RENDERED: APRIL 4, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000642-MR

RODERICK DENNIS BLINCOE — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00861

COMMONWEALTH OF KENTUCKY, THE
COMMISSIONER OF CORRECTIONS; AND
KAREN DEFEW CRONEN, DIRECTOR OF
OFFENDER RECORDS FOR THE DEPARTMENT
OF CORRECTIONS — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE. Appellant Roderick Dennis Blincoe seeks credit on his present sentence of incarceration from the Perry Circuit Court for time he served on a conviction imposed by the Shelby Circuit Court in 1978 which was vacated some ten years later. Appellant argues that he should be given credit for the time he

served, including "good time credit," and credit for the time he spent on parole on that sentence, and further that the parole board should not use against him any parole violations committed by appellant while unlawfully incarcerated. Appellant filed a petition for writ of mandamus and for declaration of rights in the Franklin Circuit Court, asking for the above relief, on the contention that the Franklin Circuit Court has jurisdiction over the Department of Corrections.

The Franklin Circuit Court declined to issue a declaratory judgment on the grounds that it would be essentially conducting a review of orders of the Perry and Shelby Circuit Courts, which it may not do, citing Commonwealth v. Hampton, Ky., 814 S.W.2d 584 (1991). The Franklin Circuit Court further stated that appellant could only obtain the relief he sought from one of the courts which sentenced him. Appellant appeals this determination. We affirm.

The pertinent background of this appeal is as follows: Appellant was convicted in 1978 in the Shelby Circuit Court for complicity to robbery in the first degree. On direct appeal, this Court concluded that appellant's conviction should be reversed on the basis that there was not sufficient evidence to convict. Blincoe v. Commonwealth, Ky. App., 627 S.W.2d 35 (1979). However, the Kentucky Supreme Court reversed the decision of this court and remanded for consideration of "issues

not previously considered and disposed of." Commonwealth v. Blincoe, Ky., 597 S.W.2d 609 (1980). The Supreme Court cited case law holding that failure to move for a directed verdict at the close of the evidence renders unpreserved an argument against the sufficiency of the evidence. Id. Thereafter, from the record, appellant's case appears to have languished until October 26, 1990, when this Court vacated his conviction pursuant to RCr 11.42, in an unpublished opinion, on the grounds that appellant received ineffective assistance of counsel by his counsel's failure to move for a directed verdict at the close of all the evidence.

Prior to his obtaining relief on that sentence, appellant was convicted in 1985 in the Perry Circuit Court for complicity to commit robbery, knowingly receiving stolen property, and unlawful imprisonment. Appellant was sentenced as a persistent felony offender, and received a sentence of 100 years imprisonment. The Perry Circuit Court indicated at the sentencing hearing that it would not run the sentence consecutively with the Shelby County sentence appellant was serving on parole. However, the court did not include that directive in its written order. In any event, pursuant to KRS 533.060(2), that sentence was required to run consecutively with appellant's Shelby County sentence because of the fact that appellant had committed the offenses while on parole. The

statute mandates that the sentence for an offense committed while on parole may not run concurrently with any other sentence.

In 1992, due to the vacation of the 1978 sentence, the Perry Circuit Court set aside appellant's conviction for being a persistent felony offender. The court sentenced appellant to serve 30 years on the underlying offenses. The court's order was silent regarding credit for service of the 1978 sentence or whether the 1985 sentence would be deemed to run concurrently with the portion of the 1978 sentence appellant served.

In addition, the record reflects that, in 1999, the Department of Corrections Offender Records Clerk informed appellant in a letter that without an order from the sentencing court Corrections could not give appellant credit for any time served on the 1978 sentence. The Records Clerk stated that the Perry Circuit Court made no determination in 1985 in its order as to how the sentence was to run with appellant's Shelby County sentence. Consequently, the Department of Corrections determined that the sentences must be run consecutively pursuant to KRS 533.060(2). The Clerk also informed appellant that time spent on parole does not count toward completion of a sentence unless parole is successfully completed, which it was not in appellant's case.

Another document appellant submitted in the record indicates that, in 1991, appellant moved the Shelby Circuit Court for an order crediting him with time spent in prison and parole on the conviction set aside. On March 1, 1991, the Shelby Circuit Court ordered that the Probation and Parole Officer for Shelby County review appellant's record and determine whether appellant was due any jail time credit, and advise the court as to the results of the investigation. However, there is nothing more about the matter in the record, and appellant asserts that the court never granted any credit. This court has no information about further proceedings in the Shelby Circuit Court. Finally, appellant brought the instant petition for mandamus and declaratory judgment on July 26, 2000.

