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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001398-MR

ISMAIL SHABAZZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 04-CR-000994

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Ismail Shabazz, appeals the July 9, 2009, order of the Jefferson Circuit Court, denying his request for probation “street time” credit pursuant to Kentucky Revised Statutes (KRS) 439.344 and House Bill 406. Following a review of the record, the arguments of the parties, and the applicable law, we affirm.

On March 7, 2006, Shabazz pled guilty to one count of trafficking in a controlled substance in the first degree, schedule II cocaine, one count of receiving stolen property over \$300, one count of tampering with physical evidence, and one count of unlawful transaction with a minor in the second degree. The Commonwealth recommended ten years' imprisonment on the trafficking charge and five years on the remaining charges, to run concurrently for a total of ten years' imprisonment. The Commonwealth objected to probation, shock probation, or any form of alternative sentencing. The trial court accepted the Commonwealth's recommendation on the length of sentencing, but overruled its objection as to probation by sentencing Shabazz to a total of ten years, probated for five years.

Thereafter, on June 14, 2007, Shabazz was indicted¹ and charged with enhanced trafficking in a controlled substance and criminal trespass. He was also arrested² and charged with kidnapping of an adult, possession of a defaced firearm, and being a convicted felon in possession of a firearm.³ On the basis of these new charges, the Commonwealth moved to revoke Shabazz's probation.

A revocation hearing was held, at the conclusion of which the trial court revoked Shabazz's probation. The trial court then placed Shabazz in the custody of the Jefferson County Sheriff, to be transported to the Department of

¹ Case No. 07-CR-2019-005.

² Case No. 08-F-00013.

³ According to the Commonwealth, these charges were made in connection with a police response to a call that a female was held against her will at gunpoint.

Corrections to begin service of his ten-year sentence. Some time after beginning service of his sentence, on September 15, 2008, Shabazz filed a motion with the trial court requesting credit for his “street time credit” pursuant to KRS 439.344 and House Bill 406 for the time he spent on probation. The trial court denied that motion, stating that the street-credit provisions of HB 406 did not apply to time spent on probation. This appeal followed.

At the outset, we note that matters of statutory construction are the province of the courts and thus are subject to *de novo* review. *Board of Com'rs of City of Danville v. Davis*, 238 S.W.3d 132, 135 (Ky.App. 2007). We review this matter accordingly.

In 2008, the Kentucky General Assembly enacted HB 406, the Commonwealth’s biennial budget, which was signed into law. Part 1, Section 1(5)(c)(4)-(5) of HB 406 FN1 states as follows:

(4) Probation and Parole Credit: 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.

(5) Minimum Expiration of Sentence: Notwithstanding KRS 439.354, a final discharge shall be issued when the prisoner has been out of prison on parole a sufficient period of time to have been eligible for discharge from prison by minimum expiration of sentence had he not been paroled, provided before this date he had not absconded from parole supervision or that a warrant for parole violation had not been issued by the board.

Shabazz argues on appeal that HR 406 provides “street time credit” for individuals on probation as well as those on parole. Shabazz premises this argument primarily on the fact that subsection (4) of the provision at issue is entitled “Probation and Parole Credit.” Shabazz states his belief that the legislature, in titling the provision as it did, intended to evidence its desire that convicted felons on both probation and parole, who committed minor violations, should receive credit towards their sentence.

As Shabazz correctly notes, HB 269, passed by the General Assembly in 2004, preceded HB 406. It was worded almost identically to HB 406 insofar as it stated as follows:

Probation and Parole Credit: Notwithstanding KRS 439.344, the period of time spent on parole shall count as 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 KRS 439.354, or when a parolee is returned for a violation other than a new felony conviction.

Shabazz argues that because the legislature worded HB 406 almost identically to its predecessor, it intended persons on probation to receive street time credit, and would have deleted that portion of the section heading had it not so intended. We cannot agree.

In 2005, this Court rejected an argument nearly identical to that which Shabazz makes on appeal in *Bierman v. Commonwealth*, 2005 WL 2105796

(Ky.App. 2005)(unpublished).⁴ In that case, this Court stated as follows:

⁴ In citing to this case, which we believe to be directly on point to this issue, we refer the parties to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), which provides that: “Opinions that are

The primary focus of this appeal is the denial of appellant's motion for credit against his revoked sentence for time he spent on probation. In denying appellant's motion for probationary "street time" credit, the trial judge concluded that the legislative authority upon which appellant relied in claiming the credit applies only to credit for time spent on parole. Finding no error in the decision of the trial judge, we affirm the denial of credit in this case.

Appellant's application for probation credit was predicated upon the attachment of what had previously been HB 269 to the General Assembly's adoption of the state budget bill for the fiscal year July 1, 2003 through June 30, 2004.

....

Appellant points to the inclusion of the word "Probation" in the heading as bringing credit for time spent on probation within the purview of the statute. Like the trial judge, we find no merit in appellant's contention.

... While the title of the statute upon which appellant relies for probation credit does in fact contain the word "probation," a fair reading of the body of the text makes clear that the phrase "probation and parole credit" is merely a generic heading on a statute dealing solely with credit for time spent on parole. The analysis by which we reach this conclusion mirrors the methodology for ascertaining legislative intent approved by the Supreme Court of Kentucky in *County of Harlan*:⁵

In interpreting a statute, this Court must be guided by the intent of the legislature in enacting the law. No single

not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action."

⁵ See *County of Harlan v. Appalachian Regional Healthcare, Inc.*, 85 S.W.3d 607 (Ky. 2002).

word or sentence is determinative, but the statute as a whole must be considered.

Supra, at 611. Reading the contested enactment in that light leaves absolutely no doubt that the legislature intended it to apply solely to credit for time spent on parole.

The General Assembly's attachment of H.B. 269 to the budget bill evinces its intent to temporarily suspend operation of KRS 439.344, a statute proscribing credit for time spent on parole:

The period of time spent on parole shall not count as a part of the prisoner's maximum sentence except in determining parolee's eligibility for a final discharge from parole as set out in KRS 439.354.

Because this statute is directed solely at parole, it cannot be seriously argued that an enactment temporarily suspending its operation applies to credit for types of release as well. Other than the phrase "Probation and parole credit" in the heading, H.B. 269 makes no mention of anything other than credit for time spent on parole. We are not free to read into an enactment an intention other than that expressed in a literal reading of the words employed nor are we free to add words which would alter an enactment's unambiguously stated purpose. Accordingly, we are convinced that the trial judge properly applied the temporary enactment contained in the budget bill in denying appellant's motion for credit for time spent on probation.

Bierman, supra, at *1-2.

Like HB 269, the body of HB 406 makes no mention of credit for anything aside from parole. Further, we note that the legislature drafted HB 406 following the release of our opinion in *Bierman*, and did not see fit to change the language of the provision in any way. This creates a strong presumption that the

court's interpretation of the statute is consistent with legislative intent. *See Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996).

Having so found, we decline to depart from our reasoning as previously set forth in *Bierman*, and accordingly, are in agreement with the trial court that HB 406 does not extend to situations concerning individuals on probation.

Accordingly, we hereby affirm the July 9, 2009, order of the Jefferson Circuit Court, the Honorable Irvin G. Maze, presiding.

ALL CONCUR.

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