

RENDERED: December 24, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2780-MR

JERRY YORK

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 78-CR-000060

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, BUCKINGHAM, AND EMBERTON, Judges.

ABRAMSON, JUDGE: Jerry York appeals a September 3, 1996, order of the Harlan Circuit Court denying his motion for modification of sentence. Finding no error, we affirm.

On June 9, 1978, the Harlan County Grand Jury indicted York on one count of intentional murder (KRS 507.020). On September 1, 1978, York appeared in court with counsel and entered a guilty plea. On September 29, 1978, the circuit court entered a final judgment finding York guilty of murder and sentencing him to twenty-one years in prison. York entered prison in October 1978 and received credit for five months and

three days of jail time. The normal maximum expiration date for his sentence was calculated by the Kentucky Corrections Cabinet to be October 5, 1999.

On July 20, 1982, York was granted parole for the first time. At that time, York's new conditional release date was calculated as July 7, 1993, after including a credit of five years, nine months and twenty-five days for good-time. After his parole was revoked for violations, York returned to prison on February 7, 1994. York's new maximum expiration date for release was adjusted to November 19, 2010. On August 25, 1994, York was paroled from prison for the second time. In February 1996, a warrant was issued for York for parole violation and, after a hearing, his parole was again revoked. He returned to prison on February 29, 1996, and his new maximum release date was recalculated to May 14, 2012.

On August 9, 1996, York filed a motion for modification of sentence pursuant to Kentucky Rule of Civil Procedure (CR) 60.02, Kentucky Rule of Criminal Procedure (RCr) 13.04, and KRS 532.120. York asked the circuit court to give him credit for the time spent on parole in determining service of his twenty-one year prison sentence, to appoint counsel and to conduct a hearing. On September 3, 1996, the circuit court summarily denied the motion. On September 24, 1996, York, by counsel, filed a motion to reconsider the denial of his motion for

modification of sentence. After a brief hearing, the circuit court denied the motion to reconsider on October 3, 1996.¹

York argues that he should receive credit toward the completion of his prison sentence for the time he spent on parole. He notes that his initial release date was October 1999, but it has been recalculated to the year 2012. Having spent over four years in prison and thirteen years on parole, York contends that extending his release date to nearly thirteen years beyond the original release date is unjust and constitutes punishment for being granted parole.

This case is controlled by statute. KRS 439.344 states:

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.

KRS 439.354 provides that the time a person spends on parole effectively counts toward his maximum release date if he has never violated the terms of parole. It states:

¹The Commonwealth argues this appeal should be dismissed on procedural grounds because the appeal was not filed timely. The circuit court denied the original motion for modification of sentence on September 3, 1996. York filed the motion to reconsider the order on September 24, 1996. The circuit court order denying the motion to reconsider was dated October 2, 1996, but it was entered on October 3, 1996. The Commonwealth maintains that the circuit court was without jurisdiction to act on the motion to reconsider because it was filed beyond the ten-day limit under CR 59.05. The exact timing of the various filings is unclear from the record. Nevertheless, while the motion to reconsider may have been untimely, the notice of appeal was filed on October 2, 1996, and plainly states that York was appealing the September 3, 1996, order. Consequently, the appeal was filed timely. See CR 73.02.

When any paroled prisoner has performed the obligations of his parole during his period of active parole supervision the board may, at the termination of such period to be determined by the board, issue a final discharge from parole to the prisoner. Unless ordered earlier by the board, a final discharge shall be issued when the prisoner has been out of prison on parole a sufficient period of time to have been eligible for discharge from prison by maximum expiration of sentence had he not been paroled, provided before this date he had not absconded from parole supervision or that a warrant for parole violation had not been issued by the board.

(Emphasis supplied).

The grant of parole is a matter of legislative grace and not a matter of right. Lynch v. Wingo, Ky., 425 S.W.2d 573, 574 (1968); Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584, 586 (1996). The clear implication in KRS 439.344 and KRS 439.354 is that time spent on parole is not credited toward a person's release date if he has violated his parole conditions. Kentucky decisions support this general principle. In Stokes v. Howard, Ky., 450 S.W.2d 520 (1970), the court held that a parole violator, who commits a subsequent crime, is not entitled to credit for time spent out on parole toward the completion of his sentences (citing KRS 439.344 and KRS 439.354). In Wooden v. Goheen, Ky., 255 S.W.2d 1000, 1002 (1953), the court stated that parole does not vacate the sentence imposed, but is merely "a conditional suspension of the sentence."

York contends that parole is a type of custody with restrictions and should count toward completion of a sentence. He cites no authority for this proposition which both the legislature and the Kentucky courts have rejected. Moreover, KRS 439.344 has been upheld as constitutional by the federal courts.

See Stokes v. Robuck, 365 F. Supp. 887 (E.D. Ky. 1973), appeal dismissed, 419 U.S. 988, 95 S. Ct. 298, 42 L. Ed.2d 261 (1974), aff'd 510 F.2d 973 (6th Cir. 1975).

York argues that justice and fairness require giving him credit for the time spent on parole. We disagree with York's attempt to equate the conditions of parole with those of imprisonment. York was granted parole twice, but he was unable to fulfill his obligation not to abuse the privilege of additional freedom and was found to have violated his parole conditions in each instance. Sentenced to serve twenty-one years in prison for intentional murder in 1978, York has spent just over four years incarcerated. By violating parole, he forfeited his opportunity to be discharged according to his original release date. The motion for modification of his sentence was properly denied.

Finally, York was not entitled to an evidentiary hearing. In Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983), our Supreme Court stated that a movant is not entitled to a hearing unless he affirmatively alleges facts which, if true, would justify granting relief and further alleges special circumstances that justify CR 60.02 relief. York's claim clearly lacks merit on the face of the record. At the September 27, 1996, hearing, York's counsel responded negatively to the judge's inquiry as to whether he had any additional evidence beyond that already submitted in the motion and memorandum. Thus, the

circuit court did not err in denying the request for a full evidentiary hearing.

For the foregoing reasons, we affirm the order of the Harlan Circuit Court.

ALL CONCUR.

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