

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000440-MR

JAMES SAVAGE

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 13-CI-00501

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, James Savage, appeals the February 14, 2014, order of the Muhlenberg Circuit Court, dismissing his petition for declaration of rights regarding his parole eligibility. The court dismissed for failure to state a claim upon which relief may be granted. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

The underlying facts in this case are not in dispute. Savage is currently serving both consecutive and concurrent felony prison sentences with the Kentucky Department of Corrections ("DOC"). One of the sentences is for ten years due to a plea of guilty on escape second degree.¹ On July 8, 2013, Savage filed a request for review of his sentence calculation and parole eligibility date with the offender information office of his institution. In response, the DOC informed Savage that his total parole eligibility was calculated by adding the two years for his escape sentence to the parole eligibility date for his other sentences, pursuant to the regulations of the Parole Board.

Savage then sought judicial review alleging that he was not informed prior to entering his plea that a different parole eligibility date would be carved out on his escape charge when he pled guilty. The Commonwealth filed a response and motion to dismiss Savage's complaint for failure to state a claim upon which relief can be granted, pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f). On February 14, 2014, the Muhlenberg Circuit Court granted the Commonwealth's motion, finding that 501 KAR 1:030 required the parole eligibility date for Savage's sentence for escape to be added to the parole eligibility dates for his other sentences for purpose of calculating parole eligibility. Accordingly, the court dismissed Savage's claim. This appeal followed.

¹ His other convictions include robbery in the first degree, persistent felony offender in the first degree, and possession of a firearm by a convicted felon, for which he is serving twenty years imprisonment.

On appeal, Savage argues: (1) That the trial court abused its discretion when it failed to order the DOC to correct his parole eligibility dates; and (2) the Appellees violated separation of government powers when the Parole Board added more time to his parole eligibility than what he initially agreed upon in his guilty plea, which he asserts is an ex post facto violation.

In response, the Commonwealth argues: (1) The Muhlenberg Circuit Court did not abuse its discretion when it held that the parole board regulations require adding the parole eligibility date for an escape sentence to a total parole eligibility date; and (2) the Appellees did not violate separation of powers or the Constitution when they followed the parole board regulations.

On appeal, Savage contends that his original plea agreement was for 20 combined years for all of his charges and that he was not made aware that the parole board could alter this date. In response, the Commonwealth maintains that Savage was informed that the total parole eligibility date would be calculated pursuant to the regulations of the parole board, which required that his total parole eligibility be calculated by adding two years for his escape sentence to the eligibility date for his other sentences. Further, the Commonwealth argues the Kentucky Parole Board has discretion over decisions regarding inmate eligibility for release on parole; thus there is no violation of separation of powers.

At the outset, we note that the standard of review that should be applied is whether there has been an abuse of that discretion by the trial court. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). The test for abuse of

discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. 5 Am.Jur.2d *Appellate Review* § 695 (1995); cf. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*. *Littleton v. Plybon*, 395 S.W.3d 505 (Ky. App. 2012).

As his first basis of appeal, Savage states that the trial court abused its discretion when they dismissed his petition for failure to state a claim. Upon a request to dismiss a petition for failure to state a claim, the court should not grant the motion unless it appears the pleading party would not be entitled to relief under set of facts which could be proved in support of his claim. *Pari–Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

The record is clear that Savage's parole eligibility date was properly calculated based on his criminal offenses. The Kentucky Parole Board is authorized by the General Assembly² to set the standards for parole eligibility. The regulations issued pursuant to that authority state that a sentence for escape must be added to a total sentence for purposes of calculating parole eligibility. 501 KAR 1:030 §3(4)(a). The regulation applies regardless of whether the escape sentence is ordered to run concurrently or consecutively. 501 KAR 1:030 §3(4).

² 501 KAR 1:030 is the administrative regulation establishing the criteria for determining parole eligibility. It gains statutory authority from KRS 439.340(3) which requires the Kentucky Parole Board to promulgate administrative regulations with respect to eligibility of prisoners for parole.

We find that the trial court did not abuse its discretion in denying the Appellant's petition for failure to state a claim. Accordingly, we decline to reverse on this basis.

Lastly, Savage argues that the Appellees violated separation of powers when the Parole Board added more time to his parole eligibility than what he initially agreed upon in his guilty plea, which he asserts is an ex post facto violation. Again, we disagree.

"[T]he ex post facto prohibition . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Martin v. Chandler*, 122 S.W.3d 540, 549 (Ky. 2003). While retroactive changes in the law governing parole might violate the ex post facto clause, the language contained in 501 KAR 1:030 Section 3(4)(a) has been present in the regulation since 2001. Therefore, the parole eligibility calculations were in effect at the time of the appellant's conviction and thus do not create an ex post facto violation. *Martin v. Chandler*, 122 S.W.3d at 549 (Ky. 2003). Accordingly, we decline to reverse on this ground.

Finding no error, we affirm the Muhlenberg Circuit Court.

ALL CONCUR.

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