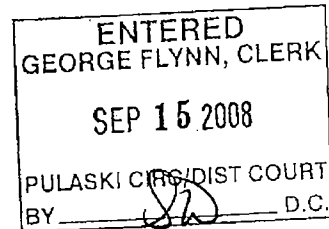


COMMONWEALTH OF KENTUCKY
28th JUDICIAL CIRCUIT
PULASKI CIRCUIT COURT
DIVISION I
CIVIL ACTION NO: 08-CI-01201



**EDDY F. MONTGOMERY, individually and
in his official capacity as Commonwealth's
Attorney for the 28th Judicial Circuit**

Plaintiff

v.

**LADONNA H. THOMPSON, in her official
capacity as Commissioner, Kentucky
Department of Corrections**

Defendant

TEMPORARY INJUNCTION

This matter is before the Court upon the application of the Plaintiff herein, Eddy F. Montgomery, Commonwealth's Attorney for the 28th Judicial Circuit, seeking entry of a Temporary Injunction pursuant to CR 65.04. The Court previously granted a Restraining Order in this case, effective August 18, 2008, at 3:00 p.m., which was then continued pending entry of this order. Based upon the following Findings of Fact and Conclusions of Law, the Restraining Order previously granted is terminated and a Temporary Injunction is hereby **GRANTED.**

Introduction

House Bill 406 is Kentucky's current budget bill. It went into effect on April 18, 2008 and will be in effect through June 30, 2010. Paragraphs (4) and (5)

of section 5, subsection (c), are the subject of this action. Those paragraphs provide:

(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.¹

It should be initially observed that "street credit"² statutes are commonplace within this country's criminal justice system. *See* 57 Okl. St. Ann. § 350; Tenn. C.A. § 40-28-122; DC St. § 24-221.01a. Such statutes are also not new to Kentucky. For example, a former statute, Ky. Rev. Stat. § 439.350, effective May 18, 1956 and later repealed, provided "[t]he total time served in the prison and on parole shall not exceed the period of the maximum sentence" Prior to the enactment of Ky. Rev. Stat. §

¹ H.R. 406, 2008 Gen. Assem., Reg. Sess. (Ky. 2008).

² "Street credit" is a colloquial term used to describe credit for the time spent on parole towards a prisoner's maximum sentence. *See* 67A C.J.S. Pardon & Parole § 90 (citing *Bonomo v. New Jersey State Parole Bd.*, 249 A.2d 611 (N. J. App. 1969); *Commonwealth. ex rel. Nerwinski v. Cavell*, 627, 144 A.2d 401 (Pa. 1958)).

439.350, “the time of liberty on parole was not counted on the sentence.”

Kirkman v. Jones, 346 S.W.2d 776 (Ky. 1961). Most recently, the 2003-2204 budget bill, HB 269, contained a nearly identical “street credit” provision to that at issue today.

The wisdom of the “street credit” provision of HB 406, and its alleged cost savings benefit to the Department of Corrections is not a concern of this Court. Those issues are political and properly vested in the discretion of this Commonwealth’s legislators and executive officials. It is worth noting, however, that Kentucky’s highest court previously commented on the sagacity of an early parole provision some eighty-six (86) years previously:

The statute which created the authority to grant paroles, as well as the statute under which . . . [the defendant] . . . was given an indeterminate sentence for his crime, were, indeed, enacted in an endeavor to uplift the convict, and coax him, if possible, into a useful citizen; but they also had in view, to some extent at least, the protection of society, and the protection of those who have not been guilty of felonies, and it is not conceivable that the Legislature intended, by these provisions, which are merely administrative, to enable a convict to escape the just punishment for his offense, and also to fail to conform his life to proper standards of citizenship. Such result would entirely defeat the purposes of the statutes, and *if a convict who has at least shown his inclination to commit crimes by doing an act by which he receives imprisonment in the penitentiary, however outrageous it might be, could at the end of his minimum term secure a parole and then escape any further consequences of his conduct by conforming to habits of good citizenship, which it must be admitted is chiefly to his own advantage, until the time when his sentence would have expired, if he had remained in prison, and then return to his evil habits and conduct, the convict would have escaped, in large part, the*

punishment for his crime, and society would gain nothing for the grace and assistance extended to him.

Commonwealth v. Minor, 241 S.W. 856, 860 (Ky. 1922) (emphasis added). The concern expressed by the court many years previously continues to succinctly sum up the frustration that many victims and their families feel today. Nevertheless, Kentucky is firmly committed to the concept of parole and to the diminution of the sentence of imprisonment through the award of various credits for educational achievement, obedience to the rules of incarceration, and now as an award for not obtaining additional felony convictions while on parole.

