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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000053-MR

JEFFREY A. CONLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 07-CR-000598

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Jeffrey Conley appeals an order of the Jefferson Circuit Court denying his petition for a writ of prohibition and/or mandamus. We affirm.

In 2007, Conley pleaded guilty to two counts of third-degree sodomy, a class D felony, KRS[1] 510.090, and two counts of first-degree wanton endangerment. The trial court sentenced him to five years on each count, to be

[1] Kentucky Revised Statutes.

served consecutively, for a total sentence of twenty years' imprisonment, probated until August 6, 2024, the date of the victim's 18th birthday. The trial court imposed numerous conditions of probation, including that Conley serve twelve months in the Community Corrections Center. While in custody, the trial court authorized Conley's release solely to pursue sex offender treatment.

Less than one year later, the trial court revoked Conley's probation, finding he had violated multiple terms of his probation, and remanded him to the Department of Corrections (DOC) to serve his sentence. The DOC classified Conley as a violent offender, declared him parole eligible after serving 85% of his sentence, and prohibited the accumulation of statutory credits. After unsuccessfully attacking his sentence, twice, by means of CR[2] 60.02, Conley filed a Petition for Writ of Mandamus and/or Prohibition asking the trial court to reverse the DOC's actions. The Commonwealth opposed the petition.

At Conley's request, the Department of Public Advocacy (DPA) was appointed to represent him on his writ petition, but was allowed to withdraw upon determining it was not a "proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense." KRS 31.110(2)(c).

By order entered December 13, 2013, the trial court denied Conley's writ petition, finding it procedurally deficient. It reasoned a writ of prohibition was procedurally inapt because Conley was seeking a writ against the Commonwealth and its agent, the DOC, not a lower court or a judicial officer, and

[2] Kentucky Rules of Civil Procedure.

a writ of mandamus was likewise unsuitable because Conley sought to compel performance by the DOC, but it [the DOC] was not a party to the underlying action. Conley appealed.

Conley's precise arguments on appeal are, at times, difficult to comprehend. We employ our best efforts to do so.

Conley first contends the trial court abused its discretion when it denied his request for counsel. We find this argument puzzling because the trial court, in fact, granted his request for counsel. Perhaps his argument is better framed as whether the trial court abused its discretion when it granted the DPA's motion to withdraw as counsel. Contrary to Conley's belief, there is no constitutional right to counsel in "a post-conviction collateral attack on a criminal conviction." *Fraser v. Commonwealth*, 59 S.W.3d 448, 451 (Ky. 2001). The DPA may, under KRS 31.110(2)(c), represent an indigent person in a post-conviction action if the proceeding is one "that a reasonable person with adequate means would be willing to bring at his own expense[.]" The DPA found Conley's case did not qualify as such, and the trial court agreed. Conley has identified nothing which leads us to conclude the trial court abused its discretion when it granted the DPA's motion to withdraw as his counsel.

Citing RCr[3] 11.42, Conley next argues he was denied effective assistance of counsel. He spends considerable time discussing the standards applicable to an ineffective assistance of counsel claim. However, Conley's writ

[3] Kentucky Rules of Criminal Procedure.

petition was not grounded in RCr 11.42, and at no point did he raise a Rule 11.42 accusation before the trial court in relation to his writ petition. This argument is entirely lacking in merit, and we decline to address it further.

This brings us to the heart of Conley's appeal. He asserts the trial court erred when it denied his writ petition. As he did before the trial court, Conley argues application of the violent offender statute, KRS 439.3401, violates the terms of his plea agreement and is otherwise improper because Class D felonies do not qualify for "violent offender" status. Conley argues that, because he is not a violent offender, he is entitled to parole eligibility after serving 20%, rather than 85%, of his twenty-year sentence, and that he is entitled to all statutory credits. He further claims the DOC's actions violate *ex post facto* laws and his due process rights. We are not persuaded.

"A writ of prohibition or mandamus is an extraordinary form of relief and should not freely be granted." *Riley v. Gibson*, 338 S.W.3d 230, 233 (Ky. 2011). The decision to issue a writ rests within the sound discretion of the court with which the petition is filed. *Hoskins v. Maricle*, 150 S.W.3d 1, 9 (Ky. 2004). A writ may be issued if:

> (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.

Mahoney v. McDonald-Burkman, 320 S.W.3d 75, 77 (Ky. 2010) (citation omitted).

Here, Conley asserts the trial court acted within its jurisdiction, but erroneously – the second category of writs. Analysis under this category prohibits consideration of the merits, unless the petitioner first establishes he has no adequate remedy by appeal or otherwise, and will suffer great and irreparable injury if error has been committed and the petition denied. *Gilbert v. McDonald-Burkman*, 320 S.W.3d 79, 84 (Ky. 2010).

Conley has an adequate remedy by a more appropriate route. In *Hoskins v. Commonwealth*, 158 S.W.3d 214 (Ky. App. 2005), this Court concluded that the proper path for a defendant to take to attack a violent-offender classification is "to proceed against the Department of Corrections with an original [declaratory] action before the Franklin Circuit Court." *Id.* at 217. This allows the DOC to be made a party to the proceeding, and to respond to and defend its actions. *Mason v. Commonwealth*, 331 S.W.3d 610, 629 (Ky. 2011) (declining to order the DOC – which had not been made a party to the appeal and was not properly before the Court "to either defend its action or to confess error – to take any affirmative action with regard to [the defendant's] offender classification or parole eligibility"). As explained by the Kentucky Supreme Court in *Mason*, Conley "is free to file a separate action against the Department of Corrections, such as a declaratory judgment action, seeking to have his parole eligibility recalculated." 331 S.W.3d at 629. Nothing in this opinion forecloses that avenue of possible

relief. Because an adequate remedy by way of a more suitable route is available to Conley, the trial court correctly denied his writ petition.

Furthermore, even if a writ was available to Conley, we are convinced at least part of his claim is wholly meritless. First, the plea agreement makes no assurance as to Conley's parole eligibility. Second, KRS 439.3401 identifies which offenders shall be deemed violent offenders. Subsection (1)(e) of that statute provides that persons who commit a felony sexual offense described in KRS Chapter 510 are violent offenders. Conley pleaded guilty to third-degree sodomy, a class D felony sexual offense defined in KRS 510.090. Despite Conley's vehement argument to the contrary, KRS 439.3401 does not exempt or exclude class D felonies from violent offender status. Conley is a violent offender. KRS 439.3401(4) further prohibits a violent offender from receiving good-time credit authorized by KRS 197.045(1)(b)1.

Conley may, however, be entitled to other statutory credits, such as statutory time credit and educational credit, provided those credits do not reduce his "term of imprisonment to less than" 85% of his sentence. KRS 439.3401(4); KRS 197.045(1)(a), (b). Further, the Commonwealth and trial court both question whether Conley is indeed subject to the more stringent 85% parole eligibility requirement, noting his offenses do not qualify for such treatment under KRS 439.3401(2) or (3). As previously noted, these issues are the proper subject of a declaratory judgment action against the DOC. We pass no judgment on them.

For the foregoing reasons, we affirm the Jefferson Circuit Court's December 13, 2013 order denying Conley's Petition for a Writ of Prohibition and/or Mandamus.

ALL CONCUR.

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