RENDERED: September 17, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000764-MR

PERRY OLEN DILLARD — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JAMES E. HIGGINS, JR., JUDGE
ACTION NO. 96-CR-00210

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, HUDDLESTON, and KNOPF, Judges.

COMBS, JUDGE. Perry Olen Dillard (Dillard) appeals from an order of the Christian Circuit Court dismissing his Petition for Declaratory Judgment brought pursuant to Kentucky Revised Statute (KRS) 418.040. Finding no error, we affirm.

In May 1996, Dillard shot two persons, killing one and seriously wounding the second, following a dispute at a pool hall. In October 1996, pursuant to a plea agreement with the Commonwealth, Dillard pled guilty to one felony count of manslaughter in the first degree (KRS 507.030)(Class B), one felony count of assault in the second degree under extreme

emotional disturbance (KRS 508.020 and 508.040)(Class D), and one felony count of possession of a handgun by a convicted felon (KRS 527.040)(Class C). The Commonwealth recommended sentences of fifteen (15) years for first-degree manslaughter, five (5) years for second-degree assault under extreme emotional disturbance, and one (1) year for possession of a handgun by a convicted felon — with all three sentences to run concurrently for a total sentence of fifteen (15) years. After accepting the plea agreement, the trial court sentenced Dillard in December 1996 to serve a total of fifteen (15) years in prison according to the Commonwealth's recommendation.

In November 1997, Dillard filed a Petition for Declaratory Judgment seeking an order that would "correct [the] final sentence." He contended that the trial court improperly failed to make written findings concerning aggravating and mitigating circumstances for purposes of sentencing. He also challenged the action of the Department of Corrections in applying KRS 439.3401 (the violent offender statute) to his sentence, thereby making him eligible for parole only after having served fifty percent (50%) of his sentence. Dillard asked the trial court to amend its final judgment and sentencing order to reflect that he would be eligible for parole after having served twenty percent (20%) of his sentence. Accompanying the petition were a motion for appointment of counsel, a motion for a full evidentiary hearing, and a motion for findings of fact and conclusions of law. After the Commonwealth failed to respond, Dillard filed a motion for default judgment in January 1998. In

March 1998, the Commonwealth's Attorney's Office filed a response to the default motion, noting that it had not received service of the original petition for declaratory judgment and seeking dismissal because the Department of Corrections had not been named as a party to the action. On March 17, 1998, the trial court dismissed the petition on the merits without an evidentiary hearing. This appeal followed.

Dillard argues that under his plea agreement, he believed that he would be eligible for parole consideration after having served 20% of his sentence. (See 501 KAR 1:030, setting forth parole eligibility guidelines.) He contends that because of its alleged error in applying the violent offender statute (KRS 439.3401) to his sentencing situation, the Department of Corrections is improperly requiring him to serve 50% of his fifteen-year sentence before he would become eligible for parole consideration. He maintains that the action of the Corrections Department equates to an impermissible altering of the final sentence of the trial court that in effect constitutes an illegal usurpation of power in violation of the separation of powers doctrine. He also argues that the trial court should have made specific findings on aggravating and mitigating circumstances. We disagree.

A defendant has no constitutional right to parole or early release from prison. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 666 (1979). The availability of parole is a matter of legislative grace and is an executive rather than a

judicial function. Rudolph v. Corrections Cabinet of Kentucky, Ky. App., 710 S.W.2d 235, 236 (1986). Parole and probation are separate and distinct matters. While the courts have authority to grant probation, parole concerns the exercise of discretion by the executive branch (Department of Corrections) subject only to certain fundamental but minimal constitutional protections; *i.e.*, due process and equal protection. Mullins v. Commonwealth, Ky. App., 956 S.W.2d 222 (1997). As a result, the Department of Corrections has exclusive jurisdiction in applying the parole eligibility statutes (including KRS 439.3401) as opposed to a trial court.

In Riley v. Parke, Ky., 740 S.W.2d 934 (1987), the Kentucky Supreme Court dealt with an analogous situation involving the application of KRS 533.060(2), which prohibits concurrent sentencing for offenses committed while on probation or parole. The Court in Riley held that the Department of Corrections did not violate the separation of powers doctrine by applying KRS 533.060(2) to a prisoner's sentences (independently of a trial court's sentencing order) because "the application of KRS 533.060(2) is essentially administrative in nature, and is certainly properly included in the duties of the Corrections Cabinet". Id. at 936.

In the case before us, Dillard was clearly subject to treatment as a violent offender pursuant to KRS 439.3401 because he pled guilty to manslaughter in the first degree – a Class B felony – involving the death of the victim. The Department of Corrections acted correctly and within its authority in applying

the violent offender statute to Dillard's situation. Therefore, the trial court did not have jurisdiction to intrude upon the executive function of the Department of Corrections and order it to tailor its parole criteria to meet Dillard's expectations.

With respect to Dillard's second allegation as to the failure of the trial court to make findings on the aggravating and mitigating circumstances, we find no error since consideration of such evidence under KRS 532.025 applies only to cases where the defendant receives a sentence either of death or of life without parole for 25 years. Dillard's sentence did not fall within these parameters. Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 306 (specific findings on mitigating factors not required in death penalty case), cert. denied, ___ U.S. ___, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997); Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 681 (1990)(same), cert. denied, 502 U.S. 831, 112 S. Ct. 107, 116 L. Ed. 2d 76 (1991).

We affirm the order of the Christian Circuit Court.

ALL CONCUR.

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