

RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000573-MR

JOHN GARLAND PERRY JR.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00696

KENTUCKY STATE LEGISLATURE; and
KENTUCKY DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: John Garland Perry, pro se, appeals from an order dismissing his petition for declaratory judgment requesting the court to declare him eligible for parole time credit as authorized by House Bill 269 (HB 269). Upon reviewing the record and the applicable law, we affirm the Franklin Circuit Court's decision.

After serving a portion of a sentence imposed by the Carroll Circuit Court, Perry was twice released on parole and

twice returned to prison as a parole violator, allegedly completing a total of two years and twenty-eight days on parole prior to the second prison return. At the time of Perry's March 20, 2003, parole revocation hearing, KRS 439.344 stated 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, the 2003 General Assembly passed an executive budget appropriations and revenue bill, HB 269, which contained a provision in section 36(a) that:

[T]he 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 set out in KRS 439.354, or when a parolee is returned as a parole violator for a violation other than a new felony conviction.

The Franklin Circuit Court dismissed Perry's claim, rejecting his contention that this statutory amendment applied to his sentence so as to reduce it by the number of days spent on parole. This appeal followed.

A trial court may not grant a motion to dismiss "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803

(Ky. 1977). Here it is not possible for Perry to succeed in his contention that HB 269 was in effect at any time during his parole revocation proceedings and that the Franklin Circuit Court inappropriately dismissed his action. According to the legislative history of HB 269, and contrary to Perry's claim, the governor did not sign the bill on Perry's parole revocation date of March 20, 2003. Instead, Governor Patton vetoed the bill on March 20, 2003, and the bill was finally passed at a later date without the governor's signature. Therefore HB 269 did not go into effect on or before the date of Perry's final hearing.

We are not persuaded by Perry's argument that HB 269 should be applied retroactively to his situation, as "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). Instead, according to KRS 446.110 the law in place at the time must be applied to Perry's parole revocation hearings. *See also Magic Coal Co. v. Fox*, 19 S.W.3d 88, 94 (Ky. 2000). Moreover, since Perry's final revocation proceeding occurred before HB 269 took effect, a different result is not compelled by KRS 446.110, which states: "If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by consent of the party affected, be applied to any judgment pronounced **after** the new law takes effect." (Emphasis added.)

Finally, Perry claims that his treatment was inconsistent with that provided to other parole violators who were returned to custody during March 2003. Perry was returned to custody as a parole violator on March 3, 2003, and his final hearing was on March 20, 2003. Perry claims that because KRS 439.440 allows the parole board thirty days in which to hear the case of a prisoner returned for a parole violation, his final hearing should have been postponed until sometime after HB 269 took effect, thereby entitling him to receive credit for time spent on parole. We disagree. Even if we assume without deciding that HB 269 took effect within thirty days of Perry's return to prison, the parole board was not required to delay its action in order to allow Perry to benefit from the statutory amendment.

We conclude that the Franklin Circuit Court properly dismissed Perry's action for failure to state a claim upon which relief could be granted. We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE KENTUCKY
DEPARTMENT OF CORRECTIONS:

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