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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-001718-MR

JOHN REES — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 06-CI-00435

WENDELL REYNOLDS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: John Rees appeals from a July 18, 2006, order of the Franklin Circuit Court denying his motion to dismiss a declaration of rights action filed by Wendell Reynolds.[1] We affirm.

Wendell Reynolds was charged with first-degree assault in 1996. Following entry of a guilty plea, Reynolds was sentenced to fifteen years' imprisonment

[1] In the notice of appeal, John Rees is not identified beyond his name. However, according to Wendell Reynolds' petition for declaration of rights, Rees is the Commissioner of the Kentucky Department of Corrections.

by the Hart Circuit Court (Action No. 1996-CR-00023). The Hart Circuit Court ordered that Reynolds serve a term of five years' imprisonment with the remaining ten years probated. Reynolds was classified as a violent offender and, thus, was required to serve fifty percent (50%) of his sentence before becoming eligible for parole.[2] After satisfying service of the five-year sentence, Reynolds was released and placed on probation. Reynolds ultimately violated his probation and was ordered to serve the remaining ten years of the fifteen-year sentence.

Upon Reynolds' commitment to custody, the Department of Corrections (Corrections) treated Reynolds' sentence as an independent ten-year sentence rather than part of the original fifteen-year sentence. According to Corrections, Reynolds would be required to serve another five years, or fifty percent (50%) of the ten-year sentence, before becoming eligible for parole. Reynolds asserted that the ten-year sentence should be treated as part of the original fifteen-year sentence and, thus, he would be eligible for parole after serving a total of seven and one-half years. Simply put, Reynolds believed he should only serve an additional two and one-half years before again becoming eligible for parole.

On March 28, 2006, Reynolds filed a Petition For Declaration Of Rights, Civil Complaint And Demand For Jury Trial in the Franklin Circuit Court. Rees subsequently filed a Response And Motion to Dismiss. On July 18, 2006, the Franklin

[2] The version of Kentucky Revised Statutes (KRS) 439.3401, in effect when appellant was sentenced required a violent offender to serve fifty percent (50%) of his sentence before becoming eligible for parole. The statute was subsequently amended to require a violent offender to serve eighty-five percent (85%) of his sentence before becoming eligible for parole.

Circuit Court granted Reynold's petition for declaration of rights and denied Rees's motion to dismiss. The court's order, in relevant part, stated as follows:

> Pursuant to KRS 439.3401, which was applicable at the time of sentencing and has since been revised, the Petitioner was required to serve 50% of the "sentence imposed" before becoming eligible for parole or probation. In this case, the Trial Judge imposed a single 15-year sentence. The structure of the Petitioner's sentence, while unique, merely divides the single 15-year sentence into 5- and 10- year portions. Corrections' parole eligibility calculation ignores the indisputable fact that the Trial Judge imposed a single sentence on the Petitioner. To allow Corrections to simply calculate the Petitioner's sentence as if the 10-year portion is entirely separate from the previous 5-year portion would permit the imposition of two sentences for a single offense. The Petitioner has but one sentence order, one case number, and one indictment. In its Response and Motion to Dismiss, the Respondent admits that "Petitioner was sentenced to a 15 year sentence for Assault 1st and the sentence was split." Even the Respondent finds it difficult to avoid using language that indicates the sentence imposed on the Petitioner is indeed a single sentence. Therefore, as a case of first impression, this Court finds that the Petitioner's sentence is to be treated as a single sentence for parole eligibility calculation purposes.
>
> Accordingly, the Petitioner is eligible for parole after serving 7 ½ years of his 15-year sentence. The Respondent's motion to dismiss is **DENIED** and the Petitioner's Petition for Declaration of Rights is **GRANTED**.

This appeal follows.

Rees contends that the Franklin Circuit Court erred by determining that Reynolds was serving one fifteen-year sentence and would be eligible for parole after serving a total of seven and one-half years. Rees points out that under KRS 439.3401(3), "a violent offender shall not be released on parole until he has served at least fifty percent

(50%) of the sentence imposed." Rees focuses on the word "imposed" in the statute. Rees argues that only a five-year sentence was originally "imposed" in 1997 and then a ten-year sentence was subsequently "imposed." Thus, Rees asserts that Reynolds must serve five years of the later imposed ten-year sentence before being eligible for parole under KRS 439.3401. We disagree.

Rather, we agree with the circuit court and also believe a single fifteen-year sentence was "imposed" upon Reynolds by the Hart Circuit Court. The Hart Circuit Court curiously "split" the fifteen-year sentence and ordered Reynolds to serve five years' imprisonment with the remainder of the sentence (ten years) "probated." While we express no opinion upon the legality of such a "split sentence"[3] in this Commonwealth,[4] we hold that a split sentence is "imposed" only once and constitutes a single sentence when determining parole eligibility under KRS 439.3401. Thus, the circuit court properly concluded that Reynolds is eligible for parole under KRS 439.3401 after serving one-half of the original fifteen-year sentence or a total of seven and one-half years.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

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[3] As used in this opinion, a split sentence is a sentence under which a defendant is ordered to serve a term of imprisonment in a state correctional facility followed by a term of probation.

[4] In *Woll v. Commonwealth ex rel. Meredith*, 284 Ky. 783, 146 S.W.2d 59 (1940), it was seemingly held that a sentencing court is without authority to impose a split sentence. However, under the current version of KRS 533.030(6), a court may impose a limited split sentence by sentencing a defendant to a term of imprisonment in a county jail for less than twelve (12) months and to a term of probation.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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