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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001009-MR

SAMUEL MCCULLUM — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-01069

RODNEY BALLARD, COMMISSIONER,
KENTUCKY DEPARTMENT OF CORRECTIONS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Samuel McCullum, *pro se*, appeals the Franklin Circuit Court's order entered June 5, 2018, dismissing his petition for declaration of rights. After careful review of the record, briefs, and applicable law, we affirm.

On May 19, 2002, in Louisville, Kentucky, McCullum was arrested for offenses allegedly committed that day, including three counts of rape in the

first degree[1] and one count each of sodomy in the first degree,[2] unlawful imprisonment in the first degree,[3] and possession of a firearm by a convicted felon.[4] On November 14, 2003, following a trial by jury in the Jefferson Circuit Court, Case No. 02-CR-01234, McCullum was acquitted of the rape charges but convicted of sodomy, unlawful imprisonment, and possession of a handgun by a convicted felon, and sentenced to twenty, five, and ten years' imprisonment, respectively, to run consecutively, for a total of thirty-five years in prison. McCullum appealed.

In 2005, during the pendency of his Kentucky appeal, North Carolina lodged a detainer against McCullum for its Case No. 03-CRS-064792 in which McCullum was charged, and later convicted, of second-degree forcible rape perpetrated on October 9, 1995. McCullum unsuccessfully challenged extradition, which took place in January 2006. In February 2006, the Supreme Court of Kentucky, in *McCullum v. Commonwealth*, 2003-SC-001009-MR, 2006 WL 436107 (Ky. Feb. 23, 2006),[5] reversed and remanded McCullum's convictions of

[1] Kentucky Revised Statutes ("KRS") 510.040, a Class B felony.

[2] KRS 510.070, a Class B felony.

[3] KRS 509.020, a Class D felony.

[4] KRS 527.040, a Class C felony.

[5] This Opinion became final on March 16, 2006.

sodomy and unlawful imprisonment but affirmed his conviction and ten-year prison sentence for possession of a firearm by a convicted felon. On June 8, 2007, McCullum entered an *Alford*[6] plea in his North Carolina case and was sentenced to eighty to one hundred and five months' imprisonment to run concurrently with his Kentucky sentence.

Afterward, in June 2007, McCullum was returned to Kentucky custody. McCullum remained incarcerated at Kentucky's Northpoint Training Center serving his sentence for possession of a handgun by a convicted felon until his discharge under an "Administrative Release" to the Jefferson County Detention Center on October 1, 2008, pending new trial for the sodomy and unlawful imprisonment charges. However, on April 10, 2009, those charges were dismissed without prejudice.

On April 22, 2009, McCullum was extradited to Georgia for charges in Case No. 07-CR-2158, including rape in the first degree; however, Georgia then declined to prosecute its charges against McCullum. Meanwhile, back in Kentucky—while McCullum was still imprisoned in Georgia—McCullum was indicted in Jefferson Circuit Court Case No. 11-CR-02223 on July 21, 2011, for one count each of sodomy and unlawful imprisonment for his actions constituting

[6] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

the offenses previously remanded and dismissed in Case No. 02-CR-01234, as well as an additional charge for being a persistent felony offender in the first degree ("PFO I").[7]

On November 2, 2011, McCullum was extradited back to Kentucky. On January 9, 2012, North Carolina requested a detainer to be lodged against McCullum listing the projected release date from his North Carolina sentence as October 9, 2014, and the date eligible for post-release supervision as January 12, 2014. No response to that request is contained within the record on appeal; however, it appears that McCullum was imprisoned from the date of the request until well after the dates North Carolina projected for release.

On February 25, 2013, McCullum entered an *Alford* plea in Jefferson Circuit Court Case No. 11-CR-02223. Following a jury trial, the PFO I charge was dismissed, and McCullum was sentenced to ten years' imprisonment for sodomy and five years for unlawful imprisonment, with terms to run concurrently, for a total of ten years in prison. On December 5, 2013, while McCullum was incarcerated and serving time on his second Kentucky sentence, Georgia placed a detainer on McCullum for its Case No. 07-CR-2158, alleging rape in the first degree.

[7] KRS 532.080(3).

On or about July 12, 2016, also during his incarceration for his second Kentucky sentence, McCullum requested a review of information from Kentucky's Department of Corrections ("DOC"), via a form citing Corrections Policies and Procedures ("CPP") 17.4, to determine how much credit for pre-sentence time in custody he was entitled to, as well as the date of expiration of his sentence. The DOC responded on or about July 27, 2016, that McCullum received 2,188[8] days of jail credit for time served and "also for the time that [McCullum was] incarcerated on 02CR01234." Being unsatisfied with this response, McCullum appealed.

