Circuit Court for Somerset County
Case No. 19-C-14-017042

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 172

September Term, 2017

SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

v.

CALVIN HEMPHILL

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 9, 2018

This appeal involves the eligibility of Calvin Hemphill, appellee, an inmate in the Division of Correction ("DOC"), to receive diminution credits for "double celling."[1] The Secretary of the Department of Public Safety and Correctional Services ("the Secretary"), appellant, seeks review of the decision of the Circuit Court for Somerset County finding that appellee was entitled to receive inmate diminution double celling credits. It raises one question for this Court's review, which we have rephrased, as follows:

> Did the circuit court err in determining that appellee was entitled to double celling diminution credits where he has continually served sentences that disqualify him from earning those credits since entering the DOC in 1999?

For the reasons set forth below, we answer that question in the affirmative, and therefore, we shall reverse the judgment of the circuit court.

[1] Code of Maryland Regulations ("COMAR") 12.02.06.04F, titled "Special Projects Credit for Housing," provides that, subject to specified exceptions, an inmate may be awarded a maximum of five special projects credits for housing for each calendar month, if the inmate is:

> (1) (a) Assigned to a cell containing two beds and is not serving a period of disciplinary segregation; or
>
> (b) Housed in a dormitory or dormitory-type housing and the housing area where the inmate is confined does not provide 55 square feet of living space per inmate, exclusive of dayrooms, toilets, and showers.

BACKGROUND

Diminution of Confinement Credits for Double-Celling

Before addressing the facts and contentions in this case, we will address generally the concept of diminution credits. When a defendant is sentenced to imprisonment, he or she is given a "term of confinement."[2] The "maximum expiration date" is "the date that an inmate's term of confinement expires." Code of Maryland Regulations ("COMAR") 12.02.06.01B(12); *Wilson v. Simms*, 157 Md. App. 82, 87, *cert. denied*, 382 Md. 687 (2004).

Inmates, however, may be entitled to earn diminution of confinement credits, which allow a deduction of a specified number of days from the inmate's term of confinement. *See* Md. Code (2017 Repl. Vol.) §§ 3-702-708 of the Correctional Services Article ("COR"). An inmate released early through the accumulation of diminution credits is released on "mandatory supervision," which is akin to parole, until the expiration of the maximum term(s) for which he or she was sentenced. COMAR 12.02.06.01B(10)-(11);

[2] "Term of confinement" is defined as: "(1) the length of the sentence, for a single sentence; or (2) the period from the first day of the sentence that begins first through the last day of the sentence that ends last, for: (i) concurrent sentences; (ii) partially concurrent sentences; (iii) consecutive sentences; or (iv) a combination of concurrent and consecutive sentences." Md. Code (2017 Repl. Vol.) § 3-701 of the Correctional Services Article ("COR"); COMAR 12.02.06.01B(18).

Sec'y of Pub. Safety & Corr. Servs. v. Hutchinson, 359 Md. 320, 326 (2000); *Sec'y, Dep't of Pub. Safety & Corr. Servs. v. Henderson*, 351 Md. 438, 441 (1998).[3]

Diminution of confinement credits can be earned in various ways; inmates may earn good conduct credits, work credits, education credits, and special projects credits. COMAR 12.02.06.04A; COR §§ 3-701-707; *Stouffer v. Holbrook*, 417 Md. 165, 171 (2010) (explaining diminution credit process). There is, however, a limit to the total number of deductions to which an inmate may be entitled, depending on the type of offense for which the inmate is serving a term of confinement. COR §§ 3-707-708.

The type of diminution credit at issue here are special projects credits for which an inmate may earn "a deduction of up to 10 days" per month from the inmate's term of confinement. Md. Code (2008 Repl. Vol.) § 3-707(a) of the Correctional Services Article.[4] In particular, it involves special projects credits based on "double celling," i.e., being confined with another inmate. COMAR 12.02.06.04F. *See* COR § 3-707; *Smith v. State*, 140 Md. App. 445, 450-51 (2001).

As indicated, there are circumstances under which an inmate may not be awarded special projects credits for double celling. COR §§ 3-702, 3-707; COMAR 12.02.06.04F(3). In 1999, at the time of appellee's initial convictions, an inmate was not eligible for double celling credit if the inmate was serving a:

[3] "Mandatory supervision" is defined as "a conditional release from incarceration granted to an inmate." COMAR 12.02.06.01B(10).

