

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-000958-MR

JOHNNY TIPTON

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 03-CI-00062

KENTUCKY STATE PAROLE BOARD

APPELLEE

OPINION

AFFIRMING

** ** * * * * * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: Johnny Tipton appeals from an order of the Morgan Circuit Court dismissing his petition for a writ of mandamus for failure to state a claim upon which relief can be granted. For the reasons stated below, we affirm.

Tipton was convicted in Laurel Circuit Court of first-degree robbery (Case No. 81-CR-154) and second-degree robbery (Case No. 81-CR-050). He received sentences of fifteen years and five years, respectively, to run consecutively. In 1984

(Case No. 84-CR-066) and 1988 (Case No. 88-CR-0024) Tipton was indicted and convicted in Lyon Circuit Court of promoting contraband. He received a sentence of one year on each of the promoting contraband convictions. All of his sentences were to run consecutively, for a total of twenty-two years to serve.

While serving his Kentucky sentence, Tipton was transferred to Nevada, pursuant to the Interstate Agreement on Detainers,¹ to stand trial on a homicide committed in October 1980. On October 9, 1989, Tipton entered a guilty plea to second-degree murder in the Third Judicial District Court of Nevada and was sentenced to fifteen years imprisonment. The judgment of conviction stated that the sentence "is to be served concurrent with those sentences imposed in the State of Kentucky in case #81CR050 (count 1), #81CR050 (count 2), #81CR154, #84CR066, and #88CR024[.]"

In June 1997, Tipton was granted parole by the Kentucky Parole Board (Board), upon condition that, pursuant to a Nevada detainer, he be transferred to the State of Nevada to complete his fifteen-year-Nevada sentence. On December 7, 1998, Tipton was paroled by the State of Nevada, and Tipton returned to Kentucky to continue serving his parole under the supervision of the Board.

¹ See KRS 440.450 et seq.

Following his return to Kentucky, in March 1999, Tipton's Kentucky parole was revoked. On April 11, 2000, the Board again granted Tipton parole, but, similar to the Nevada situation, Tipton, pursuant to a Tennessee detainer, was transferred to Tennessee to serve time for crimes committed there. The record does not disclose the details of the Tennessee crimes or the disposition thereof; however, it appears that Tennessee released Tipton in November 2000 and Tipton again commenced his parole supervision in Kentucky. In April 2002, the Board again revoked Tipton's parole.

On March 11, 2003, Tipton filed a petition for a writ of mandamus pursuant to CR 81 in Morgan Circuit Court seeking to compel the Board to give him credit on his Kentucky sentence for the time he spent incarcerated in Nevada and Tennessee. On April 1, 2003, the Board² filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to CR 12.02(f) on the ground that the Board is not vested with the authority to take the action requested by Tipton. The Board argued that the Kentucky Department of Corrections, rather than

² Noting that if Tipton had named the proper respondent in his petition for writ of mandamus, the General Counsel for the Kentucky Department of Corrections entered an appearance on behalf of the Board and submitted the motion to dismiss. Similarly, though the Board is named as the appellee in this appeal, the brief was prepared by the General Counsel for the Department of Corrections.

the Board, is vested with the authority to grant the relief sought by Tipton, i.e., to grant him credit for the time served in Nevada and Tennessee.

On April 9, 2003, the circuit court entered an order granting the Board's motion to dismiss, noting that "the Kentucky Parole Board is not a proper Respondent to this Petition, as the Board has no authority to award or calculate the sentence credit that the Petitioner seeks." This appeal followed.

When a party moves to dismiss a claim under CR 12.02(f), "[t]he [circuit] court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim."³ "In reaching its decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?"⁴

KRS 439.330(1) defines the duties of the Board as follows:

The board shall:

³ Pari-Mutuel Clerks' Union v. Kentucky Jockey Club, Ky., 551 S.W.2d 801, 803 (1977).

⁴ Bagby v. Koch, Ky. App., 98 S.W.3d 521, 522 (2002).

- (a) Study the case histories of persons eligible for parole, and deliberate on that record;
- (b) Conduct hearings on the desirability of granting parole;
- (c) Impose upon the parolee or conditional release such conditions as it sees fit;
- (d) Order the granting of parole;
- (e) Issue warrants for persons charged with violations of parole and conduct hearings on such charges, subject to the provisions of KRS 439.341;
- (f) Determine the period of supervision for parolees, which period may be subject to extension or reduction after recommendation of the cabinet is received and considered;
and
- (g) Grant final discharge to parolees.

Calculation of credits for time served is not among the duties defined for the Board under KRS 439.330(1).

The effect of parole time on a parolee's sentence, which is the issue in this case, is controlled by KRS 439.344.⁵

⁵ KRS 439.344 provides that "The period of time spent on parole shall not count as a part of the prisoner's maximum sentence except in determining the parolee's eligibility for final discharge from parole as set out in KRS 439.354." "KRS 439.354 provides as follows: 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."

The Department of Corrections is responsible for calculation of the maximum and minimum expiration dates under KRS 439.344.⁶ We accordingly agree with the circuit court that Tipton named the wrong respondent in his petition for a writ of mandamus, and the petition was properly dismissed for failure to state a claim upon which relief can be granted because, even if Tipton is correct, the Board does not have the authority to grant Tipton the relief time he sought in his petition.

However, we also note that Tipton was incorrect on the merits. Kassulke v. Briscoe-Wade⁷ squarely addressed the issue of whether a parolee serving a sentence in another state which is to run concurrently with a Kentucky sentence is entitled to credit against his Kentucky sentence for the time served in the other state. Kassulke held that a parolee is not entitled to such credit. Thus, even if Tipton had named the proper respondent in his writ of mandamus, he would not have been entitled to credit against his Kentucky sentence for the time he served in Nevada and Tennessee.

For the foregoing reasons the judgment of the Morgan Circuit Court is affirmed.

ALL CONCUR.

⁶ See Kassulke v. Briscoe-Wade, Ky., 105 S.W.3d 403, 405 (2003).

⁷ Id.

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