

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0361

Jeremy Fiske

v.

Warden, New Hampshire Prison System

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
MERRIMACK SUPERIOR COURT

**BRIEF FOR THE APPELLEE,
WARDEN, NEW HAMPSHIRE STATE PRISON**

WARDEN, NEW HAMPSHIRE STATE PRISON

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(Oral argument not requested)

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ISSUE PRESENTED

Whether a sentencing court may decline to grant a criminal defendant incarcerated after September 9, 2014 the opportunity to obtain earned time credits under RSA 651-A:22-a.

STATEMENT OF THE CASE AND FACTS

A. The petitioner's conviction and sentencing

On December 9, 2015, the petitioner was convicted of eight counts of aggravated felonious sexual assault and one count of possession of child abuse images. PB 5; PA 8.¹ On February 12, 2016, the Merrimack County Superior Court (*Delker, J.*) sentenced the petitioner after it heard arguments from both the defense and the State. PB 5; PA 8. The petitioner received a sentence of three consecutive ten to twenty year terms with the possibility of five years suspended from the third term upon successful completion of the prison's Sexual Offenders Treatment Program. PB 5; PA 8. The court declined to extend the option of earned time credits to the petitioner. PB 5. On January 25, 2021, the petitioner filed a motion to modify the mittimus, which the court denied on February 12, 2021. PA 12.

B. Procedural history

In April 2021, the petitioner filed an application for writ of habeas corpus. PB 5; PA 3. The petitioner argued that the court exceeded its statutory authority by imposing an additional condition, denial of the option of earned time credits, to the stand committed sentences. PA 3. On June 3, 2021, the Rockingham County Attorney filed the State's objection to the petitioner's application for writ of habeas corpus. PB 6; PA 8. The State argued that the opportunity for earned time credits is solely an option, not a statutory or constitutionally protected right, and thus the petitioner's

¹ Citations to the record are as follows:

"PB__" refers to the petitioner's brief and page number.

"PA__" refers to the petitioner's appendix and page number.

"AD__" refers to the appealed decision.

application for writ of habeas corpus should be dismissed. PA 13-14. On June 6, 2021, the petitioner filed a traverse to the objection to his application. PB 6; PA 16. It essentially reiterated the argument in the petitioner's application. PA 16. The court did not hold a hearing on the matter. AD 3.

On July 22, 2021, the court denied the petitioner's application for writ of habeas corpus. PB 6; AD 3. The court classified the denial of the option of earned time credits as a discretionary determination that allows the sentencing court to consider the nature and severity of the crime committed. AD 7.

This appeal followed.

SUMMARY OF THE ARGUMENT

RSA 651-A:22-a, II vests a sentencing court with discretion to grant a criminal defendant incarcerated on or after its effective date with the opportunity to obtain earned time credits. A sentencing court must exercise that discretion on a case-by-case basis and may decline in certain cases to grant a particular criminal defendant the opportunity to obtain earned time credits. To hold otherwise, as the petitioner urges, would rewrite the statute and divest sentencing courts of their discretion to determine on a case-by-case basis whether the opportunity to obtain earned time credits is appropriate.

STANDARD OF REVIEW

“In an appeal from a denial of a petition for a writ of habeas corpus, [this Court] accept[s] the trial court’s factual findings unless they lack support in the record or are clearly erroneous, but review[s] the trial court’s legal conclusions *de novo*.” *State v. Santamaria*, 169 N.H. 722, 725 (2017) (citing *Barnet v. Warden, N.H. State Prison for Women*, 159 N.H. 465, 468 (2009)).

ARGUMENT

I. RSA 651-A:22-a, II GRANTS PRESIDING JUSTICES THE DISCRETION TO DENY THE OPTION OF EARNED TIME CREDITS AT THE TIME OF SENTENCING.

This appeal requires this Court to interpret RSA 651-A:22-a. The interpretation of a statute is a question of law, which this Court reviews *de novo*. *State v. Dor*, 165 N.H. 198, 200 (2013). This Court is “the final arbiter of the intent of the legislature as expressed in the words of the statute.” *In re Guardianship of Williams*, 159 N.H. 318, 323 (2009). When construing a statute’s meaning, this Court “first examine[s] its language, and where possible, ascribe[s] the plain and ordinary meanings to words used.” *Id.*; *Dor*, 165 N.H. at 201. If the language used “is clear and unambiguous,” this Court “will not look beyond the language of the statute to discern legislative intent.” *Williams*, 159 N.H. at 323.