On or about October 21, 2016, McCullum received a memorandum from an offender information specialist which advised that a recent review of his file revealed an error in calculation of jail credit for time served—namely, the previous "credit" from sentencing to finality of appeal in 02-CR-01234 was duplicative of time served on that sentence, meaning his jail credit for 11-CR-02223 was only 1,334 days. On October 26, 2016, McCullum again requested a review of his sentence calculation utilizing the same form and attaching a copy of his DOC resident record card. In its response, the DOC replied that information

[8] This calculation included credit for 545 days from McCullum's initial arrest until final sentencing in 02-CR-01234, 853 days from sentencing until finality of his appeal in 02-CR-01234, 204 days from expiration of his ten-year sentence for possession of a handgun by a felon until the remanded charges for sodomy and unlawful imprisonment were dropped in 02-CR-01234, and 586 days from re-indictment until McCullum's entry of guilty plea and imposition of the ten-year sentence in 11-CR-02223.

contained in McCullum's unofficial resident record card is not subject to the administrative remedies process defined by CPP 17.4. Also unsatisfied with this response, McCullum again appealed. There is no further evidence of record that McCullum sought or received any other administrative or judicial relief prior to his release from confinement in Kentucky. McCullum was ultimately released—under a post-incarceration supervision period of Sex Offender Conditional Discharge ("SOCD") as required by KRS 532.043(2)—to Georgia pursuant to its detainer on February 9, 2017.

In October 2017, McCullum petitioned Kentucky's Franklin Circuit Court for a declaration of rights concerning Kentucky DOC's calculation of pre-conviction custody credit for his sentence under 11-CR-02223. His two arguments were: (1) he was unlawfully imprisoned beyond the imposed limit of judgment in 11-CR-02223 of ten years; and (2) he is entitled to credit for time spent in the custody of a foreign jurisdiction. The DOC responded with a motion to dismiss McCullum's petition for failure to state a claim upon which relief may be granted under CR[9] 12.02(f). McCullum replied, but the trial court granted the DOC's motion, dismissing McCullum's petition. This appeal followed.

McCullum presents two basic arguments on appeal: (1) the trial court erred by relying upon erroneous facts in drawing its legal conclusions; and (2) the

[9] Kentucky Rules of Civil Procedure.

trial court erred by relying upon inapplicable law in reaching its legal conclusions. In both arguments, McCullum contends that the trial court erred in granting the motion to dismiss his petition for declaration of rights.

The standard of review for a grant of a motion to dismiss for failure to state a claim upon which relief may be granted is well-settled.

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? 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*.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (internal quotation marks and citations omitted).

We first address McCullum's argument that the trial court erred by relying upon erroneous facts. He proffers four allegedly "erroneous" facts, claiming that the trial court's reliance upon each led to its improper dismissal of his petition.

The first "erroneous" fact McCullum reports is the trial court's statement that McCullum "spent time incarcerated in North Carolina between 2008 and 2013." Our review of the limited record before us supports McCullum's

contention that following his June 2007 return to Kentucky, he has not served time physically imprisoned in North Carolina, despite its request for detainer on January 9, 2012. McCullum completed his sentence in Kentucky for Case No. 02-CR-01234 in 2008 and was held pending trial as a Kentucky prisoner until the remaining charges were dismissed without prejudice in 2009. At that time, he was extradited to Georgia until his re-indictment in Kentucky in 2011. McCullum was then returned to Kentucky custody pending trial and entry of his *Alford* plea and sentence in Case No. 11-CR-02223 on February 25, 2013. McCullum was released under post-incarceration supervision and detainer to Georgia at the expiration of that sentence term in 2017. Nevertheless, for reasons discussed below, it matters not that the trial court misstated McCullum's physical whereabouts from 2008 to 2013, because the analysis remains the same when applied to the correct facts.

The second allegedly "erroneous" fact in the trial court's order was that McCullum "received 20-years total maximum time to serve." However, this factual finding is correct. McCullum was sentenced to *and served* a ten-year prison term—designated as *consecutive* to the other terms contained in the original judgment—for possession of a handgun by a convicted felon in Case No. 02-CR-01234 *before* being sentenced to ten years' imprisonment for sodomy and unlawful imprisonment in Case No. 11-CR-02223. The remaining maximum sentence of ten years in Case No. 02-CR-01234 followed by another maximum sentence of ten

years in Case No. 11-CR-02223 totals twenty years maximum on the two sentences. McCullum's contention that his sentence for sodomy and unlawful imprisonment should, or even could, run concurrently with his sentence for possession of a handgun by a felon is supported by neither fact nor law.

