State of New Hampshire
Supreme Court

NO. 2008-0138

2008 TERM

JULY SESSION

State of New Hampshire

v.

Bobby Dean Freeman

APPEAL OF FINAL DECISION OF
GRAFTON COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT BOBBY DEAN FREEMAN

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QUESTIONS PRESENTED

1. Did the court err in ruling that Bobby Dean Freeman must serve 5 years probation when the terms of his original sentence imposed probation only after parole, which never occurred?

   Preserved: MOTION TO CLARIFY (Jan. 7, 2008), *Appx.* at 32; Transcript, *passim.*

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In December 2000, after pleading guilty to two indictments of felonious sexual assault, Bobby Dean Freeman was sentenced by the Grafton County Superior Court (*Jean K. Burling*, J). RETURN FROM SUPERIOR COURT Nos. 2000-S-125 & 126 (Dec. 1, 2000), *Appx.* at 20, 21; STATE PRISON SENTENCE Nos. 2000-S-125 & 126 (Dec. 1, 2000), *Appx.* at 22, 24.[1]

In Docket-126, Mr. Freeman was sentenced to 3½ to 7 years incarceration. The court recommended that 1½ years of the minimum could be suspended if Mr. Freeman participated in a sexual offender rehabilitation program. RETURN FROM SUPERIOR COURT No. 2000-S-126, *Appx.* at 21; STATE PRISON SENTENCE No. 2000-S-126, *Appx.* at 24.

In Docket-125, Mr. Freeman was sentenced to 3 to 6 years. The court suspended the entire sentence for 10 years from the date of sentencing upon condition of good behavior. The court further ordered:

> The defendant is placed on probation for a period of 5 year(s) …. Effective: Upon Release from parole on [Docket]-126.[2]

RETURN FROM SUPERIOR COURT No. 2000-S-125, *Appx.* at 20; STATE PRISON SENTENCE No. 2000-S-125, *Appx.* at 22 (identical language but differing format). The sentences were made

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[1]For ease of reference, these charges will be labeled herein "Docket-125" and "Docket-126."

[2]"The 'essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.'" 2 R. McNamara, *New Hampshire Practice, Criminal Practice and Procedure* § 33.25 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)); RSA 651-A:2, II ("'Parole' means a conditional release from the state prison which allows a prisoner to serve the remainder of his term outside the prison, contingent upon compliance with the terms and conditions of parole as established by the parole board.").

Unlike parole, probation does not mean conditional liberty. It is a separate portion of a sentence that imposes conditions that if "found by the court, after notice and hearing, to have been violated, [a defendant] face[s] the possibility of further incarceration." *State v. White*, 131 N.H. 555, 558 (1989).

Though the conditions of the two statuses are similar, a violation of parole results in an immediate return to prison, whereas a violation of probation is akin to a new crime.

consecutive to each other.

Read together, Mr. Freeman was required to spend 7 years under the direct control of the State.[3] If he successfully completed rehabilitation programs and got paroled at the earliest possible time, 1½ years of the 3½-year minimum in Docket-126 would be suspended. Taking 1½ years off of 3½ years leaves 2 years incarcerated. After that, he would be on parole for 5 years – the remaining portion of his 3½ to 7 year sentence. He would then serve 5 years of probation in Docket-125. Two years in prison plus 5 years parole equals a total of 7 years under direct State control, followed by a 5-year probationary period. Alternatively, if he did not complete the rehabilitation program, he would serve the maximum 7 years committed in Docket-126.

Mr. Freeman was provided notice of the terms of his sentence and the interaction between parole and probation at least four times.

- The first was the Return From Superior Court. "The defendant is placed on probation for a period of 5 year(s) …. Effective: ***Upon Release from parole*** on [Docket]-126." RETURN FROM SUPERIOR COURT No. 2000-S-125, ***Appx.*** at 20 (emphasis added).

- The second was a document entitled "State Prison Sentence." "The defendant is placed on probation for a period of 5 year(s) …. Effective: ***Upon Release from parole*** on [Docket]-126." STATE PRISON SENTENCE No. 2000-S-125, ***Appx.*** at 22 (emphasis added).

