

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002296-MR

TOMMY LYKINS

APPELLANT

V. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE WILLIAM LARRY MILLER, JUDGE  
ACTION NO. 98-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING IN PART AND REVERSING IN PART

\* \* \* \* \*

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

GUDGEL, CHIEF JUDGE: This is an appeal from a conditional guilty plea entered by the Breathitt Circuit Court. In March 2000, appellant pled guilty to felony offenses of rape, sodomy, and sexual abuse stemming from incidents which occurred in 1997. A final judgment sentencing appellant was entered on August 26, 2000. At that time, over his objection, the court applied to him the provisions of KRS 532.043 and KRS 197.045(4), whereby he was ordered both to serve a three-year period of conditional release after completion of his sentence, and to undergo a sex offender treatment program before he could claim good time credits against his sentence. On appeal, appellant contends that the court erred by applying either statute to him because they both were enacted

after his commission of the charged offenses, with the result that their application to him violated the ex post facto clause of the constitution. In light of recent decisions by the supreme court and this court, we agree with appellant's argument as to the application of KRS 532.043, but we disagree with him in regard to the application of KRS 197.045(4). Hence, we affirm in part and reverse in part.

In Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000), the Kentucky Supreme Court held that KRS 532.043 could not be applied retroactively to offenses which occurred prior to its effective date without violating the ex post facto clause of the constitution. Here, the record shows that appellant committed the offenses in 1997 and was convicted of them in 2000. Pursuant to Purvis, therefore, KRS 532.043 could not be applied to appellant since the statute became effective in 1998. Although the Commonwealth concedes this point, it argues that it was not given proper notice as to the constitutional issue, and that the issue was not preserved for review. However, the Commonwealth's argument overlooks the fact that on November 5, 1998, appellant filed a motion setting forth his ex post facto constitutional arguments. That motion was denied on April 23, 1999, before appellant pled guilty. It is clear, therefore, that the attorney general was given proper notice that appellant claimed the statutes were being unconstitutionally applied to him, and that the constitutional issue was adequately preserved for review. Moreover, as the March 2000 rendition date of Purvis preceded appellant's sentencing by almost six months, certainly everyone involved should have been aware of, and should have adhered to,

the Purvis decision on the date of sentencing. Accordingly, we hold that the final judgment herein is reversed insofar as it applies KRS 532.043 to appellant.

Appellant's second contention on appeal concerns this court's decision in Lozier v. Commonwealth, Ky. App., 32 S.W.3d 511 (2000), wherein we held that because KRS 197.045(4) merely delays rather than deprives the accused of good time credits earned, its retroactive application does not violate the ex post facto clause. Although appellant attempts to factually distinguish Lozier from the matter now before us, we are unpersuaded by his argument. In short, we hold that Lozier controls the ex post facto issue presented herein regarding KRS 197.045(4).

For the reasons stated, the court's judgment is affirmed in part and reversed in part.

ALL CONCUR.

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