[4] The most recent version of this provision, which went into effect on October 1, 2017, increased the allowable monthly deduction from ten to 20 credits.

> (a) Sentence for murder, rape, sex offenses, child abuse, drug trafficking or distribution, or use of a firearm in the commission of a felony;
>
> (b) Mandatory sentence for the commission of a felony; or
>
> (c) Sentence as a repeat offender under Article 27, §643B, Annotated Code of Maryland.

COMAR 12.02.06.05N(1) (1990).

In *Smith*, this Court held that, when an inmate's term of confinement contained disqualifying sentences and non-disqualifying sentences, an inmate may earn double celling credits during any period of his or her term when the inmate is serving the non-disqualifying sentence. 140 Md. App. at 461.

In 2002, the regulations regarding double celling credits were changed. Rather than disqualifying an inmate from earning double celling credits if an inmate was serving a sentence for certain crimes, the regulation was changed to provide that an inmate whose term of confinement *includes* a sentence for a disqualifying crime is ineligible for double celling credits. COMAR 12.02.06.04F(3). The regulation also changed the list of disqualifying crimes, and as relevant to this appeal, attempted murder was added to the list. COMAR 12.02.06.04F(3)(a)(vii).

In *Sec'y, Dep't of Pub. Safety & Corr. Servs. v. Demby*, 390 Md. 580, 586, 618 (2006), the Court of Appeals held that, pursuant to the ex post facto clauses of the Federal and Maryland Constitutions, the 2002 regulatory amendments could not be applied to restrict the eligibility for double celling credits for inmates whose term of confinement consisted of sentences solely for crimes committed before January 1, 2002. It affirmed this

Court's holding that an inmate serving a term of confinement for offenses committed prior to January 1, 2002,

> may not be denied double-celling credits, for periods of time during which he or she was or is serving only an eligible sentence, for the sole reason that another sentence in his or her term of confinement is ineligible, and [] may not be denied double-celling credits on sentences for offenses that were eligible under the former regulation but are ineligible under the current regulation.

Id. at 619 (quoting *Demby v. Sec'y, Dep't of Pub. Safety & Corr. Serv*s., 163 Md. App. 47, 68 (2005)).

In 2007, the Secretary promulgated new regulations to further limit double celling credits. The new regulations provided that such special projects credits may not be awarded if the inmate was serving a term of confinement that included a sentence for a crime committed on or after July 1, 2007. COMAR 12.02.06.04F(3)(a)(xiii).[5]

[5] COMAR 12.02.06.04F currently provides:

(3) An inmate may not be awarded special projects credit under this section during the inmate's term of confinement if the inmate is serving a term of confinement that includes a:

(a) Sentence for:
(i) Abduction;
(ii) Arson in the first degree;
(iii) Carjacking or armed carjacking;
(iv) Kidnapping;
(v) Manslaughter, except involuntary manslaughter;
(vi) Mayhem and maiming, as previously proscribed under Article 27, §§384-386, Annotated Code of Maryland;
(vii) Murder or attempted murder;
(viii) Use of a handgun in the commission of a felony or other crime of violence;

Appellee's convictions and sentences

With that background of diminution credits in mind, we address appellee's convictions and sentences at issue here. On November 18, 1999, appellee was sentenced to 30 years' imprisonment, all but 15 years suspended, for his conviction of attempted first degree murder. The court also imposed the following concurrent sentences: 15 years for his conviction of possession with intent to distribute cocaine; ten years for his conviction of use of a handgun in the commission of a felony or crime of violence; and six months for another conviction.[6] The DOC calculated appellee's maximum expiration date on those sentences to be April 22, 2014. Based on appellee's accumulation of 1,063 diminution credits, the DOC released appellee on mandatory supervision on May 25, 2011.

