

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001192-MR

JEFFERY L. CARPENTER

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CI-00649

DEPARTMENT OF CORRECTIONS
AND STATE OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Jeffery L. Carpenter, *pro se*, appeals from the dismissal of his petition for a declaration of rights under Kentucky Revised Statute (“KRS”) 418.040. On appeal, he contends that the petition was improperly dismissed. However, we find the petition to be meritless. Thus, we affirm.

In 2003, Carpenter was tried and convicted by a Butler County jury of one count of first-degree sexual abuse and for being a first-degree persistent felony offender. He was sentenced to fifteen years' imprisonment pursuant to the jury's recommendation. Carpenter is currently serving a fifty-seven year sentence for multiple felony offenses, including the conviction herein for first-degree sexual abuse.

The origins of the present action began when Carpenter filed an administrative review form with the Department of Corrections ("DOC") on February 19, 2009, seeking application of "meritorious good time credit" to his sentence. Although Carpenter had continuously received "statutory good time" of ten days per month under KRS 197.045(1) on the non-sex offense portion of his sentence, he had not received "meritorious good time credit" on any portion of his sentence since 2003.

The DOC responded to Carpenter's administrative review request for meritorious good time credit with a memorandum informing Carpenter that he had in fact received good time credit on his sentence until 2003 when he was convicted of a sex crime pursuant to KRS 197.045. The memorandum further stated that meritorious good time credit is a privilege, and that Carpenter needed to participate in institutional programs recommended by his caseworker, such as the Sex Offender Treatment Program ("SOTP"), in order to become eligible to earn further meritorious good time on his sentence.

Thereafter, Carpenter made an open records request to the DOC requesting a record of whether the trial court conducted a comprehensive sex offender presentence evaluation pursuant to KRS 532.050(4) before sentencing him. The DOC issued a response stating that they had no document responsive to the request.

Carpenter then filed a petition for declaration of rights with the Franklin Circuit Court seeking a declaration from the court that he did not need to participate in the SOTP program in order to receive meritorious good time credit; seeking a declaration that the DOC should cease its “repeated recommendations” for him to enter SOTP; and finally, seeking monetary damages for the DOC’s alleged violations of his Constitutional rights.

The Franklin Circuit Court dismissed the petition. Carpenter now appeals.

On appeal, Carpenter alleges that he did not receive a comprehensive sex offender presentence evaluation as required by KRS 532.050(4) and KRS 17.554 and, therefore, that he cannot be classified as an “eligible sex offender” under KRS 197.410. Carpenter further argues that because he cannot properly be deemed an “eligible sex offender,” he cannot be compelled to participate in the SOTP or other institutional programs and that he should receive meritorious good time credit without such participation. Carpenter seeks monetary damages for these alleged violations of his due process rights.

A petition for a declaration of rights under KRS 418.040 must present an actual, justiciable, controversy on its face. *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205, 210 (Ky. 2008). The scope of matters for which such relief may be rendered is broad. *Id.* However, such review is discretionary, and a court “may refuse to exercise the power to declare rights.” *Id.* When a trial court declines to exercise its power to declare rights, the appropriate standard upon review by an appellate court is the summary judgment standard. *Smith v. O’Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997). While the appellate court must be sensitive to the possibility of prison abuse, it is also free to “respond expeditiously to meritless petitions.” *Id.*

In applying this standard upon review, we agree with the Franklin Circuit Court that Carpenter’s allegations raise no genuine issues of material fact nor entitle him to the relief that he seeks.

KRS 439.340(11) and KRS 197.045(4) require that an inmate convicted of a sex crime must first complete the SOTP mandated by KRS 197.400 before being eligible to be considered for parole or to receive meritorious good time credit on his sentence. Carpenter claims that the trial court’s alleged failure to hold a comprehensive sex offender presentence evaluation prevents him from being properly classified as an “eligible sex offender,” and thus, that the mandates of KRS 439.340(11) and KRS 197.045(4) do not apply to him.¹

¹ This is ostensibly Carpenter’s argument, as best the Court can discern from a reading of the *pro se* brief.

We agree that the trial courts are required to “order a comprehensive sex offender presentence evaluation” for any defendant convicted of a crime classified as a “sex crime” under KRS 17.500. KRS 532.050. Indeed, criminal defendants convicted of sex crimes are entitled to a comprehensive presentence evaluation before their final sentencing under Kentucky law. *Brewer v. Commonwealth*, 550 S.W.2d 474 (Ky. 1977). However, we do not herein address the issue of whether Carpenter actually received such an evaluation,² but instead address only the argument raised in his petition and on appeal –*that the failure to hold such an evaluation would effectively prevent him from being properly classified as an “eligible sex offender.”*

In order for an individual convicted of a sex crime to be classified as an “eligible sex offender,” there is no need for *any* determination by the trial court. Rather, the DOC may independently classify an individual as an “eligible sex offender” in its own discretion, as the determination of whether to classify an individual as such is a decision that may be made by “the sentencing court or department officials, or both.” KRS 197.410(2). *See also, Garland v. Commonwealth*, 997 S.W.2d 487, (Ky. App. 1999). As Carpenter was convicted of first-degree sexual abuse, is a crime classified as a “sex crime” under KRS

² Nor do we have a record which would allow us to make such a determination, as Carpenter filed the appeal of this petition while he had an RCr 11.42 appeal still pending before this Court (which would have contained the full trial record). We note as an aside, however, that the fact the DOC did not have a record of the evaluation does not mean that such an evaluation did not occur. Regardless, a claim that such an evaluation did not occur would have needed to be raised either in the direct appeal or within one year of the judgment under CR 60.02.

17.500, he may be properly deemed an “eligible sex offender” by the courts or by DOC officials.

We now turn to a discussion of whether Carpenter is entitled to meritorious good time credit.

As we have stated before, meritorious good time credit is a privilege rather than a right. *Anderson v. Parker*, 964 S.W.2d 809, 810 (Ky. App. 1997).

Moreover, KRS 197.045(4) provides, in pertinent part, that:

Any eligible sexual offender, as defined in KRS 197.410, who has not successfully completed the sex offender treatment program as determined by the program director shall not be entitled to the benefit of any credit on his sentence. A sexual offender who does not complete the sex offender treatment program *for any reason* shall serve his entire sentence without benefit of good time, parole, or other form of early release.

(Emphasis added). As Carpenter freely admits, DOC caseworkers have continuously recommended him for participation in the SOTP program, which he has repeatedly refused to participate in. Thus, under the statute, he is not eligible to be awarded good time credit on his sentence. Further, “our courts have made clear that ‘the loss of the mere opportunity to earn good-time credit does not constitute a cognizable liberty interest.’” *Seymour v. Colebank*, 179 S.W.3d 886, 891 (Ky. App. 2005), *quoting Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003). As no liberty interest is implicated which would entitle Carpenter to the minimum procedures of due process, he is “not even entitled to a hearing on

the denial or forfeiture of good time credits.” *Id.*, citing, *McGuffin v. Cowan*, 505 S.W.2d 773 (Ky. 1974). *See also*, *Anderson v. Parker*, *supra* at 810.

Carpenter wishes this Court to say that he is eligible for meritorious good time credit despite his refusal to comply with his caseworker’s requests to participate in the SOTP program. There is no basis in the law for such an assertion, nor does it present a genuine issue of material fact.

Finally, Carpenter has supplied no legal basis for his argument that he should be awarded monetary damages. We decline to give further attention to this assertion as Carpenter has failed to support it, and regardless, it is without merit.

In sum, the Franklin Circuit Court was well within its discretion to dismiss the petition as it failed to state a claim for which relief could be granted and it presented no genuine issues of material fact, even when considered in a light most favorable to Carpenter.

Accordingly, we affirm the Franklin Circuit Court.

ALL CONCUR.

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