The judgment of conviction and sentence in Case No. 11-CR-02223 was entered March 12, 2013, well after McCullum had been discharged from serving his sentence in 02-CR-01234; therefore, it is neither possible nor conceivable that the court would order the sentence in Case No. 11-CR-02223 to run concurrently with the expired sentence in 02-CR-01234. Even McCullum recognizes that a judge "cannot order a sentence to run either concurrently or consecutively to a non-existent term." *Taylor v. Sawyer*, 284 F.3d 1143, 1148 (9th Cir. 2002), *abrogated on other grounds by Setser v. United States*, 566 U.S. 231, 132 S. Ct. 1463, 182 L. Ed. 2d 455 (2012). In its order, the trial court listed the recommended sentences for each of the three counts brought in Case No. 11-CR-02223, also stating, "[t]hese sentences are to run **concurrent** for a total of ***ten (10) years* to serve**." No mention of any other sentences or convictions is made in the order. Likewise, McCullum's argument that the term "consecutive," contained in his original sentences on the three charges, was somehow voided is moot as he had served out his sentence for possession of a handgun by a felon prior to pleading

guilty and being sentenced for sodomy and unlawful imprisonment in Case No. 11-CR-02223.

The third "erroneous" fact proffered by McCullum is the trial court's statement that he is "no longer incarcerated in Kentucky." McCullum admits he was released from the Kentucky DOC's custody on February 9, 2017, on SOCD. The trial court's judgment of conviction and sentence specifically stated that, pursuant to the requirements of KRS 532.043, McCullum shall be subject to a period of post-incarceration supervision following release from incarceration upon expiration of sentence or completion of parole. This is precisely what happened. After completion of his Kentucky prison sentences, McCullum was no longer incarcerated in Kentucky but, rather, he was released under post-incarceration supervision while simultaneously extradited to Georgia per its request.

The fourth "erroneous" fact alleged is the trial court's assertion that McCullum requests "credit for nearly four (4) years that he served in the state." McCullum counters that his "request has always been that he be credited with all the time spent under the jurisdiction and control of an active judgment administered by the state of Kentucky, after the application of the appropriate precedents, laws of the Commonwealth, and the United States Constitution from the alleged occurrence date of the offenses and arrest of [McCullum] (May 19, 2002); this would total nearly 15 years in custody, and under judgments."

Considering our holding, discussed below, the amount of time for which McCullum requests credit is inconsequential.

McCullum cites *Walters v. Moore*, 121 S.W.3d 210, 215 (Ky. App. 2003), to support his contention that a "court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." However, none of the "clearly erroneous findings of fact" McCullum discusses are material facts affecting McCullum's substantial rights. As such, they fall under RCr[10] 9.24 as harmless error, which states:

> 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 it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

We next address McCullum's argument that the trial court erred by relying upon inapplicable holdings to reach its conclusion to dismiss his petition for declaration of rights. McCullum presents three theories of trial court error in its legal analysis and subsequent conclusions of law.

[10] Kentucky Rules of Criminal Procedure.

First, McCullum contends that the trial court's reliance on *Kassulke v. Briscoe-Wade*, 105 S.W.3d 403 (Ky. 2003), regarding Kentucky prison sentence credit for his time served imprisoned in foreign jurisdictions is misplaced. McCullum claims that *Kassulke* bears no factual similarity to any issue in his case because it dealt with parole status. This, as well as the rest of McCullum's argument, is simply another red herring. The trial court's citation to *Kassulke* merely bolsters, and is not decisive of, the critical legal analysis required for disposition of the instant action.

Although it appears that McCullum is correct in his assertion that at no time was he granted parole from either Kentucky sentence, it is equally apparent that he fulfilled both Kentucky prison sentences before he was extradited to Georgia on February 9, 2017, under SOCD. Particularly, considering both Kentucky sentences were discharged before McCullum initiated his action, it is unclear why McCullum petitioned the Franklin Circuit Court requesting credit for time served in a foreign jurisdiction.

Furthermore, review of the record demonstrates that McCullum was, in fact, given credit for all eligible time in custody of other jurisdictions. During his first Kentucky prison sentence, McCullum served time: in Kentucky from his initial arrest on May 19, 2002, until his extradition in January 2006; *in North Carolina* from January 2006 through June 2007; and again in Kentucky from June

2007 until his administrative discharge on October 1, 2008.[11] For his second Kentucky prison sentence, McCullum was credited with time served: in Kentucky from May 19, 2002, until his conviction on November 14, 2003; in Kentucky following an administrative release after the completion of his first sentence on October 1, 2008, through April 10, 2009, when the charges were dismissed; *in Georgia* from his re-indictment on July 21, 2011, until his extradition to Kentucky on November 2, 2011; and in Kentucky from his return on November 2, 2011, through his *Alford* plea, conviction, and sentencing on February 25, 2013, until his release to Georgia on SOCD on February 9, 2017.[12]

In either event, McCullum failed to present a claim to the Franklin Circuit Court upon which relief may be granted. Therefore, the trial court's decision to dismiss his petition was not erroneous.

