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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000018-MR

JAMES ELLIS LANG — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01356

LADONNA THOMPSON,
COMMISSIONER, KENTUCKY
DEPARTMENT OF CORRECTIONS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: James Ellis Lang appeals from a Franklin Circuit Court order dismissing his petition for a writ of mandamus. The writ sought to compel the Commissioner of the Department of Corrections to award Lang additional sentence credit for time spent on parole, to provide a "civics" program,

and to determine which other programs Lang could complete in order to earn additional sentence credit. We affirm.

FACTS

Since he was first incarcerated in 1983, Lang has had his parole revoked on six occasions, twice for committing new crimes and four times for technical parole violations. On May 3, 2011, while he was incarcerated at a halfway house in Louisville, he filed an administrative review form, claiming that he was entitled to additional sentence credit for those periods he had spent on parole preceding his return to custody for technical parole violations. He cited HB 406 (2008 Ky. Acts ch. 127) and the subsequent amendment of Kentucky Revised Statutes (KRS) 439.344 in support of his claim that time spent on parole must be credited toward a prisoner's sentence.

Lang received a letter from the Department of Corrections (DOC) Offender Information Services which informed him that HB 406, which had been applied retroactively, had expired and that the successive legislation, HB 372, was not retroactive. The letter explained that Lang would receive credit only for time he had spent on parole after June 25, 2009, the effective date of House Bill 372.

Lang also filed a Resident Grievance Form stating that amendments to KRS 197.045 made it mandatory for the DOC to determine which "other" treatment programs qualified for sentence credit. He further argued the same statute mandated the DOC to provide a "civics exam" which could enable him to earn additional non-discretionary sentence credits. The Administrative Branch Manager

replied that GED and college courses were the only recognized programs in a halfway house setting. Lang then sent a letter requesting review to the Commissioner of the DOC. According to Lang, there was no response.

On September 12, 2011, Lang filed a petition for writ of mandamus to compel the Commissioner of the DOC to direct her agents and/or employees to award him parole supervision credit, to provide a "civics exam," and to determine what "other" programs qualify for sentence credits. He also moved for an evidentiary hearing and for issuance of a summons for the Commissioner of the DOC and the Supervisor of Offender Information Services. The Commissioner filed a motion to dismiss the petition.

The circuit court entered an order finding the respondents had fulfilled their legal duty to evaluate Lang for sentence credit for the time spent on parole under KRS 439.344, they had fulfilled their legal duty to provide educational good time credit under KRS 197.045, and Lang had failed to meet the burden of proof for a writ of mandamus. The trial court dismissed the matter pursuant to Kentucky Rules of Civil Procedure (CR) 12.02 for failure to state a claim upon which relief can be granted. This appeal followed.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief may be granted is purely a question of law, and thus, we owe no deference to the trial court's determination; instead, we review the issue *de novo*. *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009) (citations omitted).

A writ of mandamus is "an extraordinary remedy which compels the performance of a ministerial act or mandatory duty where there is a clear legal right or no adequate remedy at law." *County of Harlan v. Appalachian Reg'l Healthcare, Inc.*, 85 S.W.3d 607, 613 (Ky. 2002). On appeal, the denial of a petition for writ of mandamus is reviewed for an abuse of discretion. *Owens v. Williams*, 955 S.W.2d 196, 197 (Ky. App. 1997).

ANALYSIS

As a preliminary matter, we address the appellee's contention that the trial court correctly dismissed the petition for writ of mandamus because the Commissioner's ministerial duty had been entirely discharged by the act of evaluating Lang for additional sentence credit. The Commissioner argues it is immaterial whether the decision not to award credit was correct or incorrect. We disagree.

The scope of the writ is not limited to determining whether the Commissioner evaluated Lang's request for review. *See e.g. Lemons v. Corrections Cabinet*, 712 S.W.2d 370, 372 (Ky.App. 1986) (Court of Appeals reversed an order denying a motion for writ of mandamus from an inmate alleging that the Cabinet had miscalculated his credit for jail time).

> An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. In some respects public officials must interpret the statutes imposing duties on them to form a judgment from the language of the statute as to what responsibilities are imposed. Such an intellectual activity

> does not make the duty of the officer anything other than a ministerial one.

County of Harlan, 85 S.W.3d at 613. The determination that Lang was not entitled to additional sentence credit for periods of parole prior to the enactment of Bill 372 involves precisely the type of statutory interpretation that falls within the Commissioner's ministerial duties.

Lang argues that under the terms of KRS 439.344, he is entitled to receive sentence credit for the time he spent on parole,[1] except for those periods of parole which ended in revocation for committing another crime. Lang contends that the DOC has denied him due process of law by crediting him only for the time he spent on his last reinstatement of parole. According to his resident record card, Lang's parole was last revoked on August 10, 2010.

In order to address this argument adequately, we must briefly summarize the pertinent recent history of KRS 439.344.

Prior to 2009, KRS 439.344 provided that "The period of time spent on parole shall **not** count as part of the prisoner's maximum sentence except in determining [a] parolee's eligibility for a final discharge from parole[.]" *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 159 (Ky. 2009) (emphasis added). In 2008, the Kentucky General Assembly enacted HB 406, which "drastically altered the law regarding whether time spent on parole would

[1] According to Lang, he should be credited for the following periods: May 14, 1992 to June 4, 1993; April 2, 1997 to January 22, 1998; January 24, 2002 to October 31, 2002 and December 13, 2007 to August 10, 2010, less any times spent while absconding from parole supervision.

count toward a prisoner's unexpired sentence[.]" *Id*. at 158. HB 406 essentially suspended the operation of KRS 439.344. It provided in pertinent part as follows:

> 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 subsection (5) of this section or when a parolee is returned as a parole violator for a violation other than a new felony conviction.

