

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001899-MR

JIMMY HIGHTOWER

APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 00-CR-00078

JAMES MORGAN (WARDEN)

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Jimmy Hightower appeals from an order of the Simpson Circuit Court dismissing his motion to hold Warden James Morgan of the Northpoint Training Center in contempt for the institution's actions in classifying Hightower's inmate status. Because Hightower did not timely file his notice of appeal, we have no jurisdiction to consider this appeal. Therefore, it must be dismissed.

As a result of a domestic violence incident that occurred in Simpson County on June 16, 2000, Hightower was

indicted and charged with three counts of first-degree assault, three counts of first-degree wanton endangerment, and one count of first-degree burglary. By plea agreement with the Commonwealth, one count of first-degree assault was amended to second-degree assault, and the other two counts of first-degree assault were amended to fourth-degree assault. Further, the plea agreement provided that the single count of first-degree burglary would be amended to second-degree burglary. Also, the plea agreement stated that Hightower was not a "violent offender" so as to be subject to the provisions of KRS¹ 439.3401.

Hightower appeared before the court with his attorney on November 29, 2000, and entered guilty pleas in accordance with the plea agreement. A final judgment was entered on December 21, 2000. Therein, Hightower was sentenced to ten years in prison for second-degree assault and ten years in prison for second-degree burglary. Pursuant to the plea agreement, the two sentences were ordered to run consecutively with each other for a total sentence of twenty years. He was also sentenced to twelve months in the county jail on each of the fourth-degree assault charges and to one year in prison on each of the three counts of first-degree wanton endangerment. All of those sentences were ordered to run concurrently with each other and concurrently with the sentences for second-degree

¹ Kentucky Revised Statutes.

assault and second-degree burglary. Furthermore, the judgment specifically provided that Hightower shall not be considered as a "violent offender" under KRS 439.3401.

On January 10, 2003, the prison institution initially classified Hightower for custody level purposes. He was determined to have a final custody level classification of "3" based on a determination that he had been convicted of a Class C nonviolent felony offense. However, on July 2, 2003, the prison institution reclassified Hightower based on a determination that he had been convicted of a Class C violent felony offense. His final custody level determination of "3" was unchanged. Likewise, his parole eligibility date was unchanged.

On December 8, 2003, Hightower moved the circuit court to hold the prison warden in contempt for changing his classification to that of a violent offender. In support of his motion, Hightower argued that both the plea agreement and the judgment provided that he was not to be considered a "violent offender" under KRS 439.3401. In an order entered on March 30, 2004, the court denied the motion without explanation.

On April 13, 2004, Hightower filed a motion for reconsideration. The court denied the motion in an order

entered on May 14, 2004. On June 17, 2004, Hightower filed a notice of appeal.²

Hightower had 30 days following the entry of the order denying his motion in which to file an appeal. See RCr³ 12.04(3). Therefore, he had 30 days after March 30, 2004, in which to file the notice of appeal. He failed to do so. However, Hightower did file a motion for reconsideration on April 13, 2004. We will assume for the sake of argument that this motion should be construed to be a motion to alter, amend, or vacate pursuant to CR⁴ 59.05. If such a motion is timely served, then it tolls the time for filing a notice of appeal. See CR 73.02(1)(e). However, Hightower's motion for reconsideration was not served within ten days after the entry of the March 30, 2004, order. Therefore, it was not timely served so as to toll the running of the 30-day period for filing an appeal from the March 30, 2004 order.

Even if the motion for reconsideration had been timely served as required by CR 59.05, Hightower still did not timely appeal from the May 14, 2004, order denying that motion. His notice of appeal was filed on June 17, 2004, more than 30 days

² In his notice of appeal, Hightower states that he is appealing from an order of the court dated June 11, 2004. However, there is no June 11, 2004, order in the record.

³ Kentucky Rules of Criminal Procedure.

⁴ Kentucky Rules of Civil Procedure.

after May 14, 2004. Therefore, this appeal must be dismissed because we lack jurisdiction to consider it. See United Tobacco Warehouse v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708, 710 (Ky.App. 1987).

At any rate, Hightower's arguments have no merit. The prison institution did not reclassify Hightower as a "violent offender" for purposes of KRS 439.3401, the statute that requires violent offenders to serve 85% of their sentences before being eligible for release on parole. Rather, it reclassified his custody status after correctly determining that he had been convicted of a violent offense.⁵ It had the authority to do so. See Mahoney v. Carter, 938 S.W.2d 575 (Ky. 1997). Furthermore, its reclassification for custody level purposes was not at odds with the circuit court's determination that Hightower should not be classified as a "violent offender" for purposes of KRS 439.3401. The reclassification did not affect his parole eligibility.

Finally, it appears that Hightower's challenge to his reclassification should have been by way of a declaratory judgment action against the Department of Corrections rather than a contempt action against the prison warden. See Hoskins v. Commonwealth, 158 S.W.3d 214, 217 (Ky.App. 2005).

⁵ Hightower's convictions were based on allegations that he beat his wife and threw hot grease on her, causing her serious physical injuries.

It is hereby ORDERED that this appeal be DISMISSED for lack of jurisdiction because the notice of appeal was not timely filed.

ALL CONCUR.

ENTERED: July 8, 2005

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Jimmy Hightower, *Pro Se*
Burgin, Kentucky