

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002658-MR

JIMMY D. SEXTON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 06-CI-00285

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Jimmy Sexton appeals a Franklin Circuit Court order dismissing his petition for a writ of mandamus seeking to require the Kentucky Parole Board to grant him early release under an administrative regulation in effect at the time he was released on parole in 1996. Finding no error, we affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.280.

In 1987, Sexton was convicted of two counts of complicity to commit murder and received a twenty-year sentence on each, to run concurrently. In 1996, he was released on parole. Sexton was returned to prison as a parole violator in 2005.

At the time of Sexton's 1996 release, 501 KAR 1:050 provided:

Section 1. A parolee may request a final discharge from parole after the expiration of twenty-four (24) months clear conduct from the date of parole and receipt by the board, of a full report from the parole officer of the parolee's activities while on parole or the maximum expiration for all sentences excluding a life sentence. . . .

Section 2. Upon receipt of evidence that a parolee has satisfied all preceding requirements, the chair may issue, or cause to be issued, a certificate of final discharge from parole on any sentence upon receipt of a written request from the parole officer and considered by the full board.

Section 3. When a parolee reaches the maximum expiration date of his sentence, a final discharge from parole shall be issued automatically by the board.

This regulation was promulgated under the authority of KRS 439.354, which ostensibly authorizes the Board to issue a final discharge of parole prior to the maximum expiration of a sentence. In 1998, the regulation was amended by deleting Sections 1 and 2, renumbering Section 3 as Section 1 (with minor modifications), and adding two new sections relating to restitution.

Here, Sexton alleges that because his parole officer advised him that he would have to spend the remainder of his sentence on parole, Sexton did not apply for an early final discharge while the regulation permitted it. He further alleges on appeal that the 1998 amendment of the regulation violated his rights as it constituted a retroactive enhancement of his 1987 sentence.

Sexton's arguments are disposed of by our highest court's holding in *Bd. of Prison Comm'rs v. De Moss*, 157 Ky. 289, 300-01, 163 S.W. 183, 187-88 (1914), that a statute which purports to grant the Board the power to grant early discharge of a paroled convict is an unconstitutional infringement on the governor's power to pardon, as set out in Section 77 of the Kentucky Constitution. While this case is somewhat dated, it has not been overruled, and Section 77 has not been amended in the intervening ninety-four years. In our view, *De Moss* is controlling and we are therefore bound to follow it. SCR 1.030(8)(a).

As applied to this case, irrespective of what version of 501 KAR 1:050 applies, the Board neither had in 1996 nor currently has the power to grant an early final discharge. Therefore, Sexton is not entitled to a writ of mandamus. *See Wise v. United States*, 369 F.Supp. 30, 32-33 (W.D. Ky. 1973) (petitioner seeking mandamus must prove, *inter alia*, a clear duty on the part of the defendant to do the act in question); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) (courts will not issue writs of mandamus in furtherance of unconstitutional statutes).

The Franklin Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jimmy Sexton, *Pro se*
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BRIEF FOR APPELLEE:

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