- The third was a letter. Shortly after his sentence was pronounced, the Department of Corrections mailed Mr. Freeman a letter at the State Prison. The letter informed him that he was "sentenced to the New Hampshire State Prison and placed on probation ***upon release from parole***." LETTER FROM GERARD BERGEVIN, SENIOR PROBATION/PAROLE OFFICER TO BOBBY DEAN FREEMAN (INMATE) (Dec. 4, 2000), ***Appx.*** at 26 (emphasis added).

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[3]This summary lays aside the consecutive 3 to 6 year suspended time in Docket-125 because that would not become relevant unless Mr. Freeman were a recidivist. ***State v. Budgett***, 146 N.H. 135 (2001) ("the term 'good behavior' is defined as conduct conforming to the law'").

- The fourth was also a letter. Shortly after his sentencing, Mr. Freeman's lawyer, Attorney Tony Hutchins of the Orford Public Defender Office, mailed Mr. Freeman a letter at the State Prison. The letter informed him that he was "placed on probation for a period of five years effective *upon release from parole*." LETTER FROM TONY HUTCHINS, ESQ. TO MR. BOBBY DEAN FREEMAN (Dec. 5, 2000), *Appx.* at 27 (emphasis added).

- Finally, although the transcript of Mr. Freeman's sentencing hearing is not before this Court, it must be presumed he was read his sentence by the court at that time.

During incarceration, Mr. Freeman did not complete the rehabilitation program. *Trn.* at 6-7; LETTER FROM JON BUTLER, PRISON COUNSELOR, TO JOHN ECKERT, PAROLE BOARD (Mar. 23, 2004), *Appx.* at 29. Accordingly, he served the entire 7-year term of Docket-126, and was never on parole.

Mr. Freeman was released from prison on December 1, 2007. Shortly before that, the State attempted to impose the 3 to 6 year suspended sentence in Docket-125 on the grounds that failure to complete rehabilitation programs was a violation of good behavior. The court (*Timothy J. Vaughan*, J.) correctly rejected the request:

> His election not to complete [the program] has as its penalty only the imposition of the full term of sentence [Docket]-126, not suspended sentence [Docket]-125. A sentence's recommendation … that a certain offender be enrolled in the Sexual Offender Program does not implicitly transform to become a condition of the defendant's sentence.

ORDER ON THE MOTION TO IMPOSE SUSPENDED SENTENCE (Dec. 17, 2007), *Appx.* at 30. The State did not appeal. Accordingly, Mr. Freeman is no longer incarcerated.

Given of the language of his sentencing documents and the various notifications he received at the time of sentencing, upon his release from the maximum 7-year term of incarceration, Mr. Freeman believed he was not on probation and need not contact his probation officer. When he did not report for probation, however, the State sought a probation violation.

Initially a capias was issued, but then dissolved upon Mr. Freeman complying with the terms of probation two days later.

The confusion regarding his probation status prompted Mr. Freeman to request a clarification of his sentence and a declaration that he is not on probation. MOTION TO CLARIFY (Jan. 7, 2008), *Appx.* at 32. The court (***Steven M. Houran***, J.) denied the request. ORDER (Feb. 1, 2008), *Appx.* at 36.

After Mr. Freeman appealed, the lower court also denied a request to stay imposition of probation pending appeal. Accordingly, Mr. Freeman is currently complying with the terms of probation.

SUMMARY OF ARGUMENT

Bobby Dean Freeman sets forth the terms of his sentence, which were given to him on several occasions. He points out that service of probation was dependent upon service of parole, a triggering event that never occurred.

Mr. Freeman argues that he terms of his sentence gave him a choice whether to serve either a relatively shorter period with more intense State control, or a relatively longer period with less intense control, dependent upon his seeking parole. He argues that his understanding was reasonable given the language of the sentence, his situation, and the goals of the corrections system.

Although Mr. Freeman notes that his sentence is not ambiguous, he argues that if it is, he should be given the benefit of the doubt, especially where he relied on the language of the sentence in determining whether to pursue parole.