Further, this Court will “construe all parts of the statute together to effectuate its overall purpose and to avoid an absurd or unjust result.” *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (quotation omitted). The legislature “is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” *Id.* This Court also “refuse[s] to consider what the legislature might have said or add language that the legislature did not see fit to include.” *In re James N.*, 157 N.H. 690, 693 (2008).

The legislature’s choice of language “is deemed to be meaningful,” and, “unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense.” *State Employees Assoc. of N.H. v.*

N.H. Div. of Personnel, 158 N.H. 338 (2009) (quotations, citations, and brackets omitted); *In re J.S.*, __ N.H. __, No. 2020-0502, 2021 WL 3236492, at *4 (N.H. July 30, 2021). “The expression of one thing in a statute implies the exclusion of another.” *State v. Mayo*, 167 N.H. 443, 452 (2015) (quotation omitted). This principle “is strengthened where a thing is provided in one part of the statute and omitted in another.” *Id.* (quotation omitted).

RSA 651-A:22-a establishes an earned time credits system which allows prisoners to reduce their minimum and maximum sentences by as much as 21 months each with the successful completion of a variety of programs. The programs vary from educational and vocational options to mental health and family programming. Prisoners incarcerated on or after the effective date, September 9, 2014, and “who have been granted [the] *option* by the presiding justice at the time of sentencing” are eligible to receive credits. RSA 651-A:22-a, II (emphasis added). Those incarcerated prior to the effective date may receive credits “upon recommendation of the commissioner and upon approval of the sentencing court in response to a petition which is timely brought by the prisoner.” *Id.*

The plain text of the statute vests sentencing courts with discretion to determine whether to grant prisoners the opportunity to later request earned time credits. The prerequisite that the opportunity to receive credits be granted by the sentencing court or recommended by the commissioner and approved by the sentencing court demonstrates a delegation of discretion. The petitioner acknowledges the viability of this interpretation. PB 10. The legislature could have granted eligibility to all current and future prisoners and provided no barriers to the opportunity for earned time credits, but it

did not. The statute grants discretion to sentencing courts and the commissioner to determine which individuals may seek earned time credits. The inclusion of the language in Section II in RSA 651-A:22-a leaves no alternative reading.

The State's interpretation, moreover, is consistent with the practice of other jurisdictions. Approximately twenty-three other states and the federal government offer some form of earned time credit for educational, vocational, or other appropriate programming that is comparable to New Hampshire's program.² Of these, only Kentucky and Maryland provide earned time credit as a matter of right. The other twenty-one jurisdictions, whether by the express terms of their statutes or case law, allow grants of earned time credit at the discretion of either the courts or department of corrections. *See, e.g., Verrier v. Colorado Dep't of Corr.*, 77 P.3d 875, 878 (Colo. App. 2003) (holding "that granting of earned time credit under [Colorado statute] lies in the discretion of the DOC, and plaintiff has no clear right to receive, and defendants have no clear duty to grant, earned time credit."); *State v. Aqui*, 721 P.2d 771, 774 (N.M. 1986) (holding "deduction of good time credits from an inmate's sentence is a discretionary matter,").

² *See* Ark. Code Ann. § 12-29-201 *et seq.*; Cal. Penal Code § 2933 *et seq.*; Colo. Rev. Stat. § 17-22.5-405; Conn. Gen. Stat. § 18-98a; 11 Del. Code Ann. § 4381; Fla. Stat. § 944.275; 730 Ill. Comp. Stat. 5/3-6-3; Ind. Code § 35-50-6-3.3; K.S.A. §21-6821; KRS § 197.45; MD Corr. Serv. § 3-702; Mass. Gen. Laws Ann. 127 § 129D; Miss Code Ann. § 47-5-139; Nev. Rev. Stat. Ann. § 209.4465; N.J. Stat. Ann. § 30:4-92a; N.M. Stat. Ann. § 33-2-34; New York Correction Law §§ 803-805; Ohio Rev. Code Ann. § 2967.193; Okla. Stat. 57 § 138; R.I. Gen. Laws § 42-56-26; S.C. Code Ann § 24-13-230; Tenn. Code. Ann § 41-21-230; Texas Govt. Code § 498.003.

