 2013 hearing. Defendant maintained that he

Any minimum sentence suspended pursuant to paragraph ... (d)(8) of this section shall be upon the condition that the offender shall complete a program of supervision which shall include:

a. A drug and alcohol abstinence program requiring that the offender maintain a period of not less than 90 consecutive days of sobriety as measured by a transdermal continuous alcohol monitoring device. In addition to such device, the offender shall participate in periodic, random breath or urine analysis during the entire period of supervision.

b. An intensive inpatient or outpatient drug and alcohol treatment program for a period of not less than 3 months. Such treatment and counseling may be completed while an offender is serving a Level V or Level IV sentence.

c. Any other terms or provision deemed appropriate by the sentencing court or the Department of Correction.

should be released on parole. The Court continued the hearing and required the State and defendant to submit briefing on the following issues:

- 1) Is defendant entitled to release on parole pursuant to 11 *Del. C.* § 4346(a)<sup>4</sup> since he has served 1/3 of his sentence; and
- 2) If he is not entitled to release before serving his 18 month mandatory sentence, may this mandatory 18 months be reduced by good time earned based upon 11 *Del. C.* § 4381.<sup>5</sup>

Thereafter, the State filed a Petition for Writ of Mandamus in a civil action, apparently in an effort to place the matter before the Court in the correct procedural posture. Defendant obtained the Public Defender's Office to represent him. His counsel has filed several motions, including a motion to dismiss the State's various filings. The Board of Parole has taken no further steps, nor does the Court expect it to do so in light of its decision not to oppose the State's petition.

Procedurally, the case is rather convoluted. However, the two underlying legal questions

A person confined to any correctional facility administered by the Department may be released on parole by the Board if the person has served 1/3 of the term imposed by the court, such term to be reduced by such merit and good behavior credits as have been earned, or 120 days, whichever is greater.

- (a) Subject to the limitations set forth in subsection (b) of this section, all sentences, other than a life sentence, imposed for any offense pursuant to any provision of this title, Title 16 and/or Title 21 may be reduced by good time credit under the provisions of this subchapter and rules and regulations adopted by the Commissioner of Corrections. This provision will apply regardless of any previously imposed statutory limitations set forth in this title, Title 16 or Title 21.
- (b) The awarding of good time credit set forth in subsection (a) of this section above will not apply to sentences imposed pursuant to § 4214 or § 4204(k) of this title or sentences imposed prior to the enactment of this statute.

<sup>&</sup>lt;sup>4</sup>This statute, 11 *Del. C.* § 4346(a), provides in pertinent part:

<sup>&</sup>lt;sup>5</sup>The applicable portions of 11 *Del. C.* § 4381 are as follows:

are simple and they require resolution. I resolve those questions below.

Initially, I address whether the Board of Parole has jurisdiction over this matter. This Court has ruled that a driving under the influence sentence is non-TIS.<sup>6</sup> Thus, the Board of Parole has authority over non-TIS sentences such as DUI sentences and the repealed non-TIS statutes apply.<sup>7</sup>

The case of *Woodward v. Department of Corrections*<sup>8</sup> resolves the question of whether defendant is eligible for parole after serving 1/3 of his sentence. *Woodward* holds that to be released on parole before the mandatory time elapses would violate the express terms of the statute under which a defendant was sentenced. The sentencing statute in this case, 21 *Del. C.* § 4177(d)(5) and (8), requires that defendant serve 18 months at Level 5. Where, as here, the mandatory time period of the sentencing statute is greater than the period set forth in 11 *Del. C.* § 4346(a), a defendant must serve the mandatory time period before becoming entitled to release on parole. 9

Therefore, the Board of Parole had no discretion to grant parole to a defendant serving the mandatory portion of his sentence. The Board of Parole is directed to reverse its decision as to the granting of parole to Jeffrey W. Barnes

<sup>&</sup>lt;sup>6</sup>State v. Clyne, 2002 WL 1652149, \*2 n. 6 (Del. Super. July 22, 2002). Furthermore, the SENTAC Commission has recognized that felony driving under the influence ("DUI") sentences are non-TIS. On January 17, 2014, the SENTAC Commission voted to recommend legislation that would make felony DUIs to be TIS sentences as opposed to non-TIS sentences.

<sup>&</sup>lt;sup>7</sup>See id. at \*3 n. 12.

<sup>&</sup>lt;sup>8</sup>415 A.2d 782 (Del. Super. 1980), *aff'd*, 416 A.2d 1225 (Del. 1980) ("*Woodward*"). As the later discussion below shows, I do not follow *Woodward* with regard to the reduction of this sentence for good time credits; the statutory amendments subsequent to *Woodward* render that portion of the decision to be invalid.

<sup>9</sup>Id.

The next question is whether defendant may receive good time credits on this mandatory 18 month period. The answer to this question requires the Court to delve into a bit of statutory history.