Id. at 159.

"Believing it to be in accordance with the General Assembly's intent, the DOC began applying HB 406 to award 'street credit' to prisoners for time spent on parole before HB 406's effective date." *Id*. In 2009, upon a challenge from the Attorney General, the Kentucky Supreme Court held that the General Assembly indeed intended the "street credit" provision to be applied retroactively to reduce inmates' sentences. *Id*. at 170.

On June 25, 2009, HB 372 (2009 Kentucky Laws Ch. 57) was enacted to amend KRS 439.344. It stated:

> The period of time spent on parole shall count as a part of the prisoner's sentence, except when a parolee is:
>
> (1) Returned to prison as a parole violator for a new felony conviction;
>
> (2) Classified as a violent offender pursuant to KRS 439.3401; or
>
> (3) A registered sex offender pursuant to KRS 17.500 to 17.580.

KRS 439.344, as amended again in 2010, currently provides as follows:

> The period of time spent on parole shall count as a part of the prisoner's sentence, except when a parolee is:
>
> (1) Returned to prison as a parole violator for a new felony conviction;
>
> (2) Returned to prison as a parole violator after charges have been filed or an indictment has been returned for a felony offense committed while on parole and the prisoner is subsequently convicted of that offense;
>
> (3) Returned to prison as a parole violator and is subsequently convicted of a felony offense committed while on parole;
>
> (4) Returned to prison as a parole violator for absconding from parole supervision, except that the time spent on parole prior to absconding shall count as part of the prisoner's sentence;
>
> (5) Returned to prison as a parole violator and it is subsequently determined that he or she owes restitution pursuant to KRS 439.563 and has an arrearage on that restitution. Any credit withheld pursuant to this subsection shall be reinstated when the arrearage is paid in full;
>
> (6) Classified as a violent offender pursuant to KRS 439.3401; or
>
> (7) A registered sex offender pursuant to KRS 17.500 to 17.580.

KRS 439.344.

The letter from the DOC addressing Lang's claim for additional sentence credit stated:

> Unlike House Bill 406, KRS 439.344 is not retroactive. Parole Violators having a final parole revocation hearing on or after June 25, 2009 . . . will receive credit for the current period of parole supervision only. You were a

> return parole violator on 8/10/2010 after HB 406 which was retroactive was expired and replaced by HB 372.

"No statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). There is no indication that the General Assembly intended HB 372 to be applied retroactively so as to award credit for time spent on parole before the effective date of the bill.

> We have held that retroactive application of statutes is improper unless the General Assembly "clearly manifests its intent" for the statute in question to have retroactive application. And although we have held that the General Assembly need not use "magic words" to evidence its intent for retroactive application, we have forcefully held that "there is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result."

Com. ex rel. Conway, 300 S.W.3d at 167 (internal citations omitted).

HB 372 was passed during the course of the court challenge to the retroactive application of HB 406. Had the General Assembly intended HB 372 to be applied retroactively, it would have included language to that effect in the text of the statute. Therefore, we agree with the Commissioner's conclusion that the statute is not to be applied retroactively.

As further grounds for denying Lang additional sentence credit for periods spent on parole, the Commissioner argues he is a violent offender and therefore automatically excluded under KRS 439.344(6). Lang was convicted of first-degree robbery in 1986. The term "violent offender" is defined by KRS 439.3401. Prior to 2002, commission of robbery in the first degree did not qualify a defendant as a

violent offender. "The provisions of subsection (1) of this section extending the definition of "violent offender" to persons convicted of or pleading guilty to robbery in the first degree shall apply only to persons whose crime was committed after July 15, 2002." KRS 439.3401(8). For purposes of KRS 439.344, therefore, Lang does not qualify as a violent offender.

As to Lang's other claims, that the Commissioner was required under KRS 197.045 to provide a "civics" program and to determine which "other" program he could complete in order to earn additional sentence credit, we note that he raised this matter by means of a resident grievance form instead of following the proper procedure.

The DOC Policy and Procedure (CPP) 14.6(C)(9) lists sentence calculation as a non-grievable issue. To raise such a claim, the inmate is required to follow the procedures outlined in CPP 17.4(1). This entails submitting a written request to the Jail Management section of the Offender Information Branch of the DOC. CPP 17.4(1).

KRS 454.415 states in relevant part that

> (1) No action shall be brought by or on behalf of an inmate, with respect to:
>
> . . . .
>
> (b) Challenges to a sentence calculation;
>
> (c) Challenges to custody credit;
>
> . . . .

> until administrative remedies as set forth in the policies and procedures of the Department of Corrections, county jail, or other local or regional correctional facility are exhausted.
>
> (2) Administrative remedies shall be exhausted even if the remedy the inmate seeks is unavailable.
>
> (3) The inmate shall attach to any complaint filed documents verifying that administrative remedies have been exhausted.
>
> (4) A court shall dismiss a civil action brought by an inmate for any of the reasons set out in subsection (1) of this section if the inmate has not exhausted administrative remedies[.]

Because Lang failed to exhaust his administrative remedies, the Franklin Circuit Court was bound by KRS 454.415(4) to dismiss his claims regarding KRS 197.045.

Finally, Lang argues that he was entitled to a hearing under CR 12.04, which states: "The defenses and relief enumerated in Rules 12.02 and 12.03, whether made in a pleading or by motion, shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination thereof be deferred until the trial."

CR 61.01 provides that

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the

> proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Because Lang's claims involved a question of statutory interpretation that could be resolved from the record before the court, the failure to hold a hearing was at most a harmless error that did not affect Lang's substantial rights.

CONCLUSION

The order dismissing the petition is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Ellis Lang, *Pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

John Marcus Jones
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