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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000091-MR

ANTONIO JOHNSON — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 01-CI-01052

GENERAL ASSEMBLY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Antonio Johnson appeals from a Franklin Circuit Court order dismissing with prejudice his action against the Kentucky General Assembly, the Kentucky Department of Corrections and its commissioner, Tom Campbell, because his petition styled as a AClass Action Civil Right[s] Lawsuit@ and ADeclaratory Judgment@ failed to state a claim upon which relief can be granted in that jurisdiction.

On November 6, 1992, Antonio Johnson appeared in Christian Circuit Court for sentencing, having pled guilty to one count of arson in the first degree and three counts of murder pursuant to a plea agreement with the Commonwealth. Consistent

with the Commonwealth's recommendation, the circuit court imposed a sentence of twenty years' imprisonment on each of the four counts, ordering the sentences on counts two and three to be served consecutively and the sentences on counts one and four to run concurrently, with the consecutive sentence to enhance all charges, for a total of forty years. Johnson is currently serving his sentences at the Lee Adjustment Center in Beattyville, Kentucky.

In his petition,[1] Johnson sought to file a class action Aon behalf of all similarly situated inmates that [have] been sentence[d] to serve [consecutive] term[s] of confinement,@ alleging that Kentucky Revised Statutes (KRS) 197.045(2)[2] and KRS 532.120(1)(b)[3] are Aclearly unconstitutional@ because they were

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[1] Pursuant to Ky. Rev. Stat. (KRS) 418.075 and Kentucky Rules of Civil Procedure (CR) 24.03, Johnson properly notified the Attorney General of his challenge to the constitutionality of the named statutes. The Attorney General declined to participate in the proceedings in a Anotice of intention not to intervene@ filed on August 23, 2001.

[2] KRS 197.045(2) provides: AWhen two or more consecutive sentences are to be served, the several sentences shall be merged and served in the aggregate for the purposes of the good time credit computation or in computing dates of expiration of sentence.@

[3] KRS 532.120, in relevant part, provides as follows:

> (1) An indeterminate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the Department of Corrections. When a person is under more than one(1) indeterminate sentence, the sentences shall be calculated as follows:
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> > (a) If the sentences run concurrently, the maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run; or
> > (b) If the sentences run consecutively, the maximum terms are added to arrive at an aggregate maximum term equal to the sum of all the maximum terms.

enacted in violation of KRS 439.3401(3) and, further, that the application of KRS 532.120(1)(b) and KRS 197.045 to his sentences was a violation of his civil rights.[4] Citing KRS 439.3401(3), Johnson alleged that he was eligible for parole after serving ten years of his twenty-year sentence (as opposed to forty years) and is entitled to good-time credit to be applied against that sentence. These allegations were premised upon Johnson's claim that he received ineffective assistance of counsel since he was neither advised of nor agreed to consecutive sentencing.

In Johnson's view, his forty-year sentence was therefore invalid and he was instead subject to four concurrent twenty-year sentences. Based on this logic, he also contended that he was constitutionally protected from the aggregate sentencing provisions of KRS 197.045(2) and KRS 532.120(1)(b), with his consecutive sentence having no effect on his parole eligibility date. Accordingly, he argued that KRS 439.3401(3), as construed in

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[4] The version of KRS 439.3401.(3) in effect at the time provided:

> A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least eighty-five percent (85%) of the sentence imposed. [This provision now precludes parole as well.]

Sanders v. Commonwealth,[5] applies here, making him eligible for parole after serving ten years of his twenty-year sentence.

Campbell subsequently filed a motion for enlargement of time in which to file a response to Johnson's petition which the court granted, ordering the response time enlarged until October 15, 2001. In an order entered on December 17, 2001, Franklin Circuit Court concluded that Johnson's action was Aunwarranted at best and is borderline frivolous,@ further observing that Johnson also appeared to be making a claim for ineffective assistance of counsel in Christian Circuit Court but clarifying that AFranklin Circuit is not the appropriate jurisdiction to determine that matter.@[6] It is from that order which Johnson appeals.

Although a threshold question exists as to whether Johnson initiated this action against the proper parties and/or in the appropriate manner,[7] we decline to address this issue, opting

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[5] Ky., 844 S.W.2d 391 (1993). In order to avoid the denial of equal protection and failure of due process which would otherwise result from a literal interpretation of KRS 439.3401(2) and (3), the Kentucky Supreme Court concluded that in determining minimum parole eligibility of those violent offenders who committed offenses after July 15, 1986, it was the intention of the legislature that these provisions be interpreted as requiring service of 50% of a term of years or 12 years, whichever is less, before parole eligibility. Id. at 394.

