

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-002252-MR

MICHAEL ENGLE

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 03-CI-01550

COMMONWEALTH OF KENTUCKY;  
LARRY CHANDLER, WARDEN; and  
VERTNER TAYLOR, COMMISSIONER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is a pro se appeal from an order entered by the Franklin Circuit Court denying a request for declaratory judgment filed by appellant, Michael Engle. For the reasons stated hereafter, we affirm.

Engle was convicted of first-degree sodomy and was sentenced to serve 20 years in prison on August 6, 1992. He is incarcerated at Luther Lockett Correctional Complex in LaGrange, Kentucky. Although Engle requested approximately 235 days of

meritorious good time (MGT) from 2000 to 2003, then-warden Larry Chandler denied his requests based on his failure to participate in a sex offender treatment program (SOTP).

Engle filed a petition for a declaration of rights in the Franklin Circuit Court on December 4, 2003, requesting that the court order appellees Chandler, Kentucky Department of Corrections, and Commissioner Vertner Taylor to award him 235 days of MGT. Engle asserted that by refusing to award him the requested MGT, appellees violated his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution as well as his rights under Kentucky Constitution §§ 2, 3, 7, 11, 14, 18, 26, 27, and 28. Appellees, on the other hand, maintained that none of Engle's rights had been violated. The circuit court ultimately denied Engle's request, rejecting his due process and equal protection challenges and holding that "Chandler acted within his discretionary authority in denying [Engle] MGT credit." This appeal followed.

Engle argues on appeal that the trial court erred by failing to find, based on *Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Cornell*,<sup>1</sup> that appellees acted arbitrarily by denying his request for MGT. We disagree.

The test for determining whether an administrative agency acted arbitrarily is set forth in *Cornell* as follows:

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<sup>1</sup> 796 S.W.2d 591 (Ky.App. 1990).

The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.<sup>2</sup>

Further, KRS 197.045 provides in part as follows:

(3) An inmate may, at the discretion of the commissioner, be allowed a deduction from a sentence not to exceed five (5) days per month for performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs. The allowance shall be an addition to commutation of time for good conduct and under the same terms and conditions and without regard to length of sentence.

(4) Until successful completion of the sex offender treatment program, a sex offender may earn good time. However, the good time shall not be credited to the sex offender's sentence. Upon the successful completion of the sex offender treatment program, as determined by the program director, the offender shall be eligible for all good time earned but not otherwise forfeited under administrative regulations promulgated by the Department of Corrections. After successful completion of the sex offender treatment program, a sex offender may continue to earn good time in the manner provided by administrative regulations promulgated by the Department of

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<sup>2</sup> *Id.* at 594 (internal citations omitted).

Corrections. Any sex offender, as defined in KRS 197.410, who has not successfully completed the sex offender treatment program as determined by the program director shall not be entitled to the benefit of any credit on his sentence. A sex offender who does not complete the sex offender treatment program for any reason shall serve his entire sentence without benefit of good time, parole, or other form of early release. The provisions of this section shall not apply to any sex offender convicted before July 15, 1998, or to any mentally retarded sex offender.

Thus, KRS 197.045(4) requires sex offenders convicted after July 15, 1998, to complete SOTPs in order for any earned good time to be applied to their sentences. Further, Kentucky Corrections Policies and Procedures (CPP) 15.3 establishes the guidelines under which MGT may be awarded.

Engle argues that because he was convicted prior to the effective date of KRS 197.045(4) as set forth above, appellees' actions in denying his request for MGT, because he refused to participate in an SOTP, violated the first prong of the *Cornell* arbitrariness test. In support thereof, Engle states that appellants' actions in applying KRS 197.045(4) to him violated the ex post facto prohibition, which "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred."<sup>3</sup> We disagree.

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<sup>3</sup> *Lozier v. Commonwealth*, 32 S.W.3d 511, 514 (Ky.App. 2000) (citing *Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981)).

