

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002185-MR

ELBERT PHILLIP LONG

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, SPECIAL JUDGE
ACTION NO. 97-CI-00101

DOUG SAPP; JAMES L. MORGAN; HELEN HOWARD
HUGHES, THEODORE R. KUSTER; LUTITIA PAPAILLER;
JAMES E. RANKIN; A. PAUL REECE, JR.; HOMER C.
SHUMATE; PAULA KING; DEPARTMENT OF CORRECTIONS,
NORTHPOINT TRAINING CENTER; COMMONWEALTH OF
KENTUCKY, PAROLE BOARD; and BARBARA JONES

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: GUDGEL, Chief Judge; DYCHE and HUDDLESTON, Judges.

HUDDLESTON, Judge: Elbert Phillip Long appeals from a judgment dismissing his complaint alleging civil rights violations that was treated as a petition for declaration of rights under Kentucky Revised Statutes (KRS) 418.040. Because we believe that the trial court acted properly in denying Long the relief he sought, we affirm.

Following a jury trial in May 1977, Long was convicted of murder for which he was sentenced to imprisonment for life and was convicted of first-degree rape for which he was sentenced to five years' imprisonment. Although the original judgment stated the sentences were to be served consecutively, they are now treated as concurrent sentences.¹ In September 1986, Long was released on parole under intensive supervision. A condition of parole imposed by the Parole Board was that he "must attend comp. [comprehensive] care center or a treatment program set up by the parole officer in lieu of the comp. care program until released." The parole documents signed by Long also stated that his failure to comply with the conditions "at any time" while on parole will be deemed sufficient cause to declare him a parole violator and could result in his return to prison to serve the unexpired portion of the sentence.

In December 1986, Long's parole officer required him to attend a vocational education training program involving instruction in trailer truck driving because he was having difficulty finding employment. In order to finance his participation in the program, Long had to obtain a government sponsored student loan.

In April 1987, Long was transferred to active supervision after completing the vocational education program and obtaining a job as a truck driver. In May 1987, Long's new parole officer ordered him to attend sex offender counseling as part of a sex

¹ Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993); See v. Commonwealth, Ky., 746 S.W.2d 401 (1988).

offender treatment program. Although the record is not entirely clear, Long states that in July 1988, he was notified that the Department of Corrections changed its policy to require participants to accept responsibility for any sexual offenses for which they were convicted as a condition of participation in a sexual offender treatment program. Long refused to admit guilt or accept responsibility for the attempted first-degree rape offense, so he was prohibited from further participation in the sexual offender treatment and counseling program.² Consequently, he was charged with violating a condition of his parole for failing to attend sexual counseling and his parole was revoked in July 1988.

In October 1988, Long appeared before the Parole Board, which denied parole and deferred reconsideration for four years. In October 1992, the Parole Board again denied Long parole and deferred reconsideration for four years stating several reasons for its action including the seriousness of the crimes, and the facts that violence was involved in the crimes, a death was involved, Long had three felony convictions and a firearm was used. In October 1996, the Parole Board denied Long parole and deferred reconsideration for two years. In October 1998, the Parole Board again denied Long parole and ordered him to serve out the remainder of his sentence. As grounds for this last decision, the Parole Board cited the seriousness of the offenses, the fact that violence was involved in the crimes, a life was taken and Long had prior felony convictions. The Board also noted that Long had violated the conditions of an earlier grant of parole. The Board suggested

² See Ky. Rev. Stat. (KRS) 439.340(10) and (11).

that Long attend sex offender counseling and indicated that Long could receive reconsideration if he completed a sex offender treatment program.

Meanwhile, in August 1996, Long had submitted a request to the Attorney General's Office seeking a written formal opinion and an investigation into the actions of the Department of Corrections with respect to its handling of his parole status. Long alleged that the Corrections Department and the Parole Board had violated his constitutional rights by requiring him to enter into contracts to secure student loans to pay for the vocational education program and by changing the conditions of his parole. The Attorney General's Office refused to issue a formal opinion or conduct an investigation.

In January 1997, Long filed a complaint pro se for civil rights violations which has been treated by the court and the parties as a petition for a declaration of rights. In the petition, Long alleged that the appellees violated Sections 2, 3, 17 and 19 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution. He challenged the handling of his parole status, the revocation of his parole, the Attorney General's failure to issue a formal opinion and the conduct of the attorneys in the Office of General Counsel. Long alleged that he was being held illegally on an expired sentence and sought punitive and compensatory monetary relief. He also sought an order requiring that he be given a new parole hearing and an opinion from the Attorney General's Office.