[6] Johnson subsequently filed a motion for findings of fact and conclusions of law to which Campbell responded; the court denied the motion in an order entered on January 4, 2002.

[7] For instance, in a letter filed on September 17, 2001, general counsel for the DOC acknowledged receiving service of process in this lawsuit but correctly informed the court that Aservice of process upon the [DOC] is ineffective with regard to the members of the General Assembly named in the lawsuit@ and requested that the circuit court clerk advise Johnson accordingly. Further, as successfully argued by Campbell below, Johnson Ahas failed to provide any evidence or reasonable estimate of the number (continued...)

instead to decide this case on the merits in an exercise of leniency since Johnson is acting pro se. On appeal, Johnson emphasizes that he Ahas never claim[ed] ineffective assistance of counsel@ and raises numerous points of error with the common theme being the alleged invalidity of the aforementioned statutory provisions. In essence, he argues that KRS 197.045(2) and KRS 532.120(1)(b) are unconstitutional because they conflict with KRS 439.3401(3), effectively enlarging his original sentence. Said another way, his contention is that the aggregate effect of consecutive sentencing under KRS 532.120(1)(b) and KRS 197.045(2) violates his constitutional rights by increasing his twenty-year sentence to forty years, thereby denying him eligibility for parole after serving ten years of his purported twenty-year sentence to which he was otherwise entitled. As Johnson's primary argument involves the interplay of the relevant statutes, we turn our attention to this dispositive issue.

In the construction of a statute, our highest court has consistently held that Athe polestar by which the court must be guided is to ascertain and put into effect the legislative intention.@[8] It is also well established that Aall words and phrases shall be construed and understood according to the common

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[7] (...continued)
of the class he asserts,@ thereby failing Ato satisfy a fundamental prerequisite for a class action@ and, A[m]oreover, this action brought under the provisions of 42 U.S.C. sec. 1983 asserting violation of federal constitutional rights and seeking monetary damages, gives only a personal right to [Johnson].@ However, this determination does not preclude us from reviewing Johnson's claim as to him personally.

[8] Ross v. Board of Education, 196 Ky. 366, 244 S.W. 793, 795 (1922).

and approved usage of language.@[9] When determining legislative intent, a court must refer to the language of the statute and is not free to add or subtract from the statute or interpret it at variance with its stated language.[10] AStatutes should be construed in such a way that they do not become meaningless or ineffectual,@ and a court has a duty to harmonize the law and give effect to multiple statutes on the same subject with specific provisions taking precedence over general.[11] All statutes should be interpreted to give meaning to each provision in accord with the statute as a whole.[12] Likewise, all the provisions of a statute Amust be harmonized if it can be reasonably done, and effect and enforcement given to each clause, unless the provisions of the statute are irreconcilably incongruous.@ [13]

AWhere the words of a statute 'are clear and unambiguous and express legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written.'@[14] If two statutes are repugnant to each other, Athe later statute must prevail, as it is the latest expression of the

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[9] Id.

[10] Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000)(citations omitted).

[11] Commonwealth v. Phon, Ky., 17 S.W.3d 106, 107 (2000) (citation omitted).

[12] Aubrey v. Office of Attorney General, Ky. App., 994 S.W.2d 516, 520 (1998).

[13] Ross, supra, n. 8, at 796.

[14] White v. Check Holders, Inc., Ky., 996 S.W.2d 496, 497 (1999).

legislative will.@ [15] Statutory interpretation is a question of law subject to de novo review.[16] It is with these guiding principles in mind that we endeavor to resolve the question presented.

Contrary to Johnson's implicit assertion, conflicting statutes are not necessarily unconstitutional and he cites us to no authority which supports such a leap in logic. Beyond that, no conflict exists here as concisely clarified by the affidavit of Geraldine Glass, Assistant Branch Manager of Offender Information Services for the DOC, the relevant excerpt of which is set forth below:

> He claims that KRS 197.045(2) and KRS 532.120(1)(b) are unconstitutional and in violation of KRS 439.3401. However, these statutes have different functions. KRS 197.045(2) and KRS 532.120(1)(b) relate to how consecutive sentences are calculated; KRS 439.3401 pertains to parole for violent offenders.
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> The sentences imposed on indictment number 91-CR-00319 were for commission of crimes committed on September 27, 1991. All of the offenses fit the definition of a Aviolent offender@ as set out in KRS 439.3401(1). Therefore, his parole eligibility date on the total forty (40) year sentence was calculated under the provisions of KRS 439.3401 and [Sanders]. Twelve years was added to the date of sentencing on November 6, 1992, minus one (1)

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[15] Head v. Commonwealth, 165 Ky. 603, 177 S.W. 731, 733 (1915).

