

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000743-MR

JAMES LANG

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 04-CI-00904

JOHN REES, COMMISSIONER

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: James Lang, an inmate in the custody of the Department of Corrections, brings this appeal from a declaratory judgment action in which he sought various types of relief. In his complaint and an amended complaint, he included claims that (1) he was eligible to have his sentence credited for time spent on parole; (2) he was eligible for "work for time credit" authorized by KRS 197.047; (3) he should be considered for "Governor's Goodtime" awards from August 1983 to the present, and (4) his sentences following parole revocation should have

been run concurrently rather than consecutively. The Department of Corrections filed a response, and a motion to dismiss for failure to state a claim upon which relief could be granted. The trial court overruled the amended complaint and ordered the action dismissed. We have reviewed the issues raised, and we affirm.

Lang's first claim on appeal is that pursuant to House Bill 269 of the State/Executive Branch Budget he was eligible to have time spent on parole added to his remaining unexpired sentence. Currently, the law pertaining to parole is KRS 439.344 which provides:

The 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.

In contrast, House Bill 269, the state budget bill, 2003 Ky. Acts ch. 156, pt IX, item 36(a), at page 1876, stated:

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 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 violator for a violation other than a new conviction.

Lang believes that the bill entitles him to have credit for time spent on parole prior to its revocation in 2002.

The Acts of the General Assembly reports that House Bill 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. This section was not codified as part of the probation and parole provisions of the Kentucky Revised Statutes. The portion of the bill referred to presumably became law during the period of the budget, but did not permanently change the relevant statutes on parole credit. See Com. ex rel. Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986) (General Assembly has the power to suspend or modify statutes through the reduction or elimination of an appropriation, subject to finding of financial emergency and subject to time limitation of the budgetary period).

However, the provisions of this bill do not apply to Lang's parole calculation. Lang includes with his brief a letter received from the Offender Information Services Branch of the Department of Corrections (hereinafter Corrections) which interpreted the bill as applicable only to "a returned parole violator with a technical violation who's [sic] revocation hearing is on or after April 1, 2003." Lang was returned as a parole violator on October 31, 2002. Corrections informed Lang that the statute did not qualify him to receive credit and the statute was not retroactive.

Lang on appeal argues that Corrections' interpretation was clearly erroneous. KRS 446.080(3) states that no statute shall be construed to be retroactive unless the statute expressly declares so. Lang claims the statute is retroactive pursuant to KRS 446.110:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

We agree with Corrections, however, that the final sentence of KRS 446.110 has no application here as this case does not concern the retroactive application of a new "penalty, forfeiture or punishment." We further note that Lang's case does not involve a new judgment being pronounced after the date of the new law. House Bill 269 does not apply retroactively to affect Lang's parole calculation.

Next, Lang complains that Corrections is required to award "work for time" credit pursuant to KRS 197.047. We recognize that a reduction in time credit may be ex post facto if a change in calculation serves to increase the penalty by which a crime is punishable. See Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). However, we agree with Corrections that there was no increase in this case since the statute does not automatically award credit but grants discretion to the Department of Corrections to award work for time credit. Thus, it was proper for Corrections to deny permission to participate in the program to inmates convicted of robbery in the first degree.

Third, Lang argues he is entitled to "Governor's Goodtime" credits under an executive order entered by then Governor John Y. Brown Jr., in November 1980. There is no program in existence known as "governor's goodtime;" the aforementioned executive order had authorized the Commissioner of the Department of Corrections to make additional awards of meritorious good time credit "for those inmates who have shown exceptional cooperation in meeting the requirements of the Consent Decree entered by the Federal Court, Western District of Kentucky."

We agree with Corrections that Lang has not shown any entitlement to additional credit on his sentence. This

executive order is no longer in effect, and Lang has not even shown that he would have earned meritorious good time credit in any event. The trial court correctly dismissed this claim.

Finally, Lang argued that applying the holding of Riley v. Parke, 740 S.W.2d 934 (Ky. 1987), to compute his terms of imprisonment violated double jeopardy principles because it added years to his confinement. Riley v. Parke held that KRS 533.060(2), requiring that a sentence for a felony conviction committed while on parole run consecutively with any other sentence, controls over KRS 532.110(2) which stated that a judgment of sentence which is silent as to how a sentence will run will be deemed to run concurrently. Id. Lang argues the fact that his sentences were run consecutively under this interpretation "added time" to his sentences and was therefore unconstitutional. He also contends the application of the holding of that case was ex post facto because his convictions were acquired prior to the date of that opinion. We dispose of this issue by noting that the effective date of KRS 533.060(2) was June 16, 1976. There was no change in the law by the Riley decision, only the affirmation that KRS 533.060(2) was controlling over another statute. Lang has identified no ex post facto or double jeopardy violations.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court which dismissed Lang's petition for declaratory relief.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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