In February 1997, the Attorney General moved to dismiss Long's petition for failure to state a claim stating its office is not required to issue formal opinions or investigate complaints by private individuals. Also in February 1997, the Department of Corrections, on behalf of the other defendants, filed a motion to dismiss for failure to state a claim under Kentucky Rule of Civil Procedure (CR) 12.02 based on res judicata concerning a prior lawsuit brought by Long in federal court under 42 United States Code (U.S.C.) § 1983 that had been dismissed.³ Long filed replies to the appellees' motions to dismiss and requested an evidentiary hearing.⁴ Long also moved for a temporary restraining order and a preliminary injunction in November 1997, seeking release from prison in which he alleged that prison and parole officials had committed fraud and conspired to continue holding him illegally.⁵

On January 26, 1999, Long filed an extensive motion for partial summary judgment pursuant to CR 56 seeking judgment on the legal issues of liability and a subsequent jury trial on damages. At the same time, Long renewed his motion for a temporary restraining order. The appellees filed responses to the motions

³ Attached to the motion to dismiss were documents indicating that Long filed a § 1983 action in federal court involving the same issues in his state court action. The federal suit was dismissed based on the statute of limitations. The dismissal was affirmed by the Sixth Circuit Court of Appeals and a writ of certiorari was denied by the Supreme Court.

⁴ The record also contains several documents concerning a complaint by Long that certain documents had been removed from his prison classification file. This controversy was not raised in his original petition and is not involved in the current appeal.

⁵ As stated earlier, in October 1998, Long again appeared before the Parole Board, was denied parole and was ordered to serve-out the remainder of his sentence.

incorporating their prior responses and motions to dismiss. On February 18, 1999, the circuit court summarily denied the motions for a temporary restraining order and partial summary judgment. On February 23, 1999, Long filed a CR 59.05 motion to alter or amend the judgment and a motion for findings of fact and conclusions of law pursuant to CR 52.01.

On September 8, 1999, the circuit court entered a final judgment and declaration of rights. It held that the Attorney General was not required to issue a formal opinion or investigate Long's allegations. It also held that the Corrections Department could order restitution and parole officers could modify the general terms and conditions of parole. The court stated that several issues raised by Long were factual questions not subject to resolution in a declaratory judgment action. The court dismissed all of the civil rights claims raised in the original complaint based on sovereign immunity⁶ and the fact that Long was not part of a protected class. This appeal followed.

Long raises several issues on appeal with regard to the handling of his parole supervision and the ultimate revocation of his parole for violating the conditions of parole. Long contends that the appellees have abused their authority and retaliated against him for filing this action. In support of these claims, he maintains that he has been incarcerated illegally on the five-year sentence that he received on his conviction for first-degree rape beyond its expiration date. He argues that the Corrections

⁶ But see Department of Corrections v. Furr, Ky., 23 S.W.3d 615 (2000) (holding that sovereign immunity has been waived for suits under KRS Chapter 344, the Kentucky Civil Rights Act).

Department continues to unlawfully hold him on a completed criminal sentence. In fact, Long was convicted of murder and first-degree rape and received a life sentence on the murder conviction. Even assuming that the five-year rape sentence was satisfied in 1982⁷, he is still subject to the life sentence. Thus, he clearly is not being forced to serve a completed criminal sentence and is not currently incarcerated on an expired sentence.

Long also contends that his parole officer did not have authority to order him to attend the sexual offender treatment program as a condition of his parole. Accordingly, he argues, the revocation of his parole after he was denied continued participation in the counseling sessions for refusing to admit guilt or accept responsibility in connection with the rape conviction was illegal.

Long's argument on this issue is premised on his assertion that the Parole Board has the sole authority for issuing conditions of parole.⁸ While Long is correct that the Parole Board sets out the initial conditions of parole, parole officers are authorized to "[k]eep informed concerning the conduct and conditions of each person under their supervision and use all suitable methods to aid and encourage them to bring about improvement in their conduct and condition."⁹ In addition, KRS

⁷ See, e.g., Lienhart v. Commonwealth, Ky., 953 S.W.2d 70 (1997) (suggesting that credit for determining expiration date for a concurrent sentence begins on the first date of service of any other concurrent sentence).

⁸ See, e.g., KRS 439.330(1)(c), KRS 439.340(13).

⁹ KRS 439.480(3).