ARGUMENT

I. Mr. Freeman's Sentence Means What it Says

A. Probation "Upon Release From Parole"

This Court has made clear that upon sentencing, both the defendant and the public must be able to know specifically what the sentence is:

> Due process requires a sentencing court to make clear at the time of sentencing in plain and certain terms what punishment it is exacting, as well as the extent to which the court retains discretion to impose punishment at a later date and under what conditions the sentence may be modified. The sentencing order must clearly communicate to the defendant the exact nature of the sentence.

State v. LeCouffe, 152 N.H. 148, 152 (2005) (emphasis omitted); *Stapleford v. Perrin*, 122 N.H. 1083, 1087 (1982) ("At the conclusion of the sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been exacted by the court as well as the extent to which the court retained discretion to impose punishment at a later date and under what conditions the sentence may be modified."). *See also State v. Burgess*, 141 N.H. 51 (1996); *Webster v. Powell*, 138 N.H. 36, 39 (1993) ("Defendants in criminal cases have the right to expect that sentencing orders will clearly communicate the exact nature of their sentences."); *State v. Huot*, 136 N.H. 96 (1992); *State v. Ingerson*, 130 N.H. 112 (1987); *State v. Rau*, 129 N.H. 126 (1987).

A sentence "may be amended, modified, or vacated, provided the original punishment imposed not be augmented." *State v. Rau*, 129 N.H. 126, 131 (1987).

The sentencing documents in Mr. Freeman's case provide that he would be "placed on probation … [u]pon release from parole." RETURN FROM SUPERIOR COURT No. 2000-S-125, *Appx.* at 20. These words were repeated to him several times by the court, a corrections official,

and his lawyer. The language of the sentence was repeated so many times and in so many contexts that it cannot be considered mere inartful drafting. *See Trn.* at 8. Rather, Mr. Freeman understood it, believed it, and ordered his life in accord with it.

Successful completion of the prison's sexual offender program requires discussion of personal matters with other inmates in a group setting. *See e.g., State v. Carter*, 146 N.H. 359, 360-61 (2001). Mr. Freeman twice began the program, but did not complete it. He did this knowing that failure to complete the program would result in denial of parole. *Marcoullier v. Warden*, 140 N.H. 393 (1995); *Knowles v. Warden*, 140 N.H. 387 (1995).

B. Choice to be Rid of State Control Sooner

Mr. Freeman's understanding of his sentence was that he could affect the length of his sentence and the intensity of the State's control over him, depending upon his choices regarding parole.

He understood that the State was exacting from him *either* a relatively shorter period with more intense control, *or* a relatively longer period with less intense control. He understood that the State wanted absolute control of him, in an incarceration setting, for 7 years. In the alternative, he understood that the State wanted absolute control of him for at least 2 years, then somewhat lesser control in the form of parole for the balance of the 7-year term, and finally even lesser control in the form of probation for 5 additional years. He further understood that he could affect this balance by either completing the sexual offender program and seeking parole, or by foregoing that opportunity.

C. Mr. Freeman's Understanding of His Sentence is Reasonable

Mr. Freeman's understanding of his sentence is in strict accord with the letter of his sentencing documents, and is reasonable given his circumstances. Moreover, it is in accord with the dual purposes of the corrections system. *See State v. Wentworth*, 118 N.H. 832, 842 (1978). The State could deter crime by either 1) exacting retribution in the form of incarceration, or 2) attempting rehabilitation through the sexual offender program and a more graduated release into the civilian world.

Given his knowledge of his own personality, self-assessment of his likely success with out-of-facility monitoring programs such as parole and probation, his preferences regarding submission to State control inside or outside a facility, the problems and risks associated with completion of the sexual offender program, his desire for rehabilitation, his assessments of the parole and probation systems generally, and his self-prognosis regarding the likelihood of being granted parole, Mr. Freeman made a conscience choice.

He chose the shorter of the two options, even though it resulted in more strict State control. He believed that if he served straight time under direct control, he would be rid of any – albeit relaxed – control sooner.

