

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60764
Conference Calendar

DONALD E. SMITH,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent, Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC NO. 4:91cv139-D-D

(September 28, 1995)

Before JONES, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Smith principally argues that his parole eligibility date was miscalculated in violation of the ex post facto clause. The ex post facto clause applies only to penal statutes which disadvantage the offender affected by them. Collins v. Youngblood, 497 U.S. 37, 41 (1990). To be eligible for parole under the Mississippi Code of 1942 a prisoner had to serve at least one-third of the total "term

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

or terms" for which he was sentenced or, if sentenced to a term or terms of third years or more or life, a minimum of ten years for such term or terms. See Miss. Code Ann. § 4004-03 (Supp. 1971). The Mississippi Supreme Court interpreted this statute to require a prisoner to serve a minimum of ten years for each consecutive sentence of thirty or more years or life. See Taylor v. Mississippi State Probation and Parole Bd., 365 So.2d 621, 622 (Miss. 1979). The federal courts must defer to the state court's interpretation of its own law. Valles v. Lynaugh, 835 F.2d 126, 127-28 (5th Cir. 1988). Under both versions of the law Donald E. Smith was required to serve a minimum of 36 years before he was eligible for parole. He cannot establish an ex post facto violation.

Smith also contends that prison officials infringed a due process liberty interest in their calculation of his earliest release date as 2009. Following the Supreme Court's recent decision in Sandin v. Conner, ____ U.S. ____, 115 S. Ct. 2293 (1995), the wrongful deprivation of credits toward release may still implicate due process, although many other deprivations within the prison context will not. See also Orellana v. Kyle, 1995 WL 539701 (5th Cir. 1995) (discussing Sandin). Mississippi law states that the earned-time days "may be deducted from the offender's parole eligibility time." Miss. Code Ann. § 47-5-139. The use of the word "may" makes the award of good time discretionary not mandatory; Smith does not have a liberty interest in the award of good time. See Scales v. Mississippi State Parole

Bd., 831 F.2d 565, 566 (5th Cir. 1987). Sandin does not appear to change this analysis. See Orellana, supra. To the extent that Smith argues that § 47-5-138 creates a liberty interest because it states that "the state board of corrections shall formulate and promulgate rules and regulations," this statute does not limit the parole board's discretion to award, or not award, good-time credits and, therefore, does not alter the analysis.

AFFIRMED.