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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002414-MR

DOCK B. HILLMAN

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-01270

JOHN D. REES, ET. AL.

APPELLEES

OPINION
AFFIRMING

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BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,¹ SPECIAL JUDGE.

ACREE, JUDGE: Dock Hillman appeals, *pro se*, from an order of the Franklin Circuit Court dismissing his petition for a declaration of rights. Hillman sought to

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

compel the Department of Corrections to credit time spent on parole against his imposed sentence after his parole was revoked. We affirm the circuit court's dismissal of the petition.

Hillman was released on parole on June 4, 2003, and arrested and charged with violating his parole on October 25, 2004. He sought a declaration of rights to compel the Department of Corrections to give him credit against service of his sentence for the period between the beginning of his parole and June 30, 2004. The circuit court dismissed his petition, and this appeal followed.

Hillman raises two issues on appeal. The first concerns the interpretation of legislation which temporarily allowed inmates on parole to receive credit against their sentence, provided that their parole was not revoked for commission of another felony. Secondly, he contends that the Commonwealth's interpretation of this legislation violates the constitutional prohibitions against *ex post facto* laws. We disagree.

Ordinarily, time spent on parole "shall not count as a part of the prisoner's maximum sentence except in determining [a] parolee's eligibility for a final discharge from parole[.]" Kentucky Revised Statute (KRS) 439.344. However, in 2003 the General Assembly sought to alleviate overcrowding of penal institutions and to decrease the amount spent by the Commonwealth to incarcerate offenders. Consequently, the biennial budget passed that year contained a provision temporarily suspending the operation of KRS 439.344. House Bill (H.B.) 269 §36(a) contained the following provision:

Probation and Parole Credit: Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence, when it is used to determine a parolee's eligibility for a final discharge from parole as set out in KRS 439.354, or when a parolee is returned as a parole violator for a violation other than a new felony conviction.

2003 Ky. Acts, Ch. 156, Part IX, item 36(a), p. 1876. It is that provision which Hillman seeks to employ to furnish the relief requested.

The Commonwealth argues that Hillman is ineligible for the relief provided by H.B. 269 because his parole was revoked after the expiration date of this bill on June 30, 2004. Hillman agrees that he was not arrested as a parole violator until October 25, 2004. However, he contends that, since H.B. 269 §36(a) was effective when his parole began, he was entitled to credit for time spent on parole until the expiration of the legislation. It is undisputed that Hillman's parole was not revoked for commission of a new felony offense.

The Commonwealth argues that the language "when a parolee is returned as a parole violator" governs eligibility for credit for time spent on parole pursuant to H.B. 269 §36(a). Under the Commonwealth's interpretation, the provisions of H.B. 269 only apply to paroled inmates who were returned to prison for a non-felony parole violation after the effective date of the legislation and before the expiration of the 2003-04 budget on June 30, 2004. Any parolee returned to prison outside the period of time when H.B. 269 was in effect would not be entitled to credit for time spent on parole. Consequently, the Commonwealth maintains that Hillman never became eligible for credit for time

spent on parole because the date for determining such eligibility, the date of his return to prison, fell outside the prescribed time period.

Although there are no published cases on point, this Court has previously considered the issue multiple times. In the case of *Fredricks v. Fletcher*, WL 1491235 (Ky.App. 2005), we addressed the application of H.B. 269 to the sentence of an inmate who was paroled prior to the enactment of the legislation, but charged with a non-felony parole violation while H.B. 269 was in force.² Although Fredricks' parole was not actually revoked until after the expiration of H.B. 269, he argued that he was entitled to credit against his sentence for time spent on parole while the legislation was in force because he was charged with violating his parole prior to its expiration date. This Court addressed the issue and concluded as follows:

The relevant part of HB 269, which applies to this case, provides that

[n]otwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence ... when a parolee is returned as a parole violator for a violation other than a new felony conviction.

Pursuant to HB 269, a prisoner could only receive credit for time spent on parole if he was returned to prison as a parole violator for technical violations. Thus, only after the Parole Board has actually revoked a prisoner's parole and ordered him to be returned to prison, would a prisoner have been entitled to the credit set forth in HB 269. So Fredricks was not entitled to credit for the time he spent on parole, pursuant to HB 269, at the time he

² Unpublished decision cited as persuasive authority pursuant to Kentucky Civil Rule 76.28(4)(c).

was charged with violating his parole, nor was he entitled to that credit at the time his parole was revoked since the provision had previously expired.

Fredricks, WL 1491235 at pg. 2. (Footnote omitted).

In *Rees v. Miller*, 2007 WL 2994633 (Ky.App. 2007), we considered three cases dealing with the issue of whether sentence credit was due to inmates who were revoked for non-felony parole offenses after the expiration of H.B. 269. Two of the inmates were granted parole after the legislation first took effect, as was Hillman. All three had their parole revoked after the June 30, 2004, expiration date of the legislation. In each case, this Court determined that the inmates were not eligible for any credit for the time spent on parole.

In response, Hillman claims that in “nearly all” of the unpublished cases rendered by this Court, we have concluded that inmates on parole “did not forfeit the earned credit up to June 30, 2004.” (Appellant’s reply brief at pg. 1). This argument runs contrary to the reasoning articulated in *Fredricks* and *Rees*, wherein we held that paroled inmates returned to prison after June 30, 2004, were governed by the statutory prohibition, found in KRS 439.344, against earning any sentence credit while on parole. We further note that Hillman has not cited us to any unpublished decisions which support his contention, nor have we found any decisions in the course of our own research. Consequently, the circuit court was correct in dismissing Hillman’s petition for a declaration of rights.

Hillman’s second argument is that application of KRS 349.344 to prohibit him from receiving sentence credit while on parole violates constitutional

prohibitions against *ex post facto* laws. He points out that H.B. 269 was in effect when he was granted parole and claims that, because the legislation expired before his parole revocation, he was subject to a punishment which was greater than that meted out to paroled prisoners who were returned to prison before June 30, 2004. Hillman contends that applying KRS 349.344 to his sentence was an *ex post facto* violation because its prohibition on awarding sentence credit during an inmate's period on parole was temporarily suspended by the General Assembly. However, his interpretation of the effect of H.B. 269 is simply incorrect. His punishment, which was fixed at the time of his conviction, was not made greater by the expiration of H.B. 269. Consequently, there was no *ex post facto* violation.

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

ALL CONCUR.

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