

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001348-MR

CARLTON G. FOLEY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE PAUL E. BRADEN, SPECIAL JUDGE  
ACTION NO. 02-CI-00633

KAREN D. CRONEN, BRANCH MANAGER,  
OFFENDER RECORDS AND HON. PAUL E. BRADEN

APPELLEES

OPINION

AFFIRMING

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BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order in a declaratory judgment action determining that the Department of Corrections' computation of appellant's parole eligibility was accurate. Appellant, who was convicted of intentional murder, argues that since the trial court failed to make a finding in the final judgment that appellant was a violent offender under KRS 439.3401, he was not subject to the 50% serve-out mandate in

that statute. Upon review of this argument, we adjudge it to be without merit. Hence, we affirm.

Appellant, Carlton Foley, was indicted in 1997 on one count of murder and one count of first-degree robbery, both offenses committed in 1996. Foley was convicted by a jury of both offenses and sentenced in December of 1997. The trial court sentenced Foley to 20 years on the murder conviction and 20 years on the robbery conviction in accordance with the jury's recommendations to that effect. Foley thereafter appealed his conviction to the Kentucky Supreme Court. On March 25, 1999, the Supreme Court rendered its opinion affirming the murder conviction and reversing the robbery conviction. Following this appeal, Foley discovered that his parole eligibility date, as fixed by the Kentucky Department of Corrections (the "Department") pursuant to KRS 439.3401, was June of 2006, requiring that he serve 50% of his sentence. Foley subsequently contacted the Department seeking a recalculation of his parole eligibility date with a 20% serve-out since the trial court never made a finding that the victim in this case suffered death or serious physical injury. Foley contended that KRS 439.3401 requires such a formal finding by the trial court before the 50% serve-out provision could be applied to his sentence. After being informed by the Department that the June 2006 parole eligibility date was correct, Foley filed a petition for

declaratory relief in the Laurel Circuit Court seeking to have his parole eligibility date changed to require only a 20% serve-out date. On May 27, 2003, the court entered an order adjudging that the Department's calculation of a 50% serve-out date was correct. This appeal by Foley followed.

We would first note that Foley's underlying argument was not properly raised via the declaratory judgment action against the Department in this case. Foley argues that the trial court erred in failing to give the jury a truth-in-sentencing instruction during the sentencing phase. Any alleged error at trial should have been raised in the direct appeal. See Thacker v. Commonwealth, Ky., 476 S.W.2d 838 (1972).

Nevertheless, even when we consider Foley's claim against the Department herein, we deem that it has no merit. The version of KRS 439.3401 that was in effect at the time of the offense and the trial (1996 and 1997) required violent offenders to serve 50% of their sentences before they could be released on parole. KRS 439.3401(1), as it existed in 1997, provided:

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 rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to a victim.

In 1998, KRS 439.3401(1) was amended to require that "The court shall designate in its judgment if the victim suffered death or serious physical injury." That amended version was not effective until July 15, 1998.

In his declaratory judgment action, Foley maintains that since the trial court in the present case did not specifically designate in his judgment that the victim suffered death or serious physical injury, he is not subject to the serve-out requirement in KRS 439.3401. Foley does not argue that he was not a violent offender, only that the trial court failed to designate him as such. First, prior to the 1998 version of that statute, there was no requirement that the trial court specifically designate that the victim suffered death or serious physical injury. There is no question that the 1997 version of the statute applied in the instant case, since the 1998 version specifically provided in section (6), "This section shall apply only to those persons who commit offenses after July 15, 1998." Secondly, even if the 1998 version applied, that portion of the judgment stating that Foley was convicted of intentional murder was sufficient designation in itself that the victim suffered death.

For the reasons stated above, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Central City, Kentucky

BRIEF FOR APPELLEE:

Brenn O. Combs  
Frankfort, Kentucky