The State's suggestion that "everybody presumed he would be paroled and wouldn't max out," *Trn.* at 8, reflects the *State's* presumption, but not Mr. Freeman's. Likewise, the State's suggestion that what the State thought is also "clearly what his understanding would have been," *Trn.* at 9, is without any basis. What the sentence says, rather than what it might have said, is controlling. *Webster v. Powell*, 138 N.H. 36, 39 (1993).

Mr. Freeman's understanding of the explicit language of the sentence is reasonable and in accord with its plain meaning, and he ordered his life with regard to it.

D. Triggering Event Did Not Occur

The sentencing documents say that Mr. Freeman would serve probation "upon release from parole." Parole is a triggering event, which did not occur.

The State suggests, however, that the court actually meant Mr. Freeman would serve probation "upon being released from the state prison." *Trn.* at 8-9. Had the sentence said that, Mr. Freeman would have given vastly different weight to the factors he considered when he, years ago, determined his incarceration strategy.

In accord with *Stapleford v. Perrin*, Mr. Freeman's sentence was clear at the time of sentencing. In accord with *State v. Rau*, it cannot now be augmented to include probation, even though there never was any parole.

II. Mr. Freeman Served His Time

A. Mr. Freeman's Sentence is Not Ambiguous

There is nothing ambiguous about Mr. Freeman's sentence. At the time of sentencing it gave him a clear understanding of "what punishment has been exacted by the court." *Stapleford v. Perrin*, 122 N.H. 1083, 1087 (1982). As noted, the sentencing documents make it clear that he would be "placed on probation … upon release from parole," and that because parole did not occur, probation was not triggered.

Although one cannot "manufacture ambiguity where none exists," *United States v. Culbert*, 435 U.S. 371, 379 (1978), it appears that is what has occurred here. To the extent there is an ambiguity in Mr. Freeman's sentence, however, the more lenient interpretation applies.

B. If Ambiguous, Sentence is Construed in Defendant's Favor

Courts have held that material ambiguities in a sentence must be construed in the defendant's favor.

> We are familiar with the rule that criminal laws must be construed strictly against the State and in favor of the liberty of the citizen. That is but manifestation or cropping out of a broader public policy, firmly established amongst English speaking people, which requires a high degree of certainty in the procedure by which a person is deprived of his liberty or his life. The protection it affords follows him through the incidents of trial, and is not withdrawn when most needed: when he stands before the court, in invitum and at arms length with the State, to receive sentence for his misdemeanor; to shift the picture to a more sensitive spot on the retina, when society, through its authorized agency, undertakes to budget the life of an errant member and take out of it the years forfeit to the law. The policy of the law which will not permit the accused to be convicted of crime unless his guilt is proved beyond a reasonable doubt will certainly interpose to prevent his punishment under a vague and ambiguous sentence – an instrumentality less certain than the proceeding upon which its authority is based.

Ex parte Parker, 35 S.E.2d 169, 172 (N.C. 1945). *See also Merneigh v. State*, 525 S.E.2d 362, 363 (Ga. 2000) ("Sentences for criminal offenses should be certain, definite, and free from

ambiguity; and where the contrary is the case, the benefit of the doubt should be given to the accused."); *Robinson v. Lee*, 564 A.2d 395, 399 (Md. 1989) ("Fundamental fairness dictates that the defendant understand clearly what debt he must pay to society for his transgressions. If there is doubt as to the penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one."); *State v. Corbitt*, 370 A.2d 916, 919 (N.J.Super. 1977) ("Where the meaning of a sentence is uncertain the court should resolve such a controversy in favor of liberty."); *State v. Berger*, 651 N.W.2d 639, 640 (N.D. 2002) ("The accused should be given the benefit of the doubt as to a sentence which is not certain, definite, or free from ambiguity, and serious uncertainty in the sentence should be resolved in favor of liberty.").