The issue in this case is whether the Franklin Circuit Court properly denied the petition because it did not have authority to grant appellant the relief requested. The Department of Corrections states that this is an unusual case and it essentially takes no position regarding whether appellant should be credited on his Perry County sentence with the time actually served on his vacated Shelby County sentence. The Department, however, states that it is not authorized to give credit and any decision on the question must come from the sentencing court.

Appellant, on the other hand, argues that he petitioned the proper court, and cites several cases to this Court in which the Franklin Circuit Court was deemed to have jurisdiction to order the Department of Corrections to act. In Lemon v. Corrections Cabinet, Ky. App., 712 S.W.2d 370 (1986), the defendant and the Corrections Cabinet disagreed as to the calculation of his jail time credit from Jefferson County which, according to his plea agreement, was to be added to a sentence from Hardin County. The defendant brought a motion in the Franklin Circuit Court for a writ of mandamus. On appeal, this Court agreed with the defendant and directed the Franklin Circuit Court to grant the defendant's writ of mandamus. In Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977), the defendant sought "good time" credits on his sentence which he received from the Jefferson Circuit Court. He filed a petition for a declaratory judgment in the Franklin Circuit Court. The Kentucky Supreme Court held that the defendant was entitled to the declaratory relief in the Franklin Circuit Court, and that the procedure he used to obtain that relief was proper.

We do not quarrel with appellant's position that the Franklin Circuit Court can have jurisdiction over the Corrections Department in instances where a writ of mandamus or declaratory judgment is proper. However, we conclude that this

is not a case in which the Franklin Circuit Court can provide a remedy. A writ of mandamus will issue when the party seeking it has shown that he has no other adequate remedy, and great and irreparable injury will result if it is not granted. Foster v. Overstreet, Ky., 905 S.W.2d 504 (1995). Similarly, a declaratory judgment cannot be made to questions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy. Hughes v. Welch, Ky. App., 664 S.W.2d 205 (1984). In this case, the Franklin Circuit Court correctly held that it has no basis for issuing a writ of mandamus or a declaratory judgment because it may not decide this matter without an order from the sentencing court to require the sentences to run consecutively.

Unlike in Lemon and Polsgrove, there is no statute upon which appellant clearly may rely for the Franklin Circuit Court to order the relief he seeks. Appellant has not cited a statute or case which would require the sentences to run concurrently or for appellant to get credit on a future sentence for the time he has already served on a vacated sentence. Appellant argues that KRS 532.110(2) clearly should operate to require the sentences to run concurrently. That provision states,

> If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve unless the sentence is required by subsection (3) of this section or KRS 533.060 to run consecutively.

In these unusual circumstances where one sentence has been vacated, we cannot agree with appellant that KRS 532.110(2) operates to retroactively alter the way the sentences at issue had run, or that it gives appellant credit on a sentence already served. Therefore, we agree with the Department of Corrections that it presently has no basis to give appellant relief, and the Franklin Circuit Court cannot order the Department to act as appellant demands.

Additionally, we disagree with appellant that there is already an order stating that the sentences will run concurrently. We do not agree that appellant may rely on the Perry Circuit Court's statement at sentencing in 1985 that the sentences could run concurrently, for two reasons. First, the trial court did not make it a part of the court's written judgment. When there is an inconsistency between oral statements of a court and an order reduced to writing, the written order must prevail. Commonwealth v. Taber, Ky., 941 S.W.2d 463, 464 (1997). Second, the trial court's authority to order the sentences to run concurrently was then proscribed by KRS 533.060(2), which was relied upon by the Department of

Corrections. That statute controls over the judgment of the court in any event. Riley v. Parke, Ky., 740 S.W.2d 934 (1987). Thus, contrary to appellant's assertion, there is not presently a court order to run the sentences concurrently upon which the Franklin Circuit Court could grant appellant's petition.

We agree with the Corrections Cabinet and the Franklin Circuit Court that it is up to the sentencing court to afford appellant any relief. The Department of Corrections has cited no authority, and we have found none, which would prevent the sentencing court from making appellant's Perry Circuit Court judgment concurrent with the vacated sentence appellant served, if the sentencing court so chooses. Unless some constitutional or statutory limitation exists, sentencing power in Kentucky is discretionary with the trial judge. Bartrug v. Commonwealth, Ky. App., 582 S.W.2d 61, 63 (1979). Appellant must raise this issue before the Perry Circuit Court and/or pursue the relief he sought in the Shelby Circuit Court, by way of a post-conviction motion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Anthea Mary Boarman Morehead, Kentucky	Rebecca Baylous Frankfort, Kentucky