439.346 states: "During the period of his parole, the prisoner shall be amenable to the orders of the board and the department [of corrections]." ¹⁰ The Commissioner of the Department of Corrections has the power and duty to make rules for the conduct of persons on parole as long as they do not conflict with the conditions of parole imposed by the Parole Board. ¹¹

In the current case, two of the general conditions of Long's parole required him to maintain regular employment or attempt to obtain employment when unemployed, and to comply with all rules and regulations prescribed by the Division of Probation and Parole and the special instructions of his parole officer. One of the special conditions of parole required Long to attend a treatment program specified by his parole officer. Long contends that his parole officers exceeded their authority in arranging for him to take vocational training courses that caused him to acquire a loan debt and ordering him to attend sexual offender counseling after he had completed the vocational training program. We disagree. Both of these programs were consistent with and in furtherance of the conditions of parole. Long's characterization of his educational loan debt as "restitution" is inaccurate. He was having difficulty finding a job after being released from prison and the vocational education training he received led to employment with a trucking company. The money borrowed on the

¹⁰ The Division of Probation and Parole is under the auspices of the Department of Corrections.

¹¹ KRS 439.470(1).

government loan program enhanced his ability to secure employment and benefitted him, not the victims of his crime.

Similarly, in 1996, the General Assembly passed the sexual treatment offender statute¹² requiring defendants convicted of certain sexual offenses¹³ to successfully complete the Sexual Offender Treatment Program before being granted parole. Pursuant to this statute, the Corrections Department established a policy requiring parolees with sexual offense convictions to participate in a sexual offender treatment program. Long's parole officer apparently was complying with this new policy in ordering him to attend sexual counseling. Also, in order to achieve the benefits of the Sexual Offender Treatment Program, the Corrections Department requires participants to accept responsibility for their crimes in order to be allowed to participate. While Long's required participation was ordered after he had been granted parole, this did not constitute an additional condition or violate the prohibition against ex post facto laws.¹⁴ Long's required completion of sexual offender treatment was consistent with his agreement to abide by the rules and orders of the Division of Probation and Parole and to attend a treatment program set up by his parole officer.

¹² KRS 439.340(11) and (12).

¹³ KRS 197.410.

¹⁴ See Garland v. Commonwealth, Ky. App., 997 S.W.2d 487 (1999) (finding retroactive application of sexual offender treatment program statutes did not violate ex post facto clause of the constitution because they did not involve punishment).

Long's argument that he was no longer subject to the special condition requiring attendance to a treatment program because he had completed the vocational training program is unpersuasive. The vocational training courses were part of an educational program designed to facilitate his employment rather than a treatment program. Similarly, his reliance on CPP 27-12-04¹⁵ is misplaced. First, that prison policy did not become effective until March 1, 1988, after Long was ordered to attend sexual counseling. Second, as discussed earlier, imposition of the sexual treatment program was not a modification or addition to the special conditions of parole but was consistent with the general and special conditions. Thus, Long has not shown that his parole supervisors abused or exceeded their authority. We also note that the conditions of parole need not be tied directly to the crimes for which a prisoner was convicted. Parole is directed at rehabilitation of prisoners; the conditions are intended to assure that a parolee becomes a law abiding citizen and that the public is protected. The fact that Long had completed service of his sentence for the rape conviction did not preclude the imposition of a sexual offender treatment program or revocation of parole for violation of this condition.

Long also argues that the Attorney General should have investigated his complaints and issued a formal opinion. Generally, the Attorney General is responsible for providing opinions on issues at the request of state and public officials.

¹⁵ CPP 27-12-04 requires parole officers to obtain prior approval from the Parole Board for modifications to special conditions, as opposed to general conditions, of parole.

Under KRS 15.025(4), the Attorney General has the discretion to issue formal opinions on questions of public interest if requested in writing by a private citizen. In addition, 40 Kentucky Administrative Regulation (KAR) 1:020 states that the Attorney General should not render official opinions to questions submitted in contemplation of litigation. Long has not demonstrated that the Attorney General abused his discretion in declining to issue a formal opinion at his request.

Likewise, the Attorney General's investigative authority is limited primarily to criminal matters, county financial matters, election issues, environmental and public health issues and coal mining issues.¹⁶ Long's complaints do not fall within any of the established areas of investigation. Moreover, in the area of criminal investigations, the Attorney General has discretion in deciding whether to initiate an investigation.¹⁷ The Attorney General was not obligated to conduct an investigation of Long's complaints. We agree with the circuit court that Long did not establish that he was entitled to compel the Attorney General to issue a formal opinion or conduct an investigation.

The judgment is affirmed.

ALL CONCUR.

¹⁶ See KRS 15.190-15.243.

¹⁷ See KRS 15.200.

BRIEF FOR APPELLANT:

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