Our most recent “street credit” enactment came about in a manner akin to its 2003-2004 predecessor. Robert Lawson, a Professor of the University of Kentucky College of Law, and without question Kentucky’s leading expert on the issue of penal reform, describes the passage of the 2003 provision thusly:

At the center was a Kentucky statute providing that “[t]he period of time spent on parole shall not count as a part of the prisoner’s maximum sentence” if the inmate is returned to prison for violation of parole. *Not even inmates could complain with a straight face about the fairness and common sense of the position expressed in this law.* Nonetheless, in 2002 (before the early release program described above) a bill was introduced in the legislature to amend the statute to require full credit on prison terms for time spent on parole by inmates returned to prison for parole violations not involving new felony convictions. The bill went to the Senate Judiciary Committee, was given minimal and probably indifferent consideration, and then died on the legislative vine without as much as a committee vote. The thought of equating time on parole with time in prison in calculating completion of sentences proved to be too much to swallow in a “tough

on crime” environment, even with full prison facilities and a budget crisis on the horizon. At least, it was too much to swallow under the watchful eye of law enforcement officials and the general public.

The legislature opened its 2003 session with its members' attention focused primarily on the state's budget crunch. The inmate population problem in corrections was on the legislative radar screen because of the early release program, and it was on the public's mind for the same reason. No bill was ever introduced to resurrect the idea of equating time on parole with time in prison in calculating sentences, and no entry on the subject can be found in the action ledgers of those committees that could be expected to discuss and debate such an idea. Nonetheless, there emerged from the session a prison-sentence-calculation law identical to the bill that had died in the 2002 session:

Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence . . . when a parolee is returned as a parole violator for a violation other than a new felony conviction.

The law came into existence without identifiable sponsors or supporters and without any open discussion or debate, buried away as a “special provision” in a budget bill that consisted of hundreds of pages in the session's enacted legislation. As a part of the budget bill, it makes no permanent change in the sentencing laws, will have no effect at the end of the budget period unless reenacted into law in some other form, and for these reasons alone looks almost like a desperate, certainly a feeble, attempt to address the serious population problems of the state's prison system. The fact that it came into existence as it did, out of the deep shadows of the General Assembly, suggests that there is enormous political risk in any action that appears to show softness toward crime, while the fact that it came into existence at all suggests that there are at least some people, most likely the professionals in the corrections department, who fully understand the magnitude and seriousness of the population problem in the prison system.

Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a “Tough on Crime” Philosophy*, 93 Ky. L.J. 305, 307-08 (2004-2005) (internal citations and footnotes omitted) (emphasis added). The current “street credit” provision contained within HB 406 appears to have arisen under strikingly similar circumstances, buried inside an otherwise massive budget bill and without identifiable debate or consideration by the entire General Assembly.³

Even so, it cannot be said that the General Assembly and Corrections should be faulted for concern over an ever burgeoning prison population and the spiraling costs of incarceration, both in terms of economics and the toll on Kentucky’s citizenry. As Lawson notes, Kentucky’s inmate population more than doubled during the 1980s (from 3723 to 8824), almost doubled again during the 1990s (reaching 15,444 in 2000), and continues to grow unabated, reaching a total of 17,330 in 2003, and presumably many more now.

To put the numbers into perspective, it is helpful to note that the state’s overall population increased by only 25% during the period from 1970 to 2000 (from 3,218,706 to 4,041,769) while its inmate population increased by a whopping 444% (from 2838 to 15,444). It is also helpful to note that the rate of incarceration increased from 88 in 1970 to 382 in 2000 (an increase of 434% for the period), and that the rate has continued to increase after the turn of the century. The rate in 2003 stood at 423.

Lawson, 93 Ky. L.J. at 325 (internal citations and footnotes omitted). Given these astonishing and disturbing numbers, our legislature and executive officers would

³ Neither party produced any legislative history to contradict this conclusion.

be remiss not to evaluate and address the budgetary and human costs associated with the exponential growth of state prisoners. Action is demanded. This too, however, is not within the realm of the judiciary.

The issues for this Court are far more concrete: whether the “street credit” provision of HB 406 as written or applied violates the Kentucky Constitution and/or impermissibly conflicts with other more specific statutes. However, that question must await a final adjudication given that the Court is constrained by facts and arguments which may not yet be fully developed. At this juncture, the only issue properly before the Court is whether the issuance of a temporary injunction is proper, not whether permanent relief is appropriate.

Findings of Fact

1. Eddy F. Montgomery (“hereinafter “Montgomery”), Commonwealth’s Attorney for the 28th Judicial Circuit (Pulaski, Rockcastle and Lincoln Counties), brings this action pursuant to Kentucky’s Declaratory Judgment Act, in both his official and personal capacities;⁴

2. The Respondent is Ladonna Thompson (hereinafter “Thompson”) who currently serves as the Commissioner of the Kentucky Department of Corrections, (hereinafter “Corrections”), the entity obligated pursuant to Ky. Rev. Stat. §

⁴ Because this declaratory judgment involves a claim that a statute, or portion thereof, is unconstitutional, notice is required to be provided to the Attorney General for the Commonwealth. The Court finds that such notice has been provided and that the Attorney General has not elected to intercede.

