NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3352

GREGORY L. FORSYTHE,
Appellant

v.

GILBERT WALTERS, Superintendent

On Appeal from the Memorandum Order of
the United States District Court
for the Western District of Pennsylvania
Civ. Action No. 99-cv-00142
District Judge: Hon. Robert J. Cindrich

Argued:
February 11, 2002
Before: Mansmann, McKee, and Barry, Circuit Judges

(Filed May 3, 2002)

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Jennifer E. Dubas (Argued)
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OPINION OF THE COURT

McKee, Circuit Judge.

Gregory Forsythe appeals the district court's March 23, 2000 Memorandum Order granting defendant's motion to dismiss. For the reasons that follow, we will affirm.

I.

Inasmuch as we write only for the parties, we need not recite the factual background of this case. Forsythe argues that the district court erred in finding that the allegations in his Complaint do not establish a constitutional violation when viewed in the light most favorable to him.

A.

The Fifth Amendment provides that "[n]o person. . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. However, the Supreme Court has qualified this by stating that the Fifth Amendment does not apply in

the absence of compulsion. See Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977) ("the touchstone of the Fifth Amendment is compulsion.").

Although we have not previously had occasion to address the implications of the Fifth Amendment in the prison pre-release context, the issue has been raised in an analogous setting. In Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998), the Supreme Court examined the constitutionality of Ohio's clemency process for death row inmates. There, an inmate could voluntarily request a clemency interview, but the inmate was not given use immunity as to any statements made during the interview. Therefore, parole authorities could draw adverse inferences from an inmate's failure to answer questions. Inmates sued, alleging that the procedure was a violation of their Fifth Amendment protection against self-incrimination. The Supreme Court held that since the interview was voluntary, statements were not compelled within the meaning of the Fifth Amendment. The Constitution did not, therefore, prohibit the parole authorities from drawing an adverse inference from an inmate's refusal to answer questions during the clemency interview. See Woodard, 523 U.S. at 286. The Court acknowledged that an inmate may feel pressured to answer questions and cooperate in order to improve the chance of clemency. The Court held, however, that such pressure did not implicate the Fifth Amendment. See id. at 288.

Moreover, courts have rejected the idea that an inmate has a "right" to admission into a parole-related program. Rather, courts have characterized parole merely as a "benefit" that a state may choose to provide to an inmate. See, e.g., Ainsworth v. Risley, 244 F.3d 209, 216 (1st Cir. 2001) (characterizing parole as a "benefit" which a state may condition with eligibility requirements pertaining to the admission of guilt); Doe v. Sauer, 186 F.3d 903, 906 (8th Cir. 1999) (upholding denial of parole to an inmate who refused to admit guilt).

In addition, inasmuch as an inmate's sentence is the maximum period of confinement imposed by the sentencing court, denial of parole does not amount to a change of sentence. In fact, parole has traditionally been viewed as "time served" on the street. See, e.g., Weaver v. Pa. Bd. of Probation and Parole, 688 A.2d 766, 769 (Pa. Commw. Ct. 1997) ("[a] grant of parole does not eliminate a prisoner's sentence, but instead the prisoner continues to serve his sentence during which time he or she is the subject of society's rehabilitation efforts under supervision.").

Forsythe was not "penalized" within the meaning of the Fifth Amendment because his sentence was never changed. Therefore, we find that conditioning Forsythe's acceptance into the pre-release program upon an admission of guilt does not violate the Fifth Amendment.

Forsythe's situation is similar to that of inmates seeking clemency under the regime the Court examined in Woodard. Consideration for clemency, like consideration for defendant's pre-release program, is voluntary. Since both are voluntary programs, they lack the compulsion that is the condition precedent to violating the privilege against self-incrimination. Both programs are "benefits" afforded to eligible inmates; there is no right to be admitted to either.

C.

Forsythe argues, in the alternative, that his denial from the pre-release program violates the Ex Post Facto Clause. He asserts that his application was denied because the victim's family was allowed to comment on his application pursuant to the Crime Victims Rights Act of 1992 ("CVRA"). Since that law was not enacted until after this crime was committed, Forsythe argues that it operated as an illegal ex post facto law to preclude him from being admitted into the pre-release program.

Article I of the Constitution prohibits states from enacting ex post facto laws. See U.S. Const. Art. I, cl. 1. The Supreme Court has explained that an ex post facto law exacts a "punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed[.]" Cummings v. Missouri, 71 U.S. 277, 325-26 (1866); see also United States v. Brady, 88 F.3d 225, 228 (3d Cir. 1996).

We have already discussed why conditioning admission to the pre-release program upon an admission of responsibility does not increase Forsythe's penalty. Moreover, it does not penalize his conduct at all, let alone penalize conduct that was previously legal. Courts have consistently held that restrictions that make it harder for inmates to qualify for programs such as parole, do not constitute "punishment" within the meaning of the Ex

Post Facto Clause. See, e.g., Calif. Dept. of Corrections v. Morales, 514 U.S. 499, 509 (1995) (finding that a California law that retroactively decreased the frequency of parole suitability hearings did not constitute punishment under the Ex Post Facto Clause); Cohen v. Horn, No.Civ.A.97-7175, 1998 WL 834101, at *4 (E.D. Pa. Dec. 2, 1998) (finding that a change in the factors used by Pennsylvania's parole authority to evaluate whether an inmate is granted parole does not constitute a "law" for purposes of the Ex Post Facto Clause.). Likewise, we find that application of the CVRA does not exact a punishment and therefore the CVRA can not violate the Ex Post Facto Clause.

C.

Lastly, Forsythe argues that requiring an admission of guilt violated his constitutional right to access the courts because an admission of guilt would make his post-conviction cases meaningless. Forsythe also argues that Walters denied his pre-release application to retaliate against him for initiating post-conviction litigation.

Under Bounds v. Smith, 430 U.S. 817 (1977), prison inmates have a constitutional right to access the courts under the First Amendment. See Bounds, 430 U.S. at 824-25. This access must be "meaningful." Lewis v. Casey, 518 U.S. 343, 351 (1996). However, an inmate must first demonstrate an actual injury rising to the level of "hinder[ing] . . . [one's] effort's to pursue a legal claim," in order to establish such a First Amendment violation. Id. We analyzed this requirement in Oliver v. Fauver, 118 F.3d 175 (3d Cir. 1997). There, we held that one must show an injury "such as the loss or rejection of a legal claim[.]" Oliver, 118 F.3d at 177.

Forsythe has not made that showing. He did not suffer any injury because he did not make any admission on his pre-release application. His post-conviction litigation has now apparently all been resolved against him. However, this could not have been a result of any statements of guilt that he made in his pre-release application because he did not make any. Therefore, under Lewis, Forsythe has not shown an actual First Amendment injury.

Moreover, although denying an application to a pre-release program in retaliation for filing a lawsuit could be a First Amendment violation, Forsythe presents only conclusory allegations of retaliation. There is no evidence of any nexus between those two occurrences whatsoever, and Forsythe's claim of retaliation can therefore be summarily dismissed. Consequently, we hold that the district court properly dismissed Forsythe's retaliation claim under the First Amendment.

V.

For all the reasons set forth herein, we will affirm the district court's memorandum order granting dismissal.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

/s/ Theodore A. McKee
CIRCUIT JUDGE