In 2010, the Legislature amended 11 *Del. C.* § 4381<sup>10</sup> to allow for the award of good time credits on all sentences except for life sentences, those imposed pursuant to 11 *Del. C.* § 4214,<sup>11</sup> and those imposed pursuant to 11 *Del. C.* § 4204(k).<sup>12</sup> The synopsis of Senate Bill 320 explains the rationale for this legislation:

The ability of inmates to earn good time credits was a mechanism established to assist and encourage appropriate behavior by inmates while they are incarcerated. This general concept has been modified by the General Assembly over time to prohibit good time credit for specific offenses. Unfortunately, this ad hoc application has caused significant administrative issues to arise that are difficult to address with limited staff and is inconsistent with the original intent and purpose of good time credit. This legislation proposed by SENTAC will ensure a fair and consistent application of credit time and will restore its original purpose as a tool for prisoner management. The legislation has no effect on the procedures used to award good time credit by DOC or the ability of the Commissioner to forfeit good time credit to reflect inappropriate prison behavior. The legislation will however restore the ability of inmates (other than ones serving a life sentence) to be awarded good time credit regardless of the statutory offense for which they are incarcerated subject to the limitations set forth in subparagraph (b). SENTAC has prepared this legislation as a result of its belief that it reflects the appropriate management of limited DOC resources and will result in financial savings to the State. The inmates will be supervised during their conditional release period by DOC probation officers.

This legislation became effective on July 15, 2010, when the Governor signed it.

The applicable sentencing statute, 21 Del. C. § 4177(d)(8), was signed on August 3, 2011,

<sup>&</sup>lt;sup>10</sup>S.B. 320 with Senate Amendment 1.

<sup>&</sup>lt;sup>11</sup>11 Del. C. § 4214 pertains to defendants sentenced as habitual offenders.

<sup>&</sup>lt;sup>12</sup>11 *Del. C.* § 4204(k) allows for the courts, in certain instances, to require a sentence be served day for day.

and became effective on June 30, 2012.<sup>13</sup> Both events are after the enactment of the current version of 11 *Del. C.* § 4381. The question is whether the language specifying that the minimum sentence "shall not be subject to any early release, furlough or reduction of any kind" means that good time credits may not be applied. That language, instructing that a minimum sentence for felony driving under the influence convictions "shall not be subject to any early release, furlough or reduction of any kind," has existed since the legislature mandated certain driving under the influence convictions to be felonies.<sup>14</sup> Because the language stating that a defendant "shall not be subject to any early release, furlough or reduction of any kind" existed at the time the applicable version of 11 *Del. C.* § 4381 was enacted, the amendment to 21 *Del. C.* § 4177 in 2011 did not render 11 *Del. C.* § 4381 inapplicable.

No matter what, I conclude 11 *Del. C.* § 4381 applies. With regards to the award of good time credits and early release, the Court must construe the applicable provisions of 21 *Del. C.* § 4177 *in pari materia* with 11 *Del. C.* § 4381. It would be absurd to not allow good time credits on a felony sentence pursuant to 21 *Del. C.* § 4177 after the legislature had just recently enacted 11 *Del. C.* § 4381 to award such credits. To hold otherwise would mean that the problems 11 *Del. C.* § 4381 eliminated would once again commence. The Court will not reach such an absurd result.

Thus, defendant is entitled to good time credits on his 18 months Level 5 time pursuant to 11 *Del. C.* § 4381.

<sup>&</sup>lt;sup>13</sup>Sections 12 and 24 of H.B. 168, as amended by House Amendment No. 1, House Amendment No. 2 as amended by House Amendment No. 1 to House Amendment No. 2 and House Amendment No. 3.

<sup>&</sup>lt;sup>14</sup>70 Del. Laws, ch. 62 (1995).

<sup>&</sup>lt;sup>15</sup>Watson v. Burgan, 610 A.2d 1364, 1368 (Del. 1992).

In conclusion, defendant is not entitled to an early release of incarceration pursuant to 11 *Del. C.* § 4346(a), and to that extent, the petition is GRANTED and the Court hereby directs the Board of Parole to reverse its decision allowing parole pursuant to 11 *Del. C.* § 4346(a). However, defendant's 18 months of mandatory time may be reduced by good time credits awarded pursuant to 11 *Del. C.* § 4381. Because defendant has not reached the point where those good time credits would require his release, he currently is not entitled to release from incarceration. <sup>16</sup> Defendant's arguments that his rights will be violated by requiring he go back to prison are meritless. The decision granting parole was illegal. He never should have been released from incarceration. No constitutional or *ex post facto* laws come into play. He must return to prison immediately.

IT IS SO ORDERED.

<sup>&</sup>lt;sup>16</sup>This conclusion means there is no clear legal right to a direction to the Board of Parole or Department of Correction that defendant be released from incarceration and consequently, no entitlement to a writ of mandamus exists. *See State v. Clyne, supra*, at \*1.