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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002065-MR

ELBERT PHILLIP LONG APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-01676

COMMONWEALTH OF KENTUCKY; STEVE PENCE, JUSTICE SECRETARY, JUSTICE CABINET; JOHN REES, COMMISSIONER, DEPARTMENT OF CORRECTIONS; LANCE ORTHER, BRANCH MANAGER, OFFENDER RECORDS, DEPARTMENT OF CORRECTIONS; AND JAMES L. MORGAN, WARDEN, NORTHPOINT TRAINING CENTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: In 1977, a Daviess County jury found Elbert Long guilty of murder, in violation of KRS 507.020, and of attempted rape in violation of KRS 510.040 and KRS 506.010. The

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statues 21.580.

Daviess Circuit Court sentenced him, respectively, to life and to five years in prison. In *Long v. Commonwealth,* 559 S.W.2d 482 (Ky. 1977), our Supreme Court affirmed Long's conviction and sentence. The Parole Board granted Long parole in 1986, but apparently because he refused to participate in sex-offender counseling, his parole was revoked and he was returned to prison in 1988. Since then Long has appeared before the Board three times, but on each occasion was denied parole. Following his last appearance, in 1998, the Board ordered him to serve out his life sentence. Although the record does not include the reasons for the Board's denials, Long suggests that they resulted, at least in part, from his continuing refusal of sex-offender treatment.

In December 2002, Long filed a petition in the Franklin Circuit Court seeking habeas corpus and declaratory relief. The petition comprised eighteen allegations of error. Four of those allegations attacked Long's judgment of conviction on the ground of alleged defects in the jury's verdict, while the rest complained that because Long had served his five-year sentence for attempted rape, the Department of Corrections should remove the sex offense from his record, and the Parole Board should cease to treat him as a sex offender. The trial court dismissed the habeas petition, and in an order entered May 8, 2003, this Court upheld that dismissal. *Long v.*

Commonwealth, NO. 2003-CA-000118-MR (May 8, 2003). Perhaps thinking that that was the end of the matter, the Commonwealth failed to respond to Long's declaratory judgment petition, so in May 2005, Long moved for a default or a summary judgment. The Commonwealth responded with a motion to dismiss, which the trial court granted by orders entered June 2, 2005 and September 6, 2005. Appealing from that dismissal, Long reiterates the claims he made in the trial court and contends that the trial court abused its discretion by denying his motion for default judgment. Convinced that Long is not entitled to the relief he seeks, we affirm the trial court's orders.

Initially we note, as the Commonwealth points out, that CR 55.04 precludes default judgment against the Commonwealth unless the claimant "establishes his claim or right to relief by evidence satisfactory to the Court." Because neither Long's initial pleading nor his motion for judgment clearly established a right to relief, the trial court did not abuse its discretion by denying Long's motion for a default judgment and permitting the Commonwealth to respond, albeit belatedly, to his claims.

Nor did the trial court err by dismissing Long's first four allegations of error, those alleging that his judgment is void because it is based on defective verdicts. Because these allegations attack the Daviess Circuit Court's 1977 judgment,

they should have been brought in a collateral proceeding before that court. The Franklin Circuit Court, as it correctly ruled, was not authorized to address them. The allegations, moreover, are meritless. Long is correct that he was entitled to verdicts on both counts of his indictment that were consistent, clear, and unambiguous, *Beaty v. Commonwealth,* 125 S.W.3d 196 (Ky. 2003), and that both verdicts in his case were defective. The murder verdict did not specify that the jury was finding him guilty of murder, but only that it was finding him guilty under instruction number one, where the facts constituting the elements of murder were alleged. And the attempted rape verdict mistakenly omitted the word "attempted." Neither defect renders its verdict infirm, however, because the indictment; the jury instructions; and, with respect to the attempted rape verdict, the sentence make absolutely clear what crimes the jury found. A verdict that the rest of the record makes clear and unambiguous is sufficient. *Crump v. Commonwealth,* 215 Ky. 827, 287 S.W. 23 (1926). If Long had objected before the jury was dismissed, he could have had the defects corrected. *Beaty v. Commonwealth, supra.* But at this late date they do not otherwise entitle him to relief from his judgment.

As noted above, the rest of Long's allegations of error are all variations on a single theme, *i.e.*, because he has long since served his five-year sentence for attempted rape, he

should no longer be subjected to the sex-offender consequences of that conviction. Although Long has not clearly specified how that conviction continues to prejudice him, he suggests that the principal burden is the Parole Board's continuing insistence that he undergo sex-offender counseling. Our Supreme Court recently answered Long's complaint. In *Stewart v. Commonwealth,* 153 S.W.3d 789 (Ky. 2005), the Court held that the Parole Board did not abuse its discretion by requiring an inmate serving a sentence for two offenses, one a sex offense and one not, to participate in sex-offender counseling even after the inmate had served the sex-offense portion of the sentence:

> Utilization of the Sex Offender Treatment Program by the Parole Board is one of the options available to the Board in determining the conditions of parole. The pertinent information required by the statute is not limited to the individual facts of a particular crime, but rather encompasses matters that are relevant to the question of a determination that parole would be in the best interests of society. The Sexual Offender Treatment Program is required for sex offenders, but that does not mean that it cannot be a condition of parole for other offenders on a case-by-case basis.

Stewart v. Commonwealth, 153 S.W.3d at 793-94. The Department of Corrections did not violate Long's rights, therefore, by refusing to remove the attempted rape conviction from his record, and the Parole Board did not violate his rights by conditioning parole on his participation in sex-offender

therapy, even after service of his sex-offense sentence. The Board's serve-out decision, furthermore, did not convert Long's sentence to life without parole. Long was accorded the opportunity to be heard by the Board, and the Board retains the authority to revisit the serve-out order if it wishes. Because Long is thus not entitled to relief even if the factual allegations of his complaint are true, the trial court did not err by ordering that the complaint be dismissed. CR 12.02; *Wood v. Wyeth-Ayerst Laboratories,* 82 S.W.3d 849 (Ky. 2002) (citing *Pari-Mutual Clerks' Union v. Kentucky Jockey Club,* 551 S.W.2d 801 (Ky. 1977)).

Accordingly, we affirm the June 2, 2005, and September 6, 2005, orders of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Burgin, Kentucky

BRIEF FOR APPELLEE:

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