196.030 with management of the Commonwealth's penal, reform and correctional institutions, and supervision of probation and parole;

3. Thompson has served as Commissioner since February 2008. She has a distinguished record of service within state government, serving for nineteen (19) years with Corrections prior to her appointment as Commissioner;

4. As Commissioner, Thompson is required by Ky. Rev. Stat. § 196.070 to supervise and administer numerous correctional facilities, and determine the minimum, maximum and conditional release dates of prisoners. In addition, Ky. Rev. Stat. § 196.075 requires the Commissioner to direct Corrections regarding the authority to supervise probationers and parolees;

5. Thompson oversees the current Corrections budget of approximately \$443 million of which approximately \$260 million is spent housing adults convicted of felony offenses;

6. The issue in this litigation is the General Assembly's recent adoption of HB 406, part I (Justice and Public Safety Cabinet); Subsection 5 (Corrections).

The relevant portion of HB 406 provides:

Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of a 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.

The bill also provides:

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.

7. The parties agree that this legislation, contained within the last budget bill, was enacted as a cost saving measure. Corrections' anticipates cost savings of \$12.5 million dollars in the next fiscal year due to implementation of this measure;

8. Kentucky's recidivism rate for felony offenders committed to the custody of Corrections is approximately thirty (30%) to thirty-three (33%) percent over a two year period, and has remained unchanged for several years. However, this calculation represents recidivism rates based only upon new felony offenses committed after release from custody. Over a three year period, Kentucky's recidivism rate is approximately forty (40) percent, but again based only upon new felony offenses;

9. National recidivism rates range as high as sixty-six percent (66%) over a period of three years;

10. No research is available within the Commonwealth from Corrections which measures recidivism rates of felony and misdemeanor offenders;

11. Research conducted by Corrections approximately eight (8) to ten (10) years previously indicates that violent offenders re-offend at a higher rate than nonviolent offenders;

12. The cost to the Commonwealth for offenders who recidivate has not been calculated by Corrections in the savings analysis conducted as part of the implementation of the "street credit" provision of HB 406, even though at least thirty percent (30%), and possibly a great many more, offenders released pursuant to HB 406 are likely to commit and be convicted of new felony offenses and returned to custody;

13. Though not implemented simultaneously with the effective date of the "street credit" provision of HB 406, Corrections has now implemented a new VINE notification protocol which alerts registrants, i.e. consisting usually of victims and their families, that an offender is eligible for "street credit" and will be released from custody or granted a final discharge from parole;

14. Though registrants receive VINE notice, they have no recourse available through Corrections to object to the award of "street credit" or to the offender's early release;

15. HB 406 expires June 30, 2010. Accordingly, barring new action by the General Assembly, the "street credit" provision of HB 406 will also expire on that date;

16. Ky. Rev. Stat. § 439.344, referenced in the “street credit” statute above, provides: “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.” This statute represents the treatment of time spent on parole by an offender prior to the effective date of the “street credit” provision of HB 406;

17. Ky. Rev. Stat. § 439.354, referenced above, provides as follows:

When any paroled prisoner has performed the obligations of his parole during his period of active parole supervision the board may, at the termination of such period to be determined by the board, issue a final discharge from parole to the prisoner. Unless ordered earlier by the board, 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 maximum 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.

18. At least one prior similar version of this “street credit” legislation exists. HB 269, the 2003-2004 budget bill, contained a similar “street credit” provision.

19. In litigation arising from application of HB 269, Corrections adopted a litigation posture against retroactive application of “street credit” arguing on several occasions that the statute was not expressly designated as retroactive by the General Assembly;

20. Prior to filing this action, Montgomery sought to declare the “street credit” provision of HB 406 unconstitutional in the matters of *Commonwealth of*

Kentucky v. Larry Lee Ramsey, Indictment Nos. 01-CR-00109 and 01-CR-00111 (Pulaski). That matter has now been held in abeyance;

22. While not a party to the *Ramsey* action, Corrections participated in the *Ramsey* litigation as *amicus curae*, and was present at the evidentiary hearing;

23. Both parties have stipulated that the evidentiary record in *Commonwealth of Kentucky v. Larry Lee Ramsey* is relevant and should be considered by the Court in determining whether a temporary injunction should be granted in this matter;

24. Four witnesses testified at the evidentiary hearing conducted on August 14, 2008, in the *Ramsey* matter: Rebecca Light (hereinafter "Light"), John Hall, Tammy Lee, and Amy Lee;

25. Three witnesses testified during the August 27, 2008 hearing held in this matter: Melissa Harrod, Julie Thomas (hereinafter "Thomas") and Thompson. Montgomery called each of the witnesses in his case-in-chief. Corrections elected to present no witnesses;

26. Following passage of HB 406, Thompson determined that Corrections would apply the "street credit" provisions of HB 406 retroactively, thus, qualifying