> (ix) Child abuse, abuse or neglect of a vulnerable adult, or child sale, barter, or trade under Criminal Law Article, §3-601, 3-602, or 3-603, Annotated Code of Maryland;
> (x) Assault on a Division inmate or employee under Criminal Law Article, §3-205, Annotated Code of Maryland;
> (xi) A drug crime;
> (xii) An offense which would cause the offender to be defined as a child sexual offender, offender, sexually violent offender, or sexually violent predator under Criminal Procedure Article, Title 11, Subtitle 7, Annotated Code of Maryland; or
> (xiii) A crime committed on or after July 1, 2007.
> (b) Mandatory sentence for the commission of a felony; or
> (c) Sentence as a repeat offender under Criminal Law Article, §14-101, Annotated Code of Maryland.

[6] As the circuit court noted, there is a discrepancy regarding the nature of this last conviction, but this discrepancy need not be discussed because it has no bearing on our analysis.

A short time after being released on mandatory supervision, appellee was arrested. On August 7, 2012, appellee pleaded guilty to second degree assault and was sentenced to ten years' imprisonment. The DOC calculated the maximum expiration date for that sentence to be June 2, 2022.

On August 10, 2012, the circuit court found appellee in violation of the probation imposed for his 1999 conviction of attempted murder, and it imposed a ten-year sentence, to be served consecutively to the ten-year sentence for the second degree assault conviction. The DOC calculated the maximum expiration date for that sentence to be June 4, 2031.[7]

On June 26, 2013, the Maryland Parole Commission revoked appellee's release on mandatory supervision relating to his 1999 convictions. The DOC provided a sentence calculation worksheet, which we have summarized, showing the following calculations:

Date Sentence Imposed	**Sentence**	**Maximum Expiration Date**	**Double Celling Credit Eligible?**
11/18/1999	Attempted first degree murder. 15 years from 4/22/1999 Use of a handgun in Commission of Felony or Crime of Violence.	4/22/2014	YES

[7] On November 15, 2012, the court sentenced appellee on another conviction, for conspiracy to distribute heroin. It imposed a concurrent term of nine years' imprisonment, commencing June 19, 2011.

	Ten years concurrent (1st Five years without parole) Possession with Intent to Distribute Cocaine. 15 years concurrent False statement. Six months concurrent	4/22/2009 4/22/2014 10/22/1999	NO NO YES
5/25/2011	Release from confinement on mandatory supervision (MSR) - Days out 72.		
8/7/2012	Assault-2nd Degree Ten years from 6/2/2012	6/2/2022	NO
8/10/2012	Violation of Probation on 1999 attempted first degree murder conviction. Ten years consecutive to last sentence to expire (less 363 day's credit)	6/4/2031	YES
11/15/2012	Conspiracy to distribute heroin. 9 years from 6/19/2011 concurrent	6/19/2020	NO

The calculations provided for good conduct credits of five days per month for the 1999 convictions and ten days per month for the 2012 second degree assault conviction.[8]

[8] Appellee was not given credit for the 72 days he spent out of confinement on mandatory supervision between May 25, 2011, and August 5, 2011.

Procedural Background to Claim

On January 24, 2013, appellee filed a grievance with the Inmate Grievance Office ("IGO"), asserting that he was contesting the DOC's determination that he was not entitled to the double celling diminution of confinement credits until his sentence for second degree assault reached its maximum expiration date of June 22, 2022. He argued that he was serving two terms of confinement – a "post parole" term of ten years for second degree assault (the "new" sentence) and a "pre-parole" consecutive term of ten years for attempted first degree murder (the "old" sentence), and therefore, his sentences did not "aggregate to form a single term of confinement." He argued that, after deducting credits for good conduct, his maximum expiration date on the "new" sentence for second degree assault would be on March 8, 2018, at which point he would be serving his sentence for attempted murder and would be eligible for double celling credits.

On October 17, 2013, the IGO dismissed appellee's grievance. Scott Oakley, Executive Director of the IGO, explained in a letter to appellee, as follows:

> [Y]our current term of confinement consists of sentences imposed at the outset for the crimes of murder in the first degree [] and possession with the intent to distribute CDS. I conclude, therefore, that you are not now and never have been eligible for double celling credits and that you have therefore failed to state a claim upon which administrative relief can and should be granted.

On July 29, 2014, the Circuit Court for Washington County reversed. It found that the IGO's determination that appellee "should be denied credits for double-celling due to two first degree murder convictions [was] incorrect because [appellee] was not convicted" of such offenses, and therefore, the IGO's determination was "unsupported by material and

substantial evidence."[9] The court remanded to the IGO to "determine whether [appellee's] 'attempted murder' conviction or other convictions disqualify him from receiving double-celling credits."

