

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000798-MR

DONALD SELBY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-02112

JOHNATHAN G. HALL

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Donald Selby appeals from an order of the Franklin Circuit Court dismissing his petition for declaration of rights. After our examination of the record and pertinent law, we affirm.

Selby was originally sentenced in December 2000. In February 2004, he was released on parole. That parole was transferred to the state of Indiana under the Interstate Compact for Adult Offender Supervision. Kentucky Revised

Statute[s] (KRS) 439.561. *See also* 4 U.S.C. § 112 (1965). The record contains an offender violation report issued by the Interstate Commission for Adult Offender Supervision dated April 16, 2008, which indicates that in February and March of that year, Selby was arrested for misdemeanors, failed to report the arrests, and failed a drug test. Subsequently, on May 6, 2008, a parole violation warrant was issued by the Kentucky Parole Board because Selby had been convicted in Indiana of a felony; *i.e.*, operating a motor vehicle while intoxicated. The record indicates that Selby then pled guilty to committing a felony while on parole, and the Parole Board revoked his parole on August 1, 2008.¹

Selby filed a petition for his declaration of rights in the Franklin Circuit Court, arguing that his rights had been violated by the Parole Board. The circuit court dismissed his petition. This appeal follows.

Selby now argues that under House Bill (HB) 406 from 2008, he should receive credit for the time he spent on parole. We disagree. HB 406 was the budget bill in 2008. The pertinent section provided as follows:

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 . . . when a parolee is returned as a parole violator for a violation *other than* a new felony conviction.^[2]

(Emphasis added).

¹ The record of the hearing was apparently sealed and is not part of the record on appeal.

² The General Assembly later adopted this language when it amended KRS 439.344 in 2009.

Selby acknowledges that he was returned to prison based on his felony conviction. However, he argues that his rights were violated because the parole violation warrant that resulted in the revocation was the second warrant issued. Selby does not present any authority for this argument, and we have been unable to find any. The record contains only one warrant. When evidence is missing from the record, we are bound to “assume that the record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Therefore, we affirm the trial court on this issue.

Selby also argues that the trial court erroneously denied his motion to alter, amend, or vacate the judgment under Kentucky Civil Rule[s] of Procedure (CR) 59.05. This rule requires that the motion be filed within ten days of judgment. The final judgment was entered on March 22, 2010, and Selby’s motion was filed on April 5, 2010 – 13 days after final entry (when considering weekends). The trial court denied the motion because it was untimely.

Selby contends that the trial court should have granted him leniency since he is handicapped by the prison mail system. However, our Supreme Court has explicitly held that “CR 59 motions served 13 days after entry of judgment are not timely. . . . The imperative nature of CR 59.05 is exemplified by its specific exclusion from the enlargement provision of CR 6.02.” *Arnett v. Kennard*, 580 S.W.2d 495, 496 (Ky. 1979). Thus, the trial court did not err in its denial of Selby’s motion.

We affirm the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Selby, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

J. Todd Henning
Justice and Public Safety Cabinet
Frankfort, Kentucky