

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002375-MR

ARLISS¹ WAYNE GROSS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 01-CR-002665

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BAKER AND TACKETT, JUDGES; AND MILLER, SENIOR JUDGE.²

TACKETT, JUDGE: Arliss Gross appeals from an order of the Jefferson Circuit Court denying his motion to clarify whether he was sentenced under Kentucky's violent offender statute. We agree with the trial court's determination that it was unnecessary to specify that Gross' victim suffered death due to the fact that Gross pled guilty to the offense of murder. Consequently, the trial court's order stating that the violent

¹ Arliss is spelled "Arlis" on the notice of appeal.

² Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

offender statute is applicable to Gross' sentence of imprisonment is affirmed.

Due to its brevity and clear explanation of the facts of this case, we begin by quoting the trial court's order of October 9, 2002, which is at issue here.

BACKGROUND SUMMARY

On November 19, 2001, Defendant was indicted on the capital charge of Murder and on the charge of Tampering with Physical Evidence, relating to the November 12, 2001 death of Christopher Ray Johnson, a [two year-old] child. On March 13, 2002, Defendant entered a plea of guilty, pursuant to North Carolina v. Alford, to said charges based upon the Commonwealth's recommendation of thirty-seven years on the Murder charge and five years on the charge of Tampering with Physical Evidence, to run concurrently for a total of thirty-seven years. A judgment of conviction and sentence to serve thirty-seven years was entered by the Court on March 13, 2002.

On May 2, 2002, Defendant filed a motion for modification/reduction of his sentence. The motion was denied by the Court on June 3, 2002. On July 30, 2002, Defendant filed a motion to clarify that he was not sentenced as a violent offender under [Kentucky Revised Statute] 439.3401.

OPINION

In his motion, Defendant argues that he should not be considered a violent offender for parole eligibility purposes under KRS 439.3401, since the Court did not designate in its judgment of conviction and sentence that the "victim suffered death" as required by KRS 439.3401(1). Given that Defendant pled guilty to the charge of Murder, it was readily apparent in the

judgment that the victim suffered death. Consequently, KRS 439.3401 is applicable to the Defendant's thirty-seven year sentence.

Therefore, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that the motion brought by Defendant, Arliss Wayne Gross, to clarify that he was not sentenced as a violent offender under KRS 439.34012 is DENIED.

On appeal, Gross argues that the Department of Corrections lacked the authority to impose parole eligibility at 85% of his thirty-seven year sentence due to the trial court's failure to designate him as a violent offender. The statute in question, KRS 439.3401, reads in pertinent part as follows:

(1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim The court shall designate in its judgment whether the victim suffered death or serious physical injury.

. . . .

(3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.

In its judgment and sentence on his guilty plea, the trial court failed to specifically state that Gross' victim had suffered death or serious physical injury. However, Gross pled guilty to the offense of Murder, which is defined under KRS 507.020 as follows: "A person is guilty of murder when: (a) With intent to cause the death of another person, he causes the death of such person" Clearly, it is impossible to commit the offense of Murder without causing the death of the victim.

Consequently, any judgment convicting a defendant of Murder implicitly designates that the victim suffered death. While it would be preferable for trial courts to state in their judgments that KRS 439.3401 is applicable to a convicted defendant's sentence, we are not persuaded that the failure to do so in this case overrides the legislature's intent to restrict parole eligibility in cases involving violent offenses.

Gross next contends that the trial court was required to grant him an evidentiary hearing on his motion. He cites as authority the requirement that a trial court hear evidence when a motion to vacate sentence under Kentucky Rule of Criminal Procedure (RCr) 11.42 has been filed if the allegations contained in the motion cannot be refuted on the face of the record. Gross' motion to specify that he was not sentenced as a violent offender is not an RCr 11.42 motion; therefore, evidentiary hearing requirements for such cases are inapplicable

to the situation at hand. Further, Gross has cited no authority supporting his request for an evidentiary hearing in cases such as this one.

For the forgoing reasons, the order of the Jefferson Circuit Court denying Gross' motion to specify that he was not sentenced as a violent offender is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Arlis Wayne Gross, *Pro Se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

David A. Smith
Assistant Attorney General
Frankfort, Kentucky