NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2447

RICKY R. LEWIS

VERSUS

TIM WILKINSON, WARDEN, WINN CORRECTIONAL CENTER; MONA HEYSE, WARDEN'S DESIGNEE and RICHARD STALDER, SECRETARY OF THE DEPARTMENT OF CORRECTIONS

Judgment Rendered: November 3, 2006

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 527,549

Honorable Kay Bates, Judge Presiding

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Ricky R. Lewis Winn Correctional Center Winnfield, LA	Plaintiff/Appellant In Proper Person
William L. Kline Baton Rouge, LA	Counsel for Defendant/Appellee Richard Stalder, Secretary of Department of Public Safety and Corrections

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Parro, J., concurs and assigns reasons.
Guidry, J. concurs for the reasons assigned by Judge Parro

McCLENDON, J.

In this appeal, an inmate, Mr. Ricky R. Lewis, challenges a determination by the Louisiana Department of Public Safety and Corrections (department) that Mr. Lewis is ineligible for diminution of sentence pursuant to LSA-R.S. 15:571.3. After a thorough review of the record, we affirm.

In 1989, Mr. Lewis assaulted another while armed with a dangerous weapon, and was subsequently convicted of aggravated assault, a violation of LSA-R.S. 14:37. At that time, a conviction for aggravated assault was not listed as an offense that would have excluded Mr. Lewis from diminution of sentence through good behavior or served as a predicate to exclusion. In 1994, LSA-R.S. 15:571.3A, B, and C, as amended by Acts 1994, 3rd Ex. Sess., No. 150, expanded the number of offenses that could preclude a prisoner from earning a diminution of sentence through good behavior, known as "good time." After the change, prisoners convicted of a second "crime of violence" were not eligible for "good time." LSA-R.S. 15:571.3. Louisiana Statutes Annotated-R.S. 15:571.3C(1)(q) refers to another statute, LSA-R.S. 14:2(13), for a definition of "crime of violence." Generally, a "crime of violence means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another . . . ." LSA-R.S. 14:2(13).

In 1995, Mr. Lewis was convicted of armed robbery, a violation of LSA-R.S. 14:64. By the time of that second conviction, both armed robbery and aggravated assault were included in the definition of "crimes of violence" for the purposes of LSA-R.S. 15:571.3C. See LSA-R.S. 14:2(13) (general definition of crime of violence and specifically listed offenses).

On appeal to the district court, Mr. Lewis claimed that the department's denial of "good time" increased his sentence based on the

aggravated assault, a crime committed before the amendment to LSA-R.S. 15:571.3. Essentially, he argued that the use of the 1989 aggravated assault conviction as a predicate offense rendered any increase in sentence an ex post facto application of LSA-R.S. 15:571.3. However, based on the commissioner's report, the district court found that the denial of "good time" applied to the 1995 conviction for armed robbery, which was committed after the change in the law. In 1995, and before he chose to commit another crime with elements of violence, Mr. Lewis had notice of the change in LSA-R.S. 15:571.3. After the district court affirmed the department's decision, Mr. Lewis appealed to this court.

Article I, § 10 of the United States Constitution and La. Const. art. I, § 23 prohibit the ex post facto application of a criminal law by the state. The Ex Post Facto Clause assures that persons are fairly notified of potential criminal punishment and that they may rely upon the criminal law existing at the time of their offense. In analyzing the ex post facto implications of repeat offender statutes, and of statutes increasing penalties for future crimes based on past crimes, "'the relevant 'offense' is the current crime, not the predicate crime.'" **State v. Rolen**, 95-0347, p. 3 (La. 9/15/95), 662 So.2d 446, 448, quoting **United States v. Arzate-Nunez**, 18 F.3d 730, 734 (9th Cir. 1994); **George v. Baker**, 99-0234, pp. 5-6 (La.App. 1 Cir. 11/5/99), 746 So.2d 783, 786.

As in the similar case of **George v. Baker**, 99-0234 (La.App. 1 Cir. 11/5/99), 746 So.2d 783, we again find that the department's denial of "good time," based upon a second conviction for a crime involving violence, does not fall within the ex post facto prohibition. Aggravated assault contains clear elements of attempted or threatened use of physical force. Before Mr. Lewis committed the 1995 armed robbery, the legislature constructively

notified Mr. Lewis that prisoners convicted of a second crime involving elements of the use or threat of physical force would lose the right to accumulate "good time." Thus, before he committed his second crime, he was aware that he could lose the right to apply "good time" to his sentence if he committed another violent crime. He chose to commit another violent crime, and lost the opportunity to reduce his sentence after the 1995 conviction for armed robbery, not after the first conviction in 1989. The penalty imposed on Mr. Lewis upon his 1989 conviction did not change. See **George**, 99-0234 at pp. 5-6, 746 So.2d at 786-87.

In **State v. Williams**, 358 So.2d 943, 945-46 (La.1978), a defendant's earlier conviction preceded the enactment of LSA-R.S. 14:95.1, which prohibited a convicted felon's possession of a firearm. **Williams** held that the passage of LSA-R.S. 14:95.1, prohibiting specific future behavior, provided fair notice of the consequences of future acts, and specifically found that an ex post facto application of a statute does not occur simply "because liability was premised upon a past conviction." **Williams**, 358 So.2d at 946; **George**, 99-0234 at p. 6, 746 So.2d at 786. Similarly, as with the defendant in **Williams**, Mr. Lewis received fair notice of the consequences of his future acts.

For these reasons, we affirm the judgment. The costs of the appeal are assessed to appellant, Mr. Ricky R. Lewis.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 0466

RICKY R. LEWIS

VERSUS

TIM WILKINSON, ET AL.

BEFORE: PARRO, GUIDRY, AND MCCLENDON, JJ.

PARRO, J., concurring.

I concur, simply to note that LSA-R.S. 15:571.3(C)(1)(q) provides that diminution of sentence shall not be allowed if the inmate has been convicted "one or more" times of a crime of violence. Therefore, the 1995 conviction of armed robbery is itself sufficient to preclude entitlement to diminution of sentence.

I respectfully concur.