On September 23, 2014, the IGO again dismissed appellee's grievance, determining that "one or more of the criminal convictions in [appellee's] current term of confinement disqualifie[d] [him] from receiving double celling special projects diminution of confinement credit during this term of confinement." In that regard, it stated:

> [Y]our current term of confinement includes the following sentences: a 15-year sentence for attempted murder, a 10-year sentence for use of a handgun in the commission of a felony, a 15-year sentence for possession of CDS with intent to distribute, all imposed on 11/18/99, a 10-year sentence for second degree assault imposed on 8/7/12, a 10-year sentence for attempted first degree murder imposed on 8/10/12, and a 9-year sentence for conspiracy to distribute heroin imposed on 11/15/2012. I conclude, therefore, that you have never been eligible for double celling credits and that you have therefore failed to state a claim upon which administrative relief can and should be granted.

On October 17, 2014, appellee sought judicial review of the IGO's decision in the Circuit Court for Somerset County.[10] He reiterated his argument that he was entitled to double celling credits for his attempted murder conviction.

The Secretary argued that the IGO properly determined that appellee had never been entitled to earn double celling credits because, "since his commitment to the DOC in

[9] The court noted that it had asked the Secretary to address the merits of appellee's petition, but the Secretary failed to do so.

[10] By that time, appellee had been transferred to a correctional facility in Somerset County.

November 1999, each day he has served under his term of confinement is a day during which he has served a sentence that renders him ineligible for these credits." The Secretary explained that, from 1999 until appellee was released on mandatory supervision, appellee had "served a 15-year sentence for possession with intent to distribute cocaine," which rendered him ineligible for double celling credits "under the *pre*-January 1, 2002, regulations." *See* COMAR 12.02.06.05N(1)(a) (1990) (providing that inmate serving a sentence for "drug trafficking or distribution" is ineligible for double-celling credits).

When appellee returned to the DOC in 2012, he was serving a ten-year sentence for second degree assault. Because that crime was committed after July 1, 2007, the Secretary argued that the sentence disqualified appellee from earning double celling credits until the sentence expired on June 2, 2022. Thus, because there was no time during his term of confinement in which appellee had served only an eligible sentence, the IGO had properly dismissed appellee's grievance.

On August 3, 2015, the Circuit Court for Somerset County reversed the IGO's decision. It focused solely on the sentence for attempted murder, and it determined that appellee was "*currently* eligible to receive inmate diminution double celling credits against [his] sentence for attempted murder even though [he] is not currently serving the second portion of it." The court found that appellee was "entitled to receive inmate diminution double celling credits against his sentence for attempted murder; both retroactively and in the future," and it remanded to the IGO with instructions to "calculate the total number of

inmate diminution double celling credits that [appellee] has earned and *apply* them retroactively to [appellee's] record."

On August 14, 2015, the Secretary filed a motion requesting the court to alter or amend its judgment, which was denied. This appeal followed.

DISCUSSION

The Secretary contends that the IGO correctly determined that appellee was "not eligible to earn double-celling credits because he has continuously served sentences that disqualify him from earning these credits since entering the division in 1999." It argues that, from November 18, 1999, to April 22, 2014, appellee served a 15-year sentence for possession with intent to distribute cocaine, which disqualified him from earning double celling credits under the pre-January 1, 2002, regulations. *See* COMAR 12.02.06.05N(l)(a) (1990) (providing that inmate serving a sentence for "drug trafficking or distribution" is ineligible for double celling credits).

Upon appellee's return to the DOC on August 9, 2012, he began serving a ten-year sentence for second degree assault, and because that crime was "committed on or after July 1, 2007," he was disqualified from earning double celling credits until that sentence expired on June 2, 2022. COMAR 12.02.06.04F(3)(a)(xiii). At that time, appellee would begin serving solely the sentence for attempted murder, which the Secretary acknowledges does not disqualify him from earning double celling credits.

In sum, the Secretary's position is that appellee is not permitted to earn double celling credits until he begins to serve his ten-year sentence for violating his probation on the conviction for attempted first degree murder.

