

RENDERED: OCTOBER 10, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001435-MR

MALCOLM CROSBY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 13-CI-00517

KENTUCKY DEPARTMENT OF  
CORRECTIONS; LADONNA THOMPSON,  
COMMISSIONER; ANDREA M. BENTLEY,  
OFFENDER RECORDS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Malcolm Crosby, appeals the May 20, 2013, order of the Franklin Circuit Court dismissing his Declaration of Rights petition, and finding that Crosby was not eligible for additional sentence credit for time spent on parole, and was properly denied such credit by the Appellee,

Kentucky Department of Corrections, et. al. (hereinafter “DOC”). Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Crosby is incarcerated with the Kentucky Department of Corrections system, serving a number of felony sentences. Crosby was granted parole on his sentences on three separate occasions, the first being on November 27, 2001. That period of parole was revoked on September 8, 2005, for technical violations. Regardless, during his period of release Crosby acquired additional criminal charges and subsequently entered a plea of guilty to a charge concerning a felony committed while on parole.

Crosby was again granted parole on July 23, 2007. He was returned to prison on March 3, 2010, again for a technical violation. He was then subsequently convicted of a number of felony offenses which were committed while he was on that period of parole. Crosby entered guilty pleas to each of those indictments, and was sentenced to the additional felony sentences after his parole revocation in January of 2012.

Crosby submitted requests with the DOC for credit against his sentence for the time he spent on parole. He requested credit for the time he spent on parole from November 2001 to September 2005. The DOC denied the request, noting that the law in effect during the time did not allow credit for time spent on parole. The response noted that the law did not allow credit for a parolee returned for a new felony conviction. The response also noted that the 2009 change in the law was not retroactive and therefore did not apply to his case.

Crosby also requested parole sentence credit under House Bill 406 for the time he spent on parole. The response from the DOC notified Crosby that HB 406 was effective from April 1, 2008, to June 24, 2009, when it was replaced. Crosby was on parole serving his second period of parole when the bill became effective and was not returned to the custody of the Commonwealth until after it was revoked. The DOC informed Crosby that he was not entitled to credit under the bill because he was in custody during the time the law was in effect. Another response from the DOC notified Crosby that HB 406 did not apply to any of his parole periods. The notice stated that the reason credit was denied was because Crosby had been subsequently convicted of felony offenses which he committed during the two terms of parole.

Crosby was also considered for parole sentence credit under HB 564 for the time he spent on parole. Crosby was notified that his parole revocation hearing did not take place until August 11, 2011, so his cases fell under the provisions of HB 564, which had replaced HB 406. The DOC notified Crosby that HB 564 required that credit be denied when a parolee is subsequently convicted of a felony committed while on parole. The DOC found that Crosby must be denied credit for his time on parole because of his subsequent felony convictions.

Crosby filed a petition with Franklin Circuit Court to seek judicial review of the sentence credit denials. The Franklin Circuit Court reviewed the record and upheld the decision. The circuit court denied the petition and the relief

requested, finding that the petition failed to state a claim upon which relief could be granted. It is from that order that Crosby now appeals to this Court.

In addressing Crosby's arguments on appeal, we note that while he spent three separate periods of time on parole, he acknowledges that he is not entitled to sentence credit for the third period. Accordingly, we address his arguments with respect to the first two periods of time during which he was paroled.

On appeal, Crosby argues that the court below erred when it failed to consider the information presented in his answer to the response of the DOC, that it failed to provide requested findings of fact and conclusions of law to clarify the issue, and that the court misinterpreted and misapplied the law in declining to grant his request for credit.

In response, the DOC argues that the court below did not err in denying Crosby's request. The DOC asserts that the record clearly indicates that Crosby spent three periods of time on parole, and that he committed felony offenses during both of the first two times on parole for which he is now claiming entitlement to credit. As noted, Crosby was convicted after his revocations. The Commonwealth asserts that Crosby does not qualify for parole time sentence credit under present law, or under the law in effect at the time of his revocations. Upon review of the record and applicable law, we agree.

It is clear from the record that Crosby committed and was indicted for a felony offense during both of the parole terms at issue. He did not enter a plea of

guilty and was not sentenced to those felony offenses until after his revocation hearing for all three parole terms. The current version of Kentucky Revised Statutes (KRS) 439.344 states that:

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.

Thus, according to the clear language of the statute, awarding sentence credit for parole time for parolees who are returned to prison and subsequently convicted for felony offenses committed while on parole is prohibited. Therefore, Crosby does not qualify for parole credit under present law.

Further, we are in agreement with the DOC that Crosby did not qualify for parole credit under the law in effect at the time of his revocations. Crosby was returned to prison after his first time on parole on September 8, 2005. However, he was convicted of a felony offense committed during parole after the revocation hearing. As our Kentucky Supreme Court had held, a parole violator who subsequently committed and was convicted of other felonies could not get sentence credit under the law. *Stokes v. Howard*, 450 S.W.2d 520 (Ky. App. 1970). That decision was controlling at the time that Crosby was returned to prison and convicted of the felony committed during his first period on parole. Thus, the circuit court followed the law in effect at the time of the revocation, and did not err in finding that the denial of sentence credit was appropriate.

As noted, Crosby returned to prison after his second time on parole in March of 2010. The court below was correct in finding that Crosby was not permitted parole sentence credit under the law in effect at that time. The amendment to KRS 439.344 that went into effect in 2009 was noted in *Hill v. Thompson*, 297 S.W.3d 892, 895 (Ky. App. 2009), wherein the amended version of the statute was found to deny parole sentence credit to prisoners who had committed felony offenses on parole and were subsequently convicted after their revocation hearings. Therein, this Court concluded that the General Assembly had intended to create an incentive for parolees to follow the law while on parole. We rejected the literal interpretation requested by the petitioner, finding that it would lead to situations, “where a lifelong perpetual criminal is receiving credit for time

spent while out on the streets, even when committing new felonies and abusing all aspects of our justice system.” *Id.*

We find that the court below correctly found that HB 406 did not apply to Crosby. The DOC noted that Crosby did not actually receive a parole revocation hearing until August of 2011 because he was not returned to the custody of the Commonwealth until that time. By that date, HB 406 had been repealed by HB 564, and the current version of KRS 439.344 had become effective. Thus, Crosby did not qualify for parole credit under the law as it existed at the time of his second revocation.

Wherefore, for the foregoing reasons, we hereby affirm the May 20, 2013, order of the Franklin Circuit Court, denying Crosby’s petition.

ALL CONCUR.

BRIEF FOR APPELLANT:

Malcolm Crosby, Pro Se  
Burgin, Kentucky

BRIEF FOR APPELLEES:

John Marcus Jones  
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