This Court has applied this rule, but has not squarely stated it. In *State v. Rau*, 129 N.H. 126, 130 (1987), this Court wrote: "[W]e hold that when a sentencing order, encompassing multiple counts or multiple indictments, is silent as to whether the sentences imposed on each count or indictment are to run concurrently or consecutively, the presumption is that the sentences run concurrently." Concurrent sentences are plainly to the defendant's advantage, and the "presumption" grows from the general rule stated in *Ex parte Parker* and the other cases cited *supra*. Similarly, in *State v. Parker*, 155 N.H. 89, 92 (2007), the dispute was whether the defendant was entitled to an attorney during a proceeding that was provided for in a sentencing order, but the precise nature of which was unclear. This Court held that "to the extent the language of the sentencing order is ambiguous concerning the [nature of the proceeding] we ought to err on the side of protecting a defendant's constitutional right to counsel."

Moreover, when the defendant has relied on a reasonable interpretation of the ambiguous sentencing order, the lenient construction rule is doubly appropriate. *Ward v. State*, 569 P.2d

399, 401 (Nev. 1977) ("A reasonable person in the shoes of Ward could, as Ward did, justifiably rely upon a favorable construction of the particular sentence.").

C. Sentence Ambiguities in Various Contexts

The rule that ambiguous sentences are construed in favor of the defendant has been applied in many contexts. As in *State v. Rau*, 129 N.H. at 126, several courts have held that when there is ambiguity concerning whether sentences run concurrently or consecutively, construction should favor concurrent as it is the more lenient. *Robinson v. Lee*, 564 A.2d 395 (Md. 1989); *State v. Corbitt*, 370 A.2d 916 (N.J.Super. 1977); *Ex parte Parker*, 35 S.E.2d 169 (N.C. 1945).

In *State v. Berger*, 651 N.W.2d 639 (N.D. 2002), "where [the] sentencing order was silent as to [its] commencement date," the court resolved the ambiguity "in favor of liberty" and determined the date as the one most favorable to the defendant.

In *Ward v. State*, 569 P.2d 399 (Nev. 1977), the sentence was unclear regarding whether the defendant would get credit toward his sentence for 153 days he had previously spent in jail. The court found that, based on a "favorable or advantageous construction of the ambiguous part of the sentence," he had been "led … to believe that he would receive credit for the time he has served in county jail." Citing principles at issue here, the court resolved the ambiguity in favor of the defendant and gave him credit for time served.

In *Merneigh v. State*, 525 S.E.2d 362, 363 (Ga. 2000), a court order was unclear regarding whether it had revoked a "probated sentence." Noting "the benefit of the doubt should be given to the accused," the court resolved the ambiguity in favor of the defendant.

In *Mateen v. Saar*, 829 A.2d 1007, 1013-14 (Md. 2003), an old and terse docketing entry made it unclear whether the defendant's "sentence was a flat 50 years, rather than life with all but

50 years suspended." The court noted the principle that "[i]f there is doubt as to the penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one," and resolved the ambiguity in favor of the more lenient interpretation.

In *State v. Maurstad,* 733 N.W.2d 141, 150 (Minn. 2007), the defendant was sentenced under Minnesota's sentencing guidelines that took into account his previous convictions. The court found that one of the previous sentencing orders was unclear regarding the dates of a probationary period, and that applying the guidelines to the previous sentencing order resulted in an ambiguity. It held that "word choices at sentencing …do matter, especially when a person's liberty is at stake," and resolved the ambiguity in favor of the defendant.

In *People v. Davit,* 851 N.E.2d 924, 929 (Ill.App. 2006), the defendant was convicted of violating an order of protection that had issued in a parenting proceeding. The order forbid the defendant from entering "in the household of premises located at" mother's address. When the defendant exchanged the child in the mother's driveway and yard, the issue became whether "in the household of premises" meant on the property or in the house. The court found that because "the language contained in the order of protection reasonably can be interpreted in two different ways, it is ambiguous" and that "the language in the order of protection must be strictly construed in favor of the accused."

