

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002133-MR

RICHARD SCOTT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 05-CI-00786

JOHN REES, COMMISSIONER,
DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Richard Scott brings this *pro se* appeal from a September 16, 2005, order of the Franklin Circuit Court dismissing his petition for declaration of rights seeking a court order that his federal and state prison sentences be permitted to run concurrently. Kentucky Revised Statutes (KRS) 418.040. We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On June 7, 2005, appellant filed a petition for declaration of rights in the Franklin Circuit Court. Appellant is currently incarcerated at the Eastern Kentucky Correctional Complex. In the petition, appellant outlined the following relevant facts. On June 21, 1979, appellant was convicted of first-degree robbery in the Floyd Circuit Court and was sentenced to twenty years' imprisonment. While on work detail in Franklin County, appellant escaped and was subsequently arrested in Manchester, Connecticut. During the period following his escape, appellant committed additional crimes and subsequently entered a guilty plea in United States District Court to two counts of kidnapping under applicable federal laws. Appellant was sentenced to two twenty-year terms of imprisonment on February 17, 1981. The sentences were ordered to run consecutively for a total of forty years' imprisonment.

On October 26, 1990, while in federal custody, appellant pled guilty to second-degree escape in the Franklin Circuit Court. Pursuant to the judgment, appellant received a one-year sentence. The sentence was ordered "to run consecutively to the Floyd Circuit Court sentence being served at the time of escape." The judgment was silent regarding whether the one-year sentence would be served consecutively or concurrently with the forty-year federal sentence.

In his petition, appellant argues that his one-year escape sentence should run concurrently with the forty-year federal sentence. By order entered September 16, 2005, the Franklin Circuit Court dismissed appellant's petition. This appeal follows.

Appellant contends the circuit court erred by dismissing his petition for declaration of rights. Specifically, appellant alleges that the one-year escape sentence should have run concurrently with the forty-year federal sentence.

Resolution of this issue revolves around application of KRS 532.110. Appellant was convicted and sentenced upon the escape offense on October 31, 1990. Thus, we rely upon the version of KRS 532.110 in effect in October 1990. This version of KRS 532.110 stated as follows:²

(4) Notwithstanding any provision in this section to the contrary, if a person is convicted of an offense that is committed while he is imprisoned in a penal or reformatory institution, during an escape from imprisonment, or while he awaits imprisonment, the sentence imposed for that offense may be added to the portion of the term which remained unserved at the time of the commission of the offense. **Provided, however, that the sentence imposed upon any person convicted of an escape or attempted escape offense shall run consecutively with any other sentence which the defendant must serve. (Emphasis added).**

² The relevant version of KRS 532.110 became effective on July 15, 1986.

In Gaither v. Commonwealth, 963 S.W.2d 621 (Ky. 1997), the Kentucky Supreme Court addressed the issue of whether a sentence imposed for escape should run concurrently or consecutively with an escapee's other sentence(s). The Court held that the language of KRS 532.110(4) is "unequivocal" and "mandates that a sentence imposed for an escape . . . 'shall run consecutively with any other sentence which the defendant must serve.'" Gaither, 963 S.W.2d at 622-623.

Pursuant to the clear language of KRS 532.110 and the Supreme Court's holding in Gaither, we believe it axiomatic that appellant's one-year sentence upon the escape conviction must run consecutively with the with the forty-year federal sentence. As such, we conclude the circuit court properly dismissed appellant's petition for declaration of rights.

We view appellant's remaining contention to be moot or without merit.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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