

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 26 1984

CLERK SUPREME COURT

ALAN REINERT,

)

Petitioner-Appellant,

)

Filed December 26, 1984

493

vs.

)

WARDEN CRISPUS NIX,

)

4-400

83-871

Respondent-Appellee.

)

Appeal from the Iowa District Court for Lee County - L. Vern Robinson,
Judge.

Petitioner appeals from denial of application for postconviction relief asserting that his accrued good time pursuant to Iowa Code section 246.39 (1981), was unlawfully forfeited due to a mistake in calculating the number of rules violations he had committed. REVERSED AND REMANDED.

Charles L. Harrington, Chief Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Mark Hunacek, Assistant Attorney General, for respondent-appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

After serving time at the Iowa State Penitentiary, petitioner was transferred to a halfway house. While at the halfway house, defendant violated disciplinary rules by refusing to submit to an alcoyser test on demand, escaping — i.e. being out of place of assignment, and assaulting a staff member. Disciplinary proceedings were held and petitioner's good time accrued was forfeited as follows: (1) Offense #1 (Violation of Rule #16): 8 days loss; (2) Offense #2 (Violation of Rule #9): 16 days loss; and (3) Offense #3 (Violation of Rule #1): 497 days loss. Prior to these violations, defendant had only received one forfeiture of good time in the amount of two days.

Petitioner filed an application for postconviction relief. At the postconviction hearing, defendant raised several arguments including the fact that the authorities failed to follow the mandatory sequence of 2, 4, 8, and 16 days good time forfeiture for defendant's first four violations. Because petitioner had only one prior forfeiture, he stated that the subsequent three violations should have been punished by forfeiture of 4, 8, and 16 days, rather than 8, 16, and 497 days. This argument was not pleaded by petitioner but the court allowed petitioner to amend his pleadings to conform to proof. The court denied petitioner's application for postconviction relief, but in the ruling did not address the forfeiture issue. Defendant never moved for enlargement of findings and conclusions.

The sole issue on appeal is whether the defendant's accrued good time was unlawfully forfeited pursuant to Iowa Code section 246.39.

The first issue before this court is whether the defendant preserved error on this issue.

The State argues that the defendant failed to preserve error because the trial court did not address this issue in its findings of fact and no motion to enlarge the findings was filed pursuant to Iowa Rule of Civil Procedure 179(b). In Starling v. State, 328 N.W.2d 338 (Iowa Ct. App. 1982), the Iowa Court of Appeals

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held that, in a postconviction relief case, a motion under 179(b) is necessary to preserve error on a claim that the trial court failed to make a certain finding and sufficiently specific conclusions. Id. at 342. In an earlier case, Nuzum v. State, 300 N.W.2d 131 (Iowa 1981), the supreme court held that the rules of civil procedure are applicable in postconviction relief proceedings. Id. at 132-33.

We will not expand the holding in Starling to require that a 179(b) motion be filed to preserve error when the question on appeal is other than a challenge to the failure of the court to make specific findings and to state expressly its conclusions of law relating to each issue. Although the trial court did not address the issue in its findings of fact, the petitioner did raise the issue at trial and was allowed to amend his pleadings to conform to the proof presented on this issue. We find that error was preserved.

The substantive issue in this case revolves around the proper application of Iowa Code section 246.41:

A prisoner who violates any of such rules shall forfeit the reduction of sentence earned by him, as follows:

1. For the first violation, two days.
2. For the second violation, four days.
3. For the third violation, eight days.
4. For the fourth violation, sixteen days and, in addition, whatever number of days more than one that he is in punishment.
5. For the fifth and each subsequent violation, or for an escape, or attempt to escape, the warden shall have the power, with the approval of the state director, to deprive the prisoner of any portion or all of the good time that the convict may have earned.

Iowa Code § 246.41.

The defendant claims that the State failed to properly apply this statute. While defendant was confined at the Iowa State Penitentiary, he violated one rule and lost two days of good time pursuant to section 246.41. In 1981, while defendant was in a halfway house in Davenport, he returned drunk, refused to take an alcoyser test, and assaulted a guard. A report was filed listing the recommended forfeiture of good time earned as follows:

<u>Violation</u>	<u>Recommended Loss of Good Time</u>
Rule #16 - refusal of alcoyser test	8 Days
Rule #9 - escape	16 Days
Rule #1 - assault	loss of remainder of good time earned which totals 497 days

Defendant argues that because he only had one previous rule violation, he should have received the following forfeitures:

Rule #16	4 Days
Rule #9	8 Days
Rule #1	16 Days

The State claims that the allocation was a bookkeeping error and that the 497-day forfeiture was actually attributed to the escape rather than for assault. The State then argues that the revocation of the 497 days was proper under Iowa Code section 246.41(5), which allows for the revocation of all good time earned for escape.

We reject the State's argument that the forfeiture of 497 days was actually attributable to escape rather than assault. A separate report was filed for each of the three violations and it stated clearly on the escape violation report that the defendant should forfeit 16 days.

We find that the parole board did not properly apply section 246.41, which clearly states that the defendant "shall" forfeit good time earned in the order set forth in the statute. See, Schmidt v. Abbott, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (1968) ("When addressed to a public official the word "shall" is ordinarily mandatory, excluding the idea of permissiveness or discretion.")

Under section 246.41, the defendant should have forfeited four days for violation of Rule 16, eight days for violation of Rule 9, and sixteen days for violation of Rule 1. The decision of the postconviction court is reversed and the

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case is remanded with orders to restore the 493 days of good time which were unlawfully forfeited.

REVERSED AND REMANDED.