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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001059-MR

LARRY E. WATKINS-EL — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-01433

LADONNA THOMPSON,
COMMISSIONER, KENTUCKY
DEPARTMENT OF CORRECTIONS,
AND STEVE BESHEAR, GOVERNOR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND VANMETER, JUDGES.

LAMBERT, JUDGE: Larry E. Watkins-El, proceeding *pro se*, has appealed from the May 9, 2013, order of the Franklin Circuit Court dismissing his petition for writ of mandamus/prohibition. Finding no error, we affirm.

On November 8, 2012, Watkins-El tendered a petition for writ of mandamus/prohibition in the Franklin Circuit Court against LaDonna Thompson, the Commissioner of the Department of Corrections, and Governor Steve Beshear ("the respondents"). The petition was filed on January 4, 2013, after Watkins-El paid the required filing fee. In the action, Watkins-El petitioned the circuit court to compel Thompson from executing on his life sentence for which he had already served more than twenty years. Watkins-El was indicted by the Jefferson County grand jury in 1985 and charged with first-degree assault, possession of a handgun by a convicted felon, and for being a first-degree persistent felony offender (PFO I). He was tried before a jury, which convicted him during the guilt phase of the assault and possession charges, and later recommended a fourteen-year and a one-year sentence, respectively, for those convictions. Watkins-El states that the jury did not recommend the maximum sentences. However, during the penalty phase, the jury also convicted him for being a PFO I and recommended the maximum sentence of life imprisonment.

Watkins-El claimed that the evidence upon which the PFO I conviction was based was unlawful pursuant to the 14th Amendment, and it should not have been used to enhance his sentence. Because the jury returned a less-than-maximum sentence for the two convictions, there was a strong possibility that it would not have imposed the maximum sentence of life had the prior convictions that had been deemed unconstitutional been kept from the jury. He stated that the jury had been instructed on past convictions for armed robbery, carrying a

concealed deadly weapon, and for possession of a firearm by a convicted felon (two convictions). Watkins-El stated that while he had filed several other petitions, this particular claim had never been adjudicated on the merits. He also argued that Kentucky officials were denying him the right to have his claim expediently adjudicated on the merits due to his poverty, citing the reversal of Shane Ragland's murder conviction, which he attributed to his family's wealth. He requested that the executive branch of the government stop executing on his unlawful life sentence, commute his sentence to the maximum penalty under the PFO statute, or hold a new sentencing trial without using the unconstitutional evidence.

The respondents filed an answer and moved to dismiss the petition, arguing that Watkins-El failed to state a claim against either of the named respondents and failed to name the Commonwealth as an indispensable real party in interest. The respondents also pointed out that Watkins-El had exhaustively raised this issue in several venues, including different levels of federal and state courts, where all of the rulings have upheld his 1986 conviction and sentence.

In response, Watkins-El stated that he was not challenging the conviction, but rather the maximum sentence that the jury imposed based upon unconstitutional evidence. He also moved for appointment of counsel and for an evidentiary hearing.

In an order entered May 9, 2013, the circuit court granted the motion to dismiss Watkins-El's petition. The circuit court found that Watkins-El had not

presented a claim upon which relief could be granted and was seeking to relitigate claims that had already been considered and rejected. The court also found that the respondents had acted within their discretion and in accordance with the administrative regulations. This appeal now follows.

In his brief, Watkins-El contends that he must be resentenced by the jury without consideration of the unconstitutional evidence of several of his past convictions or that his sentence be commuted to save the Commonwealth money. The respondents (now "the appellees") argue that he is not entitled to any relief.

The standard for granting a writ or prohibition or mandamus is set forth in *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004):

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. [Emphasis in original.]

It is well-settled that writs "are extraordinary in nature, and the courts of this Commonwealth 'have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" *Edwards v. Hickman*, 237 S.W.3d 183, 188 (Ky. 2007), quoting *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961). In *National Gypsum Co. v. Corns*, 736 S.W.2d 325, 326 (Ky. 1987), the Supreme Court of Kentucky made it clear that "mandamus may not be used as a substitute for appeal" and that in order to obtain such relief, "a petitioner must show that

great injustice or irreparable injury will result and that appeal does not provide an adequate remedy." With this standard in mind, we shall address Watkins-El's appeal.