[16] Revenue Cabinet v. Hubbard, Ky., 37 S.W.3d 717, 719 (2000).

year and twenty-eight (28) days jail time, or October 8, 2003.

Glass is uniquely qualified to comment on this matter and her reasoning is sound as evidenced by even a cursory review of the applicable statutes.

Because Johnson was properly sentenced to a term of years as a violent offender, his parole eligibility is governed by KRS 439.3401(3). The version of KRS 439.3401(3) in effect at the time of sentencing, as construed by Sanders,[17] provided for parole eligibility after Sanders had served either 50% of his sentence or twelve years, whichever was less. Johnson's reliance on Sanders is misplaced as that decision Adid nothing more than invalidate part of the violent offender statute, KRS 439.340, to the extent that the statute imposed a maximum period of parole ineligibility of twelve years for a life sentence, but specified a parole ineligibility period of fifty percent of the sentence for a term of years@ and is therefore distinguishable.[18] Accordingly, the Supreme Court concluded that a defendant sentenced to an aggregate term of years must be eligible for parole after a period of twelve years,

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[17] In Sanders, the Supreme Court emphasized that when a statutory distinction is challenged under the federal equal protection clause, the court should determine Awhether the challenged distinction rationally furthers some legitimate, articulated state purpose@ in addressing the question of whether the distinction between KRS 439.3401(2) violent offenders and KRS 439.3401(3) violent offenders was arbitrary and capricious. Sanders, supra, n. 5, at 393. At issue here is whether the relevant statutes can be reconciled C there is no allegation that the provisions at issue lack a rational basis, nor would such an allegation have merit.

[18] Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999).

restating its prior pronouncement that Ano aggregate sentence to a term of years could exceed a life sentence.@[19] In Land, the Supreme Court also reiterated that there is no constitutional right to parole as it is Asimply a privilege and the denial of such has no constitutional implications.@[20]

Given that Johnson's total sentence of forty years was valid, KRS 532.120(1)(b) and KRS 197.045(2) were implicated and properly applied in calculating his sentence and computing his good-time credit. In short, there is nothing unconstitutional about a statute that provides for consecutive sentencing nor are we cited to any authority which substantiates such a claim. Thus, it stands to reason that a provision requiring consecutive sentences to be merged for purposes of computing good-time credit also passes constitutional muster.

There is no dispute that KRS 439.3401(3) is valid and applies to the current facts. As interpreted in Sanders, this provision mandates that Johnson be eligible for parole after serving the lesser of 50% of his forty-year sentence, i. e., twenty years, or twelve years, meaning he was eligible for parole on October 8, 2002. Further, any good-time credit earned by Johnson would be applied to his total sentence of forty years. In summary, Johnson's sentence, good-time credit and parole eligibility were properly determined in accordance with the unambiguous terms of the governing statutes which are neither in conflict nor unconstitutional. Only a tortured reading of those statutes would

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[19] Sanders, supra, n. 5, at 394.

[20] Land, supra, n. 18, at 442.

permit a different result. With respect to Johnson's peripheral contentions,[21] suffice it to say that they are unsupported by either the record or legal authority.

The circuit court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Antonio Johnson, pro se
Beattyville, Kentucky

BRIEF FOR APPELLEE TOM CAMPBELL:

William R. Lundy, Jr.
Department of Corrections
Frankfort, Kentucky

[21] For example, Johnson alleges that Campbell's counsel engaged in improper ex parte communication with the court and that the court therefore erred in failing to dismiss Campbell's response and grant Johnson's motion for default judgment. This allegation, in turn, is apparently premised upon the mistaken belief that he did not receive copies of Campbell's motion for enlargement of time or his response to the petition. However, the record refutes this contention as it reflects both that Campbell filed his pleadings in a timely manner and that Johnson responded to the documents that he supposedly never received.

Equally meritless is Johnson's assertion that the court erred in dismissing his case because he filed the petition within the applicable statute of limitations. Satisfying this requirement is simply a prerequisite that must be met before the merits of a claim can be addressed. Likewise, Johnson's request for a jury trial did not preclude the court from dismissing his action despite his argument to the contrary.

While the foregoing summary of Johnson's secondary arguments is not exhaustive, it is illustrative of the degree to which he misconstrues governing law.