

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4524
(Summary Calendar)

JOE SOTO, JR.,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

(CA6-91-596)
April 20, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Joe Soto, Jr., a state prisoner in Texas, appeals the district court's dismissal as moot of his habeas corpus petition. For the reasons set forth below, we vacate the judgment

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of dismissal and remand for further consistent proceedings.

I

FACTS AND PROCEEDINGS

On June 3, 1985, Anderson County, Texas, filed a detainer on Soto for felony murder. He was convicted and sentenced on July 31, 1985. The detainer was canceled on December 6, 1985.

After exhausting state remedies, Soto filed a federal habeas petition seeking credit for the time served while on detainer. The State answered and moved to dismiss, contending that the matter was moot because Soto had been credited one month and 28 days against his sentence for time served while on detainer before he was convicted and sentenced. Soto responded that he is entitled to credit for the entire 187 days that elapsed between June 3, 1985 and December 6, 1985.

The matter was referred to a magistrate judge who recommended that the case be dismissed as moot. In his written objections to the magistrate judge's finding, Soto argued for the first time that, although he did receive credit for one month and 28 days, the credit was characterized as "good time" instead of "flat time." Soto pointed out that he could lose the "good time" credit if he is disciplined in the future. The district court adopted the findings and conclusions of the magistrate judge, dismissing Soto's petition. The district court also denied Soto's request for a certificate of probable cause (CPC).

This court construed Soto's appellate brief as an application for a CPC. We found that Soto's first issue, whether he was

entitled to credit for time served while on detainer after sentencing, did not raise a substantial question of law. We nevertheless granted CPC on Soto's second issue and instructed the parties to brief the questions whether (1) Texas statutory law creates a constitutionally protected liberty interest in credit for time served prior to sentencing, and (2) whether the characterization of Soto's presentence credit as "flat time" or "good time" can be determined from the record on appeal; and, if not, whether additional fact findings are necessary.

II

ANALYSIS

The State concedes that the Texas statute in question creates a constitutionally protected liberty interest in credit for time served prior to sentencing. The State also concedes that the district court implicitly concluded that Soto has already received and is entitled to "flat time" credit for the 58 days served prior to sentencing.

The State nonetheless requests that, inasmuch as Soto contends that he was credited only for "good time" and the record is inconclusive on this point, the district court's judgment be vacated and the cause be remanded for further proceedings. Agreeing with the State's position, we VACATE the district court's judgment and REMAND this matter to that court for such additional proceedings.

SO ORDERED.