Our review of the record, as well as Watkins-El's litigation history, establishes that the circuit court properly dismissed the petition for a writ of mandamus/prohibition. While Watkins-El has argued that the particular argument raised in his current action has never been decided on the merits, we disagree with this argument and note that a large portion of his actions over the years has addressed the effect of his PFO I conviction. In *Watkins-El v. Ryan*, 2006-CA-000268-MR, 2007 WL 1229406 (Ky. App. Apr. 27, 2007), this Court addressed the lower court's dismissal of his suit seeking to invalidate his PFO I conviction as not supported by valid prior felony convictions. The Court set forth in detail the history of Watkins-El's litigation in several state and federal courts:

> In 1986, Watkins-El was convicted of Assault in the First Degree, Possession of a Handgun by a Convicted Felon, and PFO I. As a result of that conviction, Watkins-El's 14 year sentence was enhanced to life imprisonment. In 1990, the prior convictions that formed the basis for the PFO I conviction were found to be the result of involuntary confessions. On August 30, 1990, the Jefferson Circuit Court ordered any evidence of those convictions suppressed and that those convictions should not be introduced to prove persistent felony offender status. The preceding facts form the general underlying basis for Watkins-El's complaint.
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> In order to have a context for this appeal, we believe that a brief summary of Watkins-El's history as an Appellant is appropriate. As previously noted by this Court in *Watkins-El v. Commonwealth*, 94-CA-2796 and

94-CA-2835 (July 26, 1996), Watkins-El shot his brother on May 15, 1985. Watkins-El was subsequently found guilty of Assault in the First Degree and Possession of a Handgun by a Convicted Felon. His 14 year sentence was enhanced to life imprisonment based on his PFO I conviction. The Supreme Court of Kentucky affirmed those convictions in June of 1987.

In October of 1987, Watkins-El filed a motion for relief pursuant to RCr 11.42 and CR 60.02. The circuit court denied that motion and this Court affirmed. In March of 1994, Watkins-El filed a second motion for relief under RCr 11.42, which the circuit court denied. This Court affirmed, holding that, even if the two felony convictions that were used to support Watkins-El's PFO conviction were constitutionally unsound, there were sufficient other felonies upon which to base that conviction.

In 1996, Watkins-El filed a Petition for Declaration of Right alleging that two federal drug possession convictions were not properly categorized as felonies and could not be used to support his PFO I conviction. The circuit court denied that motion and this Court affirmed.[1] In doing so, this Court noted that Watkins-El had previously sought RCr 11.42 and CR 60.02 relief unsuccessfully. Furthermore, this Court noted that Watkins-El had sought habeas corpus relief in the federal courts, also alleging that the federal drug convictions were not felonies sufficient to support his PFO I conviction. As noted by this Court, the United States Sixth Circuit Court of Appeals affirmed the lower court's denial of Watkins-El's petition for habeas corpus relief finding that the federal convictions could be used to support the PFO I conviction.[2] This court, in its opinion affirming the circuit court's denial of Watkins-El's Petition for Declaration of Right, held that declaratory relief was not available to Watkins-El because his criminal case had been resolved by final judgment.

[1] *See Watkins-El v. Commonwealth*, 1996-CA-002891-MR (January 30, 1998).

[2] *See Watkins v. Seabold*, 19 F.3d 20 (Table), 1994 WL 69569 (6th Cir. 1994).

Furthermore, this Court held that RCr 11.42 provides the exclusive state remedy to attack an error in a criminal conviction that could not have been raised on direct appeal.

In 2000 and 2001, Watkins-El filed several motions with the circuit court challenging his 1968 armed robbery and 1976 possession of a firearm by a felon convictions, his 1966 juvenile conviction for operating a motor vehicle without the owner's consent and stealing a license plate, his 1976 conviction for wanton endangerment, and his 1976 indictment for assault and possession of a handgun. This Court affirmed the circuit court's denial of the various motions ruling that Watkins-El had either unsuccessfully raised the issues or that he should have previously raised them and had not done so.[3] In 2004, Watkins-El filed a complaint in circuit court alleging that Governor Fletcher had violated his Constitutional duties by failing to commute Watkins-El's sentence. This court affirmed the circuit court's dismissal of that complaint.[4] Most recently, Watkins-El filed a petition for a writ of mandamus against the Kentucky State Parole Board alleging various errors with regard to the revocation of his parole. This Court upheld the circuit court's denial of Watkins-El's petition.[5]

In addition to the preceding actions, Watkins-El has filed at least two federal actions challenging his 1976 federal convictions for possession of a firearm by a felon and possession of heroin, his 1976 state conviction for wanton endangerment, and his 1989 state PFO I conviction on the grounds of ineffective assistance of counsel. The United States Sixth Circuit Court of Appeals affirmed the lower courts' orders denying Watkins-El's claims.[6] Finally, we note that Watkins-El

[3] *See Watkins v. Commonwealth*, 2001-CA-000130-MR, 2001-CA-000186-MR, 2001-CA-000250-MR (January 25, 2002).

[4] *See Watkins-El v. Ernie Fletcher, Governor*, 2005-CA-000279-MR (June 2, 2006).

[5] *See Watkins-El v. Kentucky Parole Board*, 2005-CA-001014-MR (June 30, 2006).

[6] *See United States v. Watkins-El*, 37 Fed.Appx. 701 (6th Cir. 2002).

> has unsuccessfully filed at least three federal actions asserting various violations of his rights by his parole officer and various prison officials.[7]

Watkins-El v. Ryan, 2007 WL 1229406 at *1-3.