Second, McCullum takes issue with the trial court's conclusion that he is not entitled to have jail credit applied to his Georgia sentence for time served in Kentucky or North Carolina, as a matter of Georgia's sovereign discretion. Specifically, McCullum asserts that he is not serving a sentence in Georgia and surmises that the trial court's language in this part of its order is tantamount to a typographical error. McCullum then presents an argument as to his interpretation

[11] This is approximately equal to 2,328 days or six years, four months, and thirteen days.

[12] This is approximately equal to 2,768 days or seven years, six months, and twenty-seven days.

of how the trial court's order would read had the names of the sovereigns simply been transposed, reflecting McCullum's request that he be credited time on his Kentucky sentences for time served in foreign jurisdictions rather than a request that he be credited time on a non-existent Georgia sentence. Thus, this second argument is largely a rehash of the first and fails for similar reasons. As such, no further discussion on this argument is warranted.

Third, McCullum takes issue with the trial court's conclusion that although McCullum asserts that he is entitled to equal credit against his second Kentucky sentence imposed in 2013, he cannot accumulate jail credit for sentences that have yet to be delivered. McCullum was discharged from his first Kentucky sentence on October 1, 2008. He was given credit on his second Kentucky sentence from the date of his arrest through his first conviction, from the date of discharge from his first Kentucky sentence through the dismissal of the charges in the second sentence, and from the date of re-indictment through discharge from his second Kentucky sentence. For the reasons discussed below, McCullum was not entitled to more.

In his argument McCullum cites KRS 197.035(2), which provides:

> If the ***additional*** sentence is designated to be served concurrently, or the commitment is silent, he shall be considered as having started to serve said sentence on the day he was committed on the first sentence.

(Emphasis added.) McCullum attempts to sidestep the fact that he was no longer serving a term of imprisonment under his first Kentucky judgment—which had been discharged—when he was sentenced to the terms of imprisonment on his second Kentucky judgment. Because his first Kentucky sentence had been discharged prior to imposition of the second Kentucky sentence, there was no sentence to be added to; therefore, the sentence terms of the second Kentucky judgment were not "additional" to the terms of the first Kentucky sentence as intended by this statute. As noted previously, even McCullum recognizes that a judge "cannot order a sentence to run either concurrently or consecutively to a non-existent term." *Taylor*, 284 F.3d at 1148.

McCullum also cites KRS 197.041, which provides:

> If a defendant is confined in the penitentiary during the pendency of an appeal and, on reversal, is again convicted, he shall be given credit for the period so confined in determining his date of eligibility for parole and his date of release by expiration of sentence.

According to the DOC's records, McCullum *was* credited with prison time served pursuant to this statute. However, as previously discussed at length, because the second Kentucky judgment of conviction and sentence was not entered until after McCullum had served his first Kentucky sentence, it was not possible for the two sentences to run concurrently. Review of McCullum's first judgment of conviction and sentence, which required the prison terms for the offenses to run *consecutively*,

further shows that McCullum was not entitled to duplicative credit for time served on his second Kentucky sentence from his first Kentucky sentence. To award McCullum additional custody credit on the second sentence from time served for the first would constitute a double award for which there is no legal authority.

McCullum further cites to KRS 532.120(3) and KRS 532.120(4), which provide:

> (3) ***Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence*** shall be credited by the [DOC] toward service of the maximum term of imprisonment in cases involving a felony sentence and by the sentencing court in all other cases. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.
>
> (4) If a person has been in custody due to a charge that culminated in a dismissal, acquittal, or other disposition not amounting to a conviction, ***the amount of time that would have been credited under subsection (3) of this section if the defendant had been convicted of that charge shall be credited as provided in subsection (3) of this section*** against any sentence based on a charge for which a warrant or commitment was lodged during the pendency of that custody.

(Emphasis added.) These provisions further support the DOC's calculation of McCullum's credit for time served, as discussed above. Accordingly, McCullum failed to make a claim upon which relief could be granted. For these reasons, the

trial court did not err in granting the DOC's motion to dismiss McCullum's petition for declaration of rights.

We further note that the fact the trial court's order may have been based on a few immaterial misstatements of fact, or that the court used slightly different reasoning to reach its decision, does not alter our result. It is well-settled that an appellate court may affirm a lower court for any reason supported by the record. *Kentucky Farm Bureau Mutual Insurance Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991).

For the foregoing reasons, the order of the Franklin Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel McCullum, *pro se*
Decatur, Georgia

BRIEF FOR APPELLEE:

Linda M. Keeton
Department of Corrections
Office of Legal Services
Frankfort, Kentucky