Appellee, a self-represented litigant, states that he filed a grievance in 2012 because he realized that he was being denied double celling credits. In his argument, however, he states that the issue is the date of eligibility for such credits on his attempted murder term of confinement. He characterizes the Secretary as arguing that he will never be eligible for credits, and he argues, as best as we can discern, that he is eligible for these credits at the conclusion of his sentence for second degree assault, which he calculates, after deducting good conduct and other credits, to be June 17, 2017.

In assessing the argument here, we must be clear on the proper standard of review. With appeals originating from an inmate grievance proceeding,

> "an appellate court reviews the agency decision under the same statutory standards as the circuit court[; thus,] we reevaluate the decision of the agency, not the lower court.'" *Watkins v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 45-46 (2003). We "'give appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.'" *Campbell v. Cushwa*, 133 Md. App. 519, 538 (2000) (citation omitted). This deference does not extend to cases where the agency has made an error of law, however.
>
> [W]e "may always determine whether the administrative agency made an error of law." . . . Typically, such a determination requires considering "(1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision." . . . Moreover, in cases that involve determining whether a constitutional right has been infringed, we make an independent constitutional appraisal. [*Watkins*, 377 Md.] at 46.

Demby, 163 Md. App. at 59–60.

As indicated, *supra*, the parties appear to agree that appellee is not permitted to earn double celling credits until he completes his "new" ten-year sentence for his conviction for second degree assault and begins serving his ten-year consecutive sentence for his "old" conviction for attempted murder. We agree.

We find instructive the analysis in *Smith*, 140 Md. App. 445. In that case, Smith was serving two consecutive sentences, the first of which rendered him ineligible to earn double celling credits, and the second of which did not. *Id*. at 449-50.[11] The first sentence, the 30-year "old" sentence, was imposed in 1982 for second degree murder with a start date of June 10, 1977. *Id.* at 449. In 1989, Smith was released on parole. *Id*. Approximately one year later, the Maryland Parole Commission revoked Smith's parole and Smith was returned to DOC custody. *Id*. at 449-50. At the same time, Smith was convicted for a robbery committed while on parole, and the circuit court sentenced him to a five-year term to be served consecutively to the remaining term of his murder sentence. *Id*. at 450.

The DOC argued that Smith was not eligible for double celling credits because he was serving a term of confinement that included a sentence for murder, an ineligible sentence. *Id*. at 452. Under this analysis, Smith would never become eligible for double celling credits because the credits were applied, not to a sentence, but to the entire term of

[11] Appellee, like Smith, is serving two consecutive sentences, the first of which makes him ineligible for double celling credits.

confinement, and one of the sentences in Smith's "term of confinement" was not entitled to double celling credits. *Id*.

This Court disagreed. We stated that "diminution credits, once they are created, should be earned and calculated against the eligible *sentence* of an inmate rather than against his or her entire *term of confinement*." *Id*. at 461 (emphasis added). We held:

> [W]hen an inmate's term of confinement includes both a sentence that is not eligible for the special project credits in question and a consecutive sentence that is eligible for those credits, the two sentences must be considered separately, so that the inmate may reduce his or her term of confinement by earning special project credits against the eligible sentence.

Id. Thus, once Smith finished the sentence for the ineligible offense and began his consecutive eligible sentence, he could begin earning double celling credits. *Id*. at 463.

Based on the rationale of *Smith*, appellee's confinement for the "new" sentence for the conviction of second degree assault will expire once he serves its ten-year term, minus any diminution of confinement credits he has earned on that sentence. He then will begin his term of confinement for his "old" sentence, for his conviction of attempted murder, for which he will be eligible for double celling credits.

Appellee asserts in his brief that, after subtracting diminution credits, he will have completed his sentence for second degree assault on June 17, 2017.[12] Thus, by appellee's argument, at the time he filed his IGO grievance in 2013, or at the time of the IGO's final

[12] The Secretary did not respond to this assertion.

decision in 2014, he was not entitled to double celling credits. Accordingly, the IGO did not err in dismissing appellee's grievance.[13]

JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.

[13] This determination does not preclude appellee from filing another grievance if the Division of Correction does not permit double celling credits when appellee begins (or if his calculations are correct, at the point when appellee began) serving his sentence for attempted murder.