In analyzing Watkins-El's argument that the trial court should have enforced an alleged 1986 agreement to reduce his PFO I conviction if the underlying felony convictions were dismissed, this Court stated that "even if there had been an agreement between the trial court and Watkins-El in 1986, Watkins-El would be, and is, subject to the PFO I conviction based on the federal felonies." *Id*. at *4. The Court also addressed Watkins-El's argument that the agreement represented the law of the case:

> The law of the case doctrine precludes a litigant from re-litigation of any issue raised and decided in a prior appeal. *Williamson v. Commonwealth*, 767 S.W.2d 323 (Ky. 1989). As we have noted above, Watkins-El has repeatedly and unsuccessfully challenged his PFO I conviction on appeal. Therefore, the law of the case is that Watkins-El's PFO I conviction was appropriate and Watkins-El is barred from raising that issue. Therefore, Watkins-El is not entitled to any relief for any claims arising out of the alleged 1986 agreement.

Id.

One week before the above opinion was rendered, this Court affirmed Watkins-El's consolidated Kentucky Rules of Civil Procedure (CR) 60.02 appeal, also related to his PFO I conviction. The Court stated:

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[7] *See Watkins-El v. Lofton*, 89 F.3d 837, 1996 WL 306365 (6th Cir. 1996); *Watkins-El v. Woodward*, 104 F.3d 361, 1996 WL 733128 (6th Cir. 1996).

Appellant challenges the validity of his 1986 first-degree persistent felony offender conviction and the life sentence that was imposed as a result. The crux of his argument concerns a 1990 order in a separate, unrelated case wherein a different division of the Jefferson Circuit Court ruled that Appellant's 1970 convictions for armed robbery and carrying a concealed weapon were inadmissible to prove Appellant's persistent felony status because the guilty pleas from those convictions were involuntary under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Appellant now contends that because the two 1970 felonies were also used to prove his 1986 PFO status, that such conviction is also rendered invalid.

As the Commonwealth points out, Appellant has raised this argument, albeit with various modifications, in numerous collateral attacks in the circuit court, on appeal to this Court and the Kentucky Supreme Court, as well as in the federal courts. *Watkins v. Seabold*, 19 F.3d 20 (Table) (6th Cir. 1994). All courts have unanimously held that Appellant's argument is "wholly without merit." Clearly, even absent the 1970 felonies, Appellant had more than sufficient other felony convictions to support the PFO I conviction.[8] In its May 2005 order ruling on Appellant's motion to proceed *in forma pauperis* on the appeal herein, even the trial court noted:

> In his CR 60.02 motion, Watkins attacked the validity of the prior convictions underlying his PFO I conviction, which he has unsuccessfully done numerous times before by appeal and by post-conviction CR 60.02 and RCr 11.42 motions. While the Court believes this most recent appeal

[8] Federal and state court opinions show that Appellant has a lengthy criminal history including a 1966 state conviction for operating a motor vehicle without the owner's consent and stealing license plates; a 1970 state conviction for armed robbery and carrying a concealed weapon; 1976 federal conviction on two counts of a felon in possession of a firearm and two counts of possession of heroin; a 1977 state conviction for wanton endangerment; a 1981 federal conviction for voluntary manslaughter; 1986 state convictions for first-degree assault, possession of a handgun by a convicted felon, and for being a first-degree persistent felony offender, for which he received a life sentence; and a 1991 state conviction for escape. [Footnote 2 in original.]

> by Watkins to be entirely frivolous, it does not have the authority to refuse to permit him ... to proceed *in forma pauperis* on appeal.
>
> Undoubtedly, Appellant is a perennial litigant who is using judicial resources to raise issues that have been repeatedly decided against him. "Every person charged with a crime is entitled to at least one fair and impartial trial, but it is absolutely absurd to take the time of the courts with continuous filing and refiling of motions for the same relief under the same proceedings." *Bell v. Commonwealth*, 396 S.W.2d 772, 772-73 (Ky. 1965).

Watkins v. Commonwealth, 2005-CA-002216-MR, 2007 WL 1206951 *1 (Ky. App. Apr. 20, 2007).

Watkins-El has not met the stringent standard to obtain a writ of mandamus or prohibition, and we agree with the appellees that the circuit court's ruling should be affirmed. He has not established that a great injustice or irreparable injury will result, and he has already exhaustively litigated the issue of the effects of the PFO I conviction through various appeals. His latest argument that the jury might not have imposed the maximum enhanced penalty had it not considered the prior felony convictions is speculative at best and is not enough to meet this high standard, especially in light of the overwhelming litigation surrounding this particular aspect of his original criminal conviction.

For the foregoing reasons, the order of the Franklin Circuit Court dismissing Watkins-El's petition for writ of mandamus/prohibition is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

L. E. Watkins-El, *pro se*
Pineville, Kentucky

BRIEF FOR APPELLEES:

Jack Conway
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky