

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000159-MR

MARK F. BORDERS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 94-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, BUCKINGHAM AND GUDGEL, JUDGES.

BUCKINGHAM, JUDGE: Mark F. Borders appeals from an order of the Hardin Circuit Court denying, without an evidentiary hearing, his motion for pre-release probation brought pursuant to KRS¹ 439.575. Because the statute authorizing pre-release probation is unconstitutional, we affirm.

In August 1995, Borders entered a guilty plea pursuant to an agreement with the Commonwealth to rape in the first degree (2 counts), incest (4 counts), unlawful transaction with a minor in the first degree, rape in the third degree (4 counts), sexual

¹ Kentucky Revised Statutes.

abuse in the first degree, sodomy in the third degree (4 counts), unlawful transaction with a minor in the second degree (7 counts), unlawful transaction with a minor in the third degree (3 counts), sexual misconduct (2 counts), and sexual abuse in the third degree (3 counts), involving three separate young female victims. The Commonwealth recommended various sentences for each count to run concurrently for a total sentence of 15 years. On November 15, 1995, the circuit court entered a judgment sentencing Borders to serve 15 years in prison on the above offenses consistent with the Commonwealth's recommendation. The court imposed the sentence of imprisonment upon finding that there was a substantial risk Borders would commit another crime during any period of probation, that he was in need of correctional treatment, that probation would unduly depreciate the seriousness of the crime, and that he was ineligible for probation under KRS 532.080 or KRS 533.060.

On September 9, 1998, Borders filed a motion for pre-release probation pursuant to KRS 439.575.² On September 10, 1998, the circuit court summarily denied the motion without a hearing. On January 13, 1999, Borders filed a motion asking the court to reconsider its previous order and order the Department of Corrections to prepare an assessment report. On January 14, 1999, the circuit court summarily denied the motion to reconsider

² The motion actually referred to KRS 439.119 but no such statute exists. The erroneous citation appears to be related to the fact that the statutory law was enacted in 1998 as H.B. 455, 1998 Ky. Acts Ch. 606, § 119 (effective July 15, 1998).

or set aside the previous order denying pre-release probation. This appeal followed.

On appeal, Borders does not directly challenge the circuit court's denial of pre-release probation, but rather challenges the court's failure to conduct a hearing on the request. Borders argues that he was entitled to a hearing under the due process clauses of the 5th and 14th Amendments of the United States Constitution. He argues that he has a liberty interest in pre-release probation that cannot be deprived without a fair opportunity to present evidence at a meaningful hearing. On the other hand, the Commonwealth maintains that a hearing was unnecessary because Borders did not qualify for pre-release probation under the terms of the statute.

This case was held in abeyance pending the decision of the Kentucky Supreme Court in the case of Prater v. Commonwealth, ___ S.W.3d ___ (2002), which involved the constitutionality of KRS 439.575. In Prater, the supreme court held that the pre-release probation program as codified in KRS 439.575 violated the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution. The court held that the authority granted to the judiciary in the statute impermissibly infringed on the executive branch's exclusive authority to grant parole.

This court is obligated to follow the decisions of the Kentucky Supreme Court. See SCR 1.030(8)(a); Gilbert v. Barkes, Ky., 987 S.W.2d 772 (1999); Peak v. Commonwealth, Ky. App., 34 S.W.3d 80 (2000). Given the fact that the circuit court had no authority to grant Borders's pre-release probation, his claim to

a liberty interest in such probation and a right to an evidentiary hearing prior to being deprived of that interest is without merit. The decision of the Kentucky Supreme Court in Prater renders Borders's arguments and the question of his eligibility moot and is dispositive of his appeal.

For the foregoing reasons, we affirm the order of the Hardin Circuit Court.

ALL CONCUR.

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