Engle's Kentucky Corrections Resident Record Card reflects that MGT was awarded to Engle and credited to his sentence on at least eight occasions, including twice after the effective date of the current KRS 197.045(4). These MGT credits demonstrate that Chandler did not apply KRS 197.045(4) to Engle; otherwise, the MGT would not have been credited to his sentence, because he never completed an SOTP. Instead, it is clear that Chandler refused to award Engle any additional MGT pursuant to KRS 197.045(3), which Engle does not contend is inapplicable to him. MGT is defined as "good time credit that may be awarded for clear conduct and program participation."<sup>4</sup> As such, both the availability and amount of MGT awarded under this section falls within the Kentucky Department of Correction's discretion.<sup>5</sup> Engle's refusal to participate in an SOTP certainly falls within the matters which may be considered when making a determination of whether to award MGT. This is especially true since Engle's caseworker and classification committee recommended that he participate in an SOTP.

Next, Engle argues that appellees' denial of his request for MGT violated due process and the standard set forth in *Cornell*. The circuit court cited case law which sets forth, "[p]risoners claiming a due process violation under the

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<sup>4</sup> Kentucky Corrections Policies and Procedures 15.3(IV).

<sup>5</sup> *Martin v. Chandler*, 122 S.W.3d 540, 543-44 (Ky. 2003).

Fourteenth Amendment must demonstrate that they have been deprived of a protected liberty or property interest by arbitrary governmental action.”<sup>6</sup> However, KRS 197.045(4) and CPP 15.3 do not provide Engle with a state-created liberty interest in MGT. Although Engle correctly asserts that, with certain exceptions, CPP 15.3(V)(A) mandates that inmates shall be considered annually for MGT, whether MGT is awarded is purely discretionary. As this court has stated, “[n]o inmate has a *right* to meritorious good time under CPP 15.3, it is a *privilege* bestowed at the discretion of the Commissioner.”<sup>7</sup> Further, as this court has held, “[b]ecause the award of meritorious good time under CPP 15.3 is left entirely to the discretion of prison administrators . . . inmates such as appellant have no protected liberty interest at stake in its’ [sic] denial.”<sup>8</sup> Accordingly, Engle has no liberty interest at stake in the potential award of additional MGT.

Further, with regard to any procedural due process claim Engle is asserting, this court has stated that inmates are “not entitled to a hearing on the issue of the denial of good time credit available under a policy created by authority of KRS

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<sup>6</sup> *Williams v. Bass*, 63 F.3d 483, 485 (6th Cir. 1995).

<sup>7</sup> *Anderson v. Parker*, 964 S.W.2d 809, 810 (Ky.App. 1997).

<sup>8</sup> *Id.* at 810.

197.045 delegated to the Corrections Cabinet."<sup>9</sup> Therefore, the circuit court did not err in finding that appellees did not violate Engle's due process rights.

Engle next argues that appellees denied him the right to equal protection of the law, because sex offenders convicted on different dates are treated differently. We agree with the circuit court that appellees have not violated Engle's equal protection rights. Again, KRS 197.045(4) was not applied to Engle and KRS 197.045(3), although applied to him, makes no distinction between any groups of inmates. Because prisoners are not a suspect class and no fundamental right is at stake here, KRS 197.045(3) does not violate equal protection standards if it is rationally related to a legitimate government interest.<sup>10</sup> Such a relationship exists in the fact that the state has a legitimate interest in maintaining orderly prisons, and the possibility of being awarded MGT serves as an incentive to inmates in the furtherance of that interest.

Finally, appellees' refusal to award Engle MGT is supported by substantial evidence. The Kentucky legislature clearly believes that a sex offender will benefit from participating in an SOTP. While KRS 197.045(4) does not require Engle to participate in such a program in order for any good

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<sup>9</sup> *Id.* at 811 (citing *McGuffin v. Cowan*, 505 S.W.2d 773 (Ky.App. 1974)).

<sup>10</sup> *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997).

time he earns to be credited to his sentence, his refusal to participate in an SOTP certainly may be a factor in the determination of whether he should be awarded additional MGT pursuant to KRS 197.045(3).

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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