

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1899

ROOSEVELT STEWART

VERSUS

CUSTODIAN/WARDEN WINN CORRECTIONAL CENTER;
LOUISIANA BOARD OF PAROLE, GRETCHEN MCCARATLE, E.
PEGGY LANDRY; LOUISIANA DEPARTMENT OF CORRECTIONS,
RICHARD STALDER, VENETIA MICHAELS; STATE OF
LOUISIANA, GOVERNOR MIKE FOSTER, KATHLEEN BLANCO

DATE OF JUDGMENT: September 15, 2006

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 530,606 "J(25)"), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE CURTIS A CALLOWAY, JUDGE

Roosevelt Stewart
Winnfield, Louisiana

Plaintiff/Appellant
Pro Se

William L. Kline
Baton Rouge, Louisiana

Counsel for Defendants/Appellees
Louisiana Department of Public Safety
and Corrections, et al.

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AFFIRMED IN PART AS AMENDED; VACATED IN PART.

Kuhn, J.

Plaintiff, Roosevelt Stewart, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (“DPSC”), appeals a judgment of the district court that dismissed his petition for injunctive relief without prejudice and ordered the dismissal to be considered a “strike” in accordance with Louisiana Revised Statutes 15:1187. We amend the judgment to provide that the dismissal of Stewart’s petition is “with prejudice,” and as amended, we affirm the district court’s dismissal of Stewart’s petition. Further, we vacate the remaining portions of the judgment ordering that the dismissal be considered a “strike” and ordering the Clerk of Court to record the strike.

On March 23, 2005, Stewart filed an “Application for a Preventive/preliminary Injunction” in the Nineteenth Judicial District Court, naming DPSC and several other parties as defendants. Based on this pleading, it appears that Stewart essentially sought to enjoin DPSC from supervising his early release from incarceration after a diminution of sentence for good behavior, as mandated by Louisiana Revised Statutes 15:571.5(B)(2).

Based on Stewart’s allegations, he was incarcerated after being convicted of armed robbery and forgery; DPSC advised him in 1987 that he was entitled to earn increased diminution of sentence for good behavior in lieu of incentive wages; Stewart was released “as if released on parole” in 1993, and in 1996, this parole was revoked; Stewart was again released “as if released on parole” in 2001, and in 2004, this parole was revoked. In the proceedings below, Stewart generally challenged the legality of his supervision by DPSC while released “as if released

on parole” under Louisiana Revised Statutes 15:571.5, claiming such supervision is illegal and unconstitutional.

Upon screening Stewart’s suit pursuant to Louisiana Revised Statutes 15:1178 and 1188, the commissioner for the district court found, in pertinent part:

[Stewart] asserts absolutely no irreparable harm or injury, and states no cause of action for injunctive or any other relief. He simply is not legally entitled to be released without parole supervision before he has served his full sentence. Thus, this suit must be dismissed as frivolous without service pursuant to the authority of [Louisiana Revised Statutes] 15:1184-88. I also note that amending the petition would be futile as the validity of good time parole supervision under [Louisiana Revised Statutes] 15:571.5 has been upheld hundreds of times by this Court and also upheld by the First Circuit. Because this claim is frivolous and a waste of this Court’s limited time and resources, I suggest that a [Prison Litigation Reform Act] strike be imposed as a sanction. (Footnotes omitted).

After a *de novo* consideration, the district court ordered the dismissal of Stewart’s suit, without prejudice, prior to service on DPSC. The judgment further ordered that the dismissal was to be considered a “strike” in accordance with Louisiana Revised Statutes 15:1187.

Stewart has appealed the district court’s judgment, asserting DPSC has misapplied the applicable statutory provisions governing his incarceration and parole supervision and that he is entitled to immediate release from custody based on the years he has served. Specifically, Stewart challenges the forfeiture of his earned good time upon the revocations of his 1993 and 2001 releases. Additionally, Stewart seeks credit against his sentence for time spent while released “as if released on parole.” He further asserts that DPSC’s application of Louisiana Revised Statutes 15:571.5 violates *ex post facto* principles. We find no merit in these frivolous arguments; these and similar arguments have been

addressed and rejected innumerable times. *See Manuel v. Stalder*, 04-1920 (La. App. 1st Cir. 12/22/05), 928 So.2d 24; *Ferrington v. Louisiana Bd. of Parole*, 03-2093 (La. App. 1st Cir. 6/25/04), 886 So.2d 455, 458, *writ denied*, 04-2555 (La. 6/24/05), 904 So.2d 741, and cases cited therein. Stewart failed to set forth a cause of action and the district court properly dismissed his frivolous suit.

Where a petition fails to state a cause of action, a plaintiff is entitled to amend his demand if the grounds of the objection can be removed by amendment. La. C.C.P. art. 934. In this instance, however, we find that no amendment could possibly cure the deficiencies in Stewart's claims. *Ferrington v. Louisiana Bd. of Parole*, 03-2093 at p. 7, 886 So.2d at 459. Thus, Stewart's claims should have been dismissed with prejudice, and we amend the judgment accordingly.

On appeal, Stewart also challenges the district court's imposition of the "strike" pursuant to Louisiana Revised Statutes 15:1187. Because Stewart challenged the duration of his confinement in prison and not a condition of his confinement, we find the district court erred in assessing the "strike." See La. R.S. 15:1181(2); *Manuel v. Stalder*, 04-1920 at pp. 5-6, 928 So.2d at pp. 27-28. Accordingly, we vacate that portion of the district court's judgment that assessed the "strike."

For these reasons, we amend that portion of the judgment ordering the dismissal of Stewart's suit to provide that the suit is dismissed with prejudice, and as amended we affirm the dismissal. We further vacate that portion of the judgment that assessed the "strike" and ordered the Clerk of Court to record the "strike" for future reference under Stewart's name, DOC number, and docket number and to notify the commissioners in writing when Stewart had three or

more PLRA strikes. Costs of this appeal are assessed against plaintiff, Roosevelt Stewart.

AFFIRMED IN PART AS AMENDED; VACATED IN PART.