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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001364-MR

LARRY CRUMP — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 15-CI-00497

LADONNA THOMPSON,
COMMISSIONER OF DEPARTMENT OF
CORRECTIONS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Larry Crump appeals from a Franklin Circuit Court order dismissing his petition for declaratory and injunctive relief in which he argued that the Department of Corrections misinterpreted 501 Kentucky Administrative Regulations (KAR) 1:030 in calculating his parole eligibility. We affirm.

After escaping from the custody of the DOC, Crump was apprehended and charged in Floyd Circuit Court with second-degree escape and several other charges. He entered a plea of guilty to the second-degree escape charge, enhanced by a first-degree PFO charge for a ten-year sentence. He also entered a plea of guilty to eight Class D felonies, receiving a sentence of five years for each. The sentences were all designated to run concurrently, for a total sentence of ten years (in addition to the original sentence for which he had been incarcerated when he escaped).

Crump's individual convictions are all 20 percent parole eligible, but the escape conviction triggered the application of 501 KAR 1:030 Section 3(4). This regulation governs parole review for crimes committed while in an institution or while on escape. The pertinent parts of the regulation provide as follows:

> (4) Parole review for crimes committed . . . while on escape. If an inmate commits a crime . . . while on an escape and receives a concurrent or consecutive sentence for this crime, eligibility time towards parole consideration on the latter sentence shall not begin to accrue until he becomes eligible for parole on his original sentence. This shall include a life sentence.
>
> (a) Except as provided by paragraph (b) of this subsection, in determining parole eligibility for an inmate who receives a sentence for an escape, . . . or on a sentence for a crime committed while on an escape, **the total parole eligibility shall be set by adding the following, regardless of whether the sentences are ordered to run concurrently or consecutively**:
>
> 1. The amount of time to be served for parole eligibility on the original sentence;

> 2. If the inmate has an additional sentence for escape, the amount of time to be served for parole eligibility on the additional sentence for the escape;
>
> . . . and
>
> 4. If the inmate has an additional sentence for a crime committed while on escape, the amount of time to be served for parole eligibility on the additional sentence for the crime committed while on escape.

501 KAR 1:030 (emphasis supplied).

The DOC calculated Crump's new parole eligibility date by adding together 20 percent of his ten-year sentence for escape (2 years), plus 20 percent of each of his eight five-year sentences (1 year each), regardless of whether the sentences were run concurrently or consecutively under the final judgment. Thus, while Crump claimed that he expected to add only two years (20 percent of the total concurrent 10-year sentence) of additional time before he became eligible for parole, the calculations by the DOC added ten years.

Crump filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging that his counsel was ineffective for advising him that his parole eligibility would be 20 percent of his total sentence under the plea agreement. The Commonwealth reached a resolution with Crump to reduce his eight 5-year sentences to eight 1-year sentences. According to Crump, he believed that this agreement would result in his parole eligibility being calculated on an aggregate sentence of 18 years (3.6 years before parole eligibility).

After entering into the new agreement, Crump learned that the DOC would treat his sentences in the same manner as before. Under the table found in 501 KAR 1:030 Sec. 3, the parole eligibility for a 1-year sentence is 4 months, which is greater than 20 percent of one year, which is approximately 2.4 months. Consequently, Crump is subject to 4.6 additional years before parole eligibility (20 percent of ten years which is two years, plus eight 4-month periods).

Crump filed a grievance with the DOC which was denied. He then filed a declaratory judgment action in Franklin Circuit Court which was denied for failure to state a claim upon which relief may be granted. This appeal followed.

When considering a motion to dismiss, "the allegations contained in the pleading are to be treated as true and must be construed in a light most favorable to the pleading party. The test is whether the pleading sets forth any set of facts which—if proven—would entitle the party to relief. Since the trial court is not required to make factual findings, the determination is purely a matter of law. Consequently, we review the decision of the trial court de novo." *Mitchell v. Coldstream Labs., Inc*., 337 S.W.3d 642, 644-45 (Ky. App. 2010) (internal citations omitted).

Crump argues that his individual sentences should not count individually and consecutively towards the total sentence for purposes of calculating parole eligibility, but should be treated concurrently. He contends that the phrase in section (4)(a) of 501 KAR 1:030, "regardless of whether the sentences are ordered to run concurrently or consecutively," refers to the enumerated categories that

follow, not to the individual sentences within the category of subsection (4.) He contends that it is the categories of sentences that must be considered consecutively, not each component sentence within those categories. He contends that the DOC's interpretation is inconsistent with its treatment of the original sentences, which are not "unpacked."

In our view, the DOC's calculation of parole eligibility is supported by the plain language of the regulation which states that "the total parole eligibility shall be set by adding the following, regardless of whether the sentences are ordered to run concurrently or consecutively[.]" The fact that Crump is serving the sentences concurrently is irrelevant to this calculation. The language of subsection (4.) refers only to an individual additional sentence, with no provision for multiple sentences being run concurrently.

Crump further argues that the DOC's treatment of the eight 1-year sentences individually for purposes of calculating his parole eligibility, instead of aggregating them into one 8-year sentence, is contrary to the manner in which sentences are treated elsewhere in our criminal code. He argues that, at the very least, his1-year sentences should be treated as part of an 18-year aggregate sentence, with each 1-year sentence adding only 20 percent of one year. He contends that to do otherwise is nonsensical, because it results in different parole eligibility times between an inmate serving a single 8-year sentence (20 percent of 8 years equaling 1.6 years before parole eligibility) and an inmate serving eight 1-year sentences (8 times 4 months, or 2.6 years before parole eligibility). This

outcome is not necessarily "nonsensical" because it reflects the fact that the latter inmate committed many more offenses, albeit less serious ones, while he or she was on escape or in an institution. Furthermore, this result is a function of the requirement that the 20 percent rule does not apply to sentences of one year under 501 KAR 1:030 Sec. 3. An inmate serving a two-year sentence is parole eligible after 4 months, for example, the same as an inmate serving only one year. There is no statute or regulation requiring the sentences to be treated in the aggregate for purposes of calculating parole eligibility.

Crump contends that the same rules apply to the construction of a regulation as apply to the construction of a statute, and that the canons of construction demonstrate that the DOC's interpretation is ambiguous and invalid, in which case the rule of lenity is applied. We do not detect any ambiguity in the DOC's interpretation. In any event, an administrative body's construction of its own regulation is controlling, particularly when that construction is longstanding and consistent. *McCreary County Bd. of Educ. v. Begley*, 89 S.W. 3d 417, 421 (Ky. 2002).

Crump's parole eligibility was calculated in exactly the same manner before and after his new plea agreement. The DOC's interpretation of the regulation has been consistent throughout these proceedings and will not be disturbed on appeal.

The order dismissing the petition is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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