In addition, this Court has already determined that a request for sentence reduction with earned time credits is a discretionary decision unbound by express limitation. *State v. Bailey*, No. 2018-0461, 2019 N.H. LEXIS 83, at *3 (N.H. April 17, 2019) (unpublished). The language of RSA 651-A:22-a does not contain any more direction to sentencing courts determining whether to grant the option of earned time credits than those deciding whether to grant a sentence reduction. This Court's decision in *Bailey* supports the contention that the grant or denial of the option of earned credits is discretionary. Without express limitation as to the grounds a sentencing court may consider when determining whether to grant or deny the option of earned time credits, it may consider the offense committed and may deny the future opportunity to utilize the earned time credit system. *See id.*

The statute does not reveal an intent to make earned time credits available to all inmates. Instead, it limits the availability of earned time credits to prisoners in the “least restrictive security classifications of general population and minimum security” and such credits may be forfeited for “involvement or membership in a security threat group, attempted escape, escape, or commission of any category A offense listed in the department of corrections policy and procedure directives.” RSA 651-A:22-a, III.

The statute does not then provide the opportunity for earned time credits to all prisoners, free from those limitations. It delegates discretion to the sentencing court, depending on the date of incarceration, to decide which prisoners within those limitations are suited for the opportunity to

seek earned time credits. Outside of those specific limitations, the statute provides no specific direction to the decision-maker's determination.

The petitioner cites *State v. Baker*, 164 N.H. 296, 300 (2012), in support of his contention that the opportunity of earned time credits cannot be denied based solely on the offense for which the prisoner is sentenced. PB 11-12. But *Baker* is not analogous. The *Baker* Court held that the offense itself cannot be used to deny the annulment of that same offense when the legislature had predetermined which crimes are eligible for annulment. *Baker*, 164 N.H. at 300.

Unlike annulment, however, the legislature here granted discretion to the *sentencing* court, which is in the best position to consider the suitability of earned time credit in light of the nature of offense and consistent with the traditional goals of sentencing – punishment, deterrence, and rehabilitation. *State v. Willey*, 163 N.H. 532, 541 (2012). By designating the sentencing court as the body empowered to grant or deny the opportunity for earned time credit, the legislature signaled that the nature of the crime should be a paramount consideration. Prisoners denied the option of seeking earned time credits at the time of sentencing are, therefore, ineligible for the remainder of their sentence.

The petitioner requests that this Court allow prisoners incarcerated after the effective date and denied the option of earned time credits at sentencing to later seek eligibility for earned time credits through the mechanism described in clause two of Section II for those incarcerated prior to the effective date. The statute sets up this alternative mechanism because it cannot reach back through time to allow the consideration of the option of earned time credits at the sentencing hearings for prisoners

incarcerated before its enactment, not as an alternative for those denied the option. The plain language of the statute distinctly separates the process for eligibility for earned time credits for prisoners incarcerated before and after the effective date. The statute contains no language allowing the substitution of one for the other. To allow prisoners denied the option of earned time credits to later seek eligibility through the mechanism designed for those incarcerated after the effective date would read additional language into the statute the legislature did not deem appropriate to add.

The different information available to the applicable decision maker for prisoners incarcerated before and after the effective dates does not produce an arbitrary result. The presiding justice at the time of sentencing has little other than the offense committed and, for some, previous criminal history, to consider when deciding whether to grant or deny the option of earned time credits for those incarcerated after the effective date. The commissioner and sentencing court have greater information, including the prisoner's behavior during incarceration, when considering when to grant or deny the option for those incarcerated before the effective date. The different information available is an inevitable result of a statutory scheme designed to grant the opportunity to request the option of earned time credits to both prisoners incarcerated before and after the effective date. The change the petitioner seeks is legislative, not judicial. This Court should affirm.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court deny the petitioner's claims and affirm the judgment below.

The Warden does not request oral argument.

Respectfully submitted,

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April 1, 2022

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,334 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 1, 2022

/s/ Zachary L. Higham
Zachary L. Higham

CERTIFICATE OF SERVICE

I, Zachary L. Higham, hereby certify that a copy of the foregoing has been served on Senior Assistant Appellate Defender Thomas Barnard, counsel for the petitioner, through the New Hampshire Supreme Court's electronic filing system.

April 1, 2022

/s/ Zachary L. Higham
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