D. *State v. Drader* – North Dakota Supreme Court

The facts of *State v. Drader*, 432 N.W.2d 553 (N.D. 1988), are closely related to Mr. Freeman's situation. Drader's sentence provided that he:

> be imprisoned in the State Penitentiary … for a term of 15 years …; upon serving 5 years of the penitentiary sentence, the balance of 10 years of the 15-year sentence is to stand suspended upon conditions … 1. That earlier parole is not to be considered until the defendant has successfully completed the sex offender program; [and] 2. That during parole or probation, the defendant shall faithfully and conscientiously undergo counseling.

Drader, 432 N.W.2d at 553. Drader elected to not complete the rehabilitation program. He was thus not eligible for "earlier parole," and served the initial 5-year term incarcerated. He was then released on probation, which upon request of the state the trial court revoked because of Drader's failure to complete the sex offender program. The court posed its question as "we must first decide if the trial court was correct in interpreting the original sentence to require Drader to complete the sex-offender program at the State Penitentiary as a condition of probation." *Id.* at 554.

> Drader argues that the first condition of release relates only to the five years imposed and is only a condition of parole and not probation; that is, the sentence mandated that he would have to serve the full five years if he did not complete the sex-offender program, but if he did complete the program he could get out early on parole. Therefore, he asserts, he has fulfilled the first condition by serving the full five years imposed and should be released on probation subject to the remaining conditions. He also argues that if this court determines that the language of the sentence is ambiguous it should be construed in favor of the defendant.

Drader, 432 N.W.2d at 554.

The court rejected cases cited by the state holding that sentences are to be "construed according to the usual canons of construction in order to give effect to the intent of the sentencing

court." *Id.* Rather, it found that such canons do not apply where there are "conditions in the sentence that the offender must understand in order to comply therewith." The North Dakota Supreme Court held that "the benefit of the doubt as to a sentence which is not certain, definite, and free from ambiguity should be given to accused, and serious uncertainty in the sentence must be resolved in favor of liberty." *Id.* The court wrote:

> "We reject an interpretation of a sentence which would allow a person to be incarcerated for five years only to have the suspended portion of that person's sentence revoked upon his release because of the confusing language in the sentence."

Id. at 555. Moreover, the court ruled that "because [Drader's] belief was not unreasonable under the circumstances, his probation should be reinstated." *Id.*

Mr. Freeman's situation is similar to *Drader*. Rather than complete the sex offender program, Mr. Freeman served the entire initial term of his sentence. Like *Drader*, when Mr. Freeman was released, the State sought to maintain control, arguing that whatever the exact language of the sentence document, the sentencing court did not intend the incarceration strategy chosen by the offender. Although *Drader* and Mr. Freeman's situation differ in the precise language and conditions of the sentences, they are similar in that both defendants relied on the terms of their respective sentences, and made choices pursuant to them. Like the South Dakota Supreme Court, this Court should give "the benefit of the doubt as to a sentence which is not certain, definite, and free from ambiguity … to [the] accused," and should hold that "uncertainty in the sentence must be resolved in favor of liberty." *Drader*, 432 N.W.2d at 554.

CONCLUSION

There is no ambiguity in Bobby Dean Freeman's 2000 sentencing order, which made clear he would be "placed on probation … upon release from parole." Because there was no parole – and thus no "release from parole" – he cannot be "placed on probation."

To the extent there is an ambiguity, the sentence should be construed to favor the less harsh outcome, especially here, where Mr. Freeman reasonably relied on the sentencing language in determining to not pursue his parole option.

Accordingly, Mr. Freeman requests this Court issue an order dissolving his probation status, and declare that his punishment has been fully exacted.

Respectfully submitted,

Bobby Dean Freeman
By his Attorney,

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Dated: July 14, 2008

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Bobby Dean Freeman requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case have not been squarely decided by this Court, and because the jeopardy of an erroneous decision to Mr. Freeman is significant.

I hereby certify that on July 14, 2008, copies of the foregoing will be forwarded to Stephen Fuller, Esq., Senior Assistant Attorney General.

Dated: July 14, 2008

Joshua L. Gordon, Esq.

APPENDIX