

RENDERED: FEBRUARY 17, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000078-MR  
AND  
NO. 2011-CA-000829-MR

JAMES G. BIXLER

APPELLANT

v. APPEALS FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NOS. 10-CI-01652 AND 10-CI-01438

DEPARTMENT OF CORRECTIONS,  
OFFENDER RECORDS

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CAPERTON, KELLER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James G. Bixler, *pro se*, appeals from an order entered by the Franklin Circuit Court dismissing his petitions for declaration of rights regarding his claims for good-time credits and parole eligibility and entitlement.

We conclude that based on established judicial precedent, KRS 197.045(4) does not operate as an *ex post facto* law as applied to Bixler and affirm.

Bixler is serving a fifteen-year sentence for the offense of rape in the first degree. He committed the offense on May 30, 1993, but was not convicted until January 17, 2002. The substance of his allegation is that KRS 197.045(4) cannot be applied to him because he committed the sex offense prior to the statute's effective date.

The circuit court dismissed the petition for failure to state a claim upon which relief can be granted. Under CR 12.02(f), dismissal is appropriate when:

[I]t appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this 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?

*James v. Wilson*, 95 S.W.3d 875, 883-884 (Ky.App. 2002)(internal quotation and footnote omitted).

KRS 197.045(4) requires that an inmate who has not completed the sex offender treatment program (SOTP) “serve his or her entire sentence without benefit of sentencing credit, parole, or other form of early release.” Bixler contends that if applied to his offense prior to the statute's enactment, it is an unconstitutional *ex post facto* law.

The inmates in *Martin v. Chandler*, 122 S.W.3d 540 (Ky. 2003), and *Lozier v. Commonwealth*, 32 S.W.3d 511 (Ky.App. 2000), presented the same arguments now presented by Bixler and were rejected.

In *Martin*, the Court recognized that the United States and Kentucky Constitutions prohibit *ex post facto* laws and explained the basis of an *ex post facto* claim:

Although the Latin phrase ‘ex post facto’ literally encompasses any law passed ‘after the fact’ . . . ‘[i]t is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.’”

*Id.* at 546 (quoting *Collins v. Youngblood*, 497 U.S. at 41-42, 110 S.Ct. at 2718-2719, 111 L.Ed.2d at 38-39 (1990)).

As a preface to its discussion of the application of KRS 197.045(4) to an offense committed prior to its enactment, the court pointed out that parole is not a right but a privilege. *Id.* at 552. After a thorough analysis of United States Supreme Court decisions and of this state’s appellate court decisions, the Court held as follows:

Stated in the plainest terms, although KRS 197.045(4) has been applied retrospectively in Appellant's case, the statute's additional requirement for Appellant's eligibility to earn *discretionary* good time credits towards his sentence is not an “increase in punishment” prohibited by the Ex Post Facto Clause.

*Id.*

Bixler's assertions are identical to those presented in *Martin*.

Consequently, his petitions failed to state a claim upon which relief can be granted.

The orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James G. Bixler, *Pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Allison R. Brown  
Department of Corrections  
Frankfort, Kentucky