

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002447-MR

CLARENCE T. HARPER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 03-CI-03967

KENTUCKY DEPARTMENT OF
CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Inmate Clarence T. Harper appeals from an order of the Fayette Circuit Court denying his petition for declaratory judgment requesting that, pursuant to House Bill 269 (H.B. 269), he be awarded credit towards his remaining unexpired sentence for time spent on parole. As Harper is not entitled to credit under the provision at issue, we affirm.

In 1979 Harper was sentenced to 15 years' imprisonment. He was paroled, unsuccessfully, six times, in

1981, 1982, 1985, 1986, 1992, and 1997. On three occasions, he was convicted of new felonies, and for being a persistent felony offender, increasing his total sentence by an additional fifteen years. On September 24, 2003, Harper filed a petition for declaratory judgment in the Fayette Circuit Court, contending that, pursuant to H.B. 269, he is entitled to have two periods of time when he was paroled and had his parole revoked for technical violations with no new felony charges, October 9, 1992 to May 16, 1996, and December 10, 1997 to May 1, 2000, credited toward his remaining unexpired sentence. The trial court denied Harper's petition. This appeal followed.

KRS 439.344, "Effect of parole time on sentence", provides that "[t]he period of time spent on parole shall not count as a part of the prisoner's maximum sentence except in determining parolee's eligibility for a final discharge from parole as set out in KRS 439.354." However, in 2003 the General Assembly passed a state budget bill, H.B. 269, which contained the following provision:

36. COMMUNITY SERVICES AND LOCAL FACILITIES

a. Probation and Parole Credit:
Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence, when it is used to determine a parolee's eligibility for a final discharge from parole as set out in KRS 439.354, or when a parolee is returned as a parole

violation for a violation other than a new felony conviction.

2003 Ky. Acts, Ch. 156, Part IX, item 36(a), p. 1876. H.B. 269 was vetoed in part on March 20, 2003, became law on March 23, 2003, without the Governor's signature, and the Governor's vetoes were overridden in part on March 25, 2003. See 2003 Ky. Acts, Vol II, p. 1912. The veto and veto overrides did not affect the provision at issue in this case. Id. The bill did not permanently change the relevant statutes on parole. See Com. ex rel. Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986) (General Assembly may suspend or modify existing statutes in a budget bill). See also, KRS 446.145.

As an appendix to his brief, Harper attaches a letter from the Department of Corrections which states that "HB 269 was effective April 1, 2003 and will remain in effect until June 30, 2004. Only parolees who have their parole revoked after April 1, 2003 are eligible for Supervision Credit."¹ On appeal, Harper contends that H.B. 269 creates a liberty interest for all Kentucky prisoners, and that the Department of Corrections interpretation, that H.B. 269 applies solely to prisoners whose parole was revoked after April 1, 2003, conflicts with the

¹ H.B. 269 was the budget bill for July 1, 2002 through June 30, 2004. See 2003 Ky. Acts, Vol. II, p. 1723. We note that the effective date cited by the Department of Corrections, April 1, 2003, is not apparent from the language of the bill, however, Harper does not dispute this date. The bill apparently became law at some point on or after March 23, 2003, see 2003 Ky. Acts, Vol. II, p. 1912, and would expire as of the expiration date of the bill, June 30, 2004. See 2003 Ky. Acts, Vol. II, p. 1723; KRS 48.310.

legislative intent of easing prison overcrowding and saving the state money. Harper contends that because H.B. 269 is remedial and procedural in nature, and expressly states that "the period of time spent on parole shall count . . .", that it should be interpreted as applying retroactively to any and all time spent on parole which qualify under its provisions.

While a statute should be construed to carry out the intent of the legislature, see KRS 446.080(1), KRS 446.080(3) states that "[n]o statute shall be construed to be retroactive, unless expressly so declared." The provision at issue in H.B. 269 contains no express declaration of retroactivity. Remedial or procedural statutes can be retroactively applied in the absence of an express declaration of retroactive application if consistent with the legislative intent. Spurlin v. Adkins, 940 S.W.2d 900 (Ky. 1997). However, the provisions of a budget bill are only effective for the time period of the budget. See KRS 48.310. We believe that if the General Assembly intended to provide a remedial statute, it would have permanently amended KRS 439.344 instead of providing a temporary suspension of the statute through the budget bill. Accordingly, we conclude that H.B. 269 was not intended to be retroactive. The law in effect at the time of Harper's parole revocations at issue (1997 and 2000) was KRS 439.344, under which he is not entitled to receive

credit towards his remaining unexpired sentence for time spent on parole.

Harper further contends that the Department of Corrections interpretation of H.B. 269 violates the prohibition against double jeopardy and his right to equal protection. From our review of the record, it appears that Harper failed to comply with KRS 418.075 by notifying the Attorney General of these constitutional challenges. Accordingly, we will not address these issues on appeal.

For the aforementioned reasons, the Fayette Circuit Court's denial of Harper's petition for declaratory judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clarence T. Harper, Pro Se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Brenn O. Combs
Frankfort, Kentucky