

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-001784-MR

KEON SIMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 17-CI-00856

RODNEY BALLARD, COMMISSIONER,  
DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Keon Sims, *pro se*, appeals from the October 9, 2017, order of the Franklin Circuit Court dismissing his petition for declaratory judgment. The circuit court dismissed his petition regarding his classification as a “violent offender” under Kentucky Revised Statute (KRS) 439.3401 for failing to state a claim on which relief could be granted pursuant to Kentucky Rule of Civil

Procedure (CR) 12.02(f). Having concluded the circuit court did not err in dismissing the petition, we affirm.

On November 3, 2010, Sims pleaded guilty to two counts of robbery in the first degree, a Class B felony, in violation of KRS 515.020. The trial court imposed a sentence of twenty years on each count to be served concurrently. The trial court also revoked Sims's probation in two prior convictions, which resulted in a ten-year sentence to be served consecutively with the twenty-year sentence, for a total of thirty-years' imprisonment.

As a result of the conviction for robbery in the first degree, the Kentucky Department of Corrections (DOC) classified Sims as a violent offender under KRS 439.3401(1). Due to his status as a violent offender, Sims is ineligible for parole until he serves at least eighty-five percent of his sentence and he may not receive any credit that would reduce the term of imprisonment to less than eighty-five percent. KRS 439.3401(3)(a), (4).

On September 15, 2017, Sims petitioned for a declaration of rights pursuant to KRS 418.040, *see Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997), in the Franklin Circuit Court. In his petition, Sims asked to be reclassified as a nonviolent offender with a parole eligibility requirement of twenty percent rather than eighty-five percent of his sentence. Sims contended DOC's application of the violent offender statute to his sentence was improper under *Pate v. Dep't of*

*Corrections*, 466 S.W.3d 480 (Ky. 2015), because the circuit court did not designate if his first-degree robbery offenses resulted in serious physical injury or death in the final judgment of conviction. DOC responded and moved to dismiss for failure to state a claim on which relief could be granted pursuant to CR 12.02(f). The circuit court granted the motion to dismiss. This appeal followed.

Our standard of review for a circuit court's dismissal of a complaint pursuant to CR 12.02 is:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

*James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation and citation omitted). We review a determination of a matter of law under the *de novo* standard. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

On appeal, Sims argues DOC erroneously designated him as a violent offender under KRS 439.3401. Sims contends his classification as a violent offender is improper because the final judgment did not include a finding regarding whether the victim suffered death or a serious physical injury. The language of

KRS 439.3401, which was effective in 2011<sup>1</sup> when Sims was convicted, defined a violent offender in pertinent part as follows:

(1) As used in this section, “violent offender” means any person who has been convicted of or pled guilty to the commission of:

(a) A capital offense;

(b) A Class A felony;

(c) A Class B felony involving the death of the victim or serious physical injury to a victim;

[ . . . ]

(l) Robbery in the first degree.

The court shall designate in its judgment if the victim suffered death or serious physical injury.

Sims argues because his judgment did not include the designation of death or serious physical injury to a victim, DOC’s application of the “violent offender” statute to his sentence is improper. As support, Sims relies on his interpretation of the Supreme Court of Kentucky’s holding in *Pate*. However, *Pate* is inapplicable here.

The facts and issues in *Pate* are distinguishable from those before us now in two considerable ways. First, the issue in *Pate* involved the interpretation

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<sup>1</sup> KRS 439.3401 has been amended to add a new offense which qualifies as a “violent offense,” resulting in the subsection for “Robbery in the first degree” now appearing under 439.3401(1)(n). 2018 Ky. Acts, ch. 115 § 10 (effective July 14, 2018).

of KRS 439.3401 as it was amended in 2006. *Pate*, 466 S.W.3d at 486. This language differs significantly from the version applied to Sims. Second, the inmate in *Pate* had been convicted following a jury trial that took place in 2005. *Id.* at 483. At the time of his conviction and until the statute was amended, the inmate was designated as a non-violent offender. *Id.* at 484. Once the statute was amended, DOC retroactively applied the new language to change the inmate's classification to "violent offender" status. *Id.* The inmate had already begun serving his sentence when DOC changed his status. *Id.* Here, there is no question involving retroactive application to Sims's sentence because DOC has classified Sims as a violent offender since the trial court sentenced him.

*Pate* addressed the constitutionality and retroactive application of the amended language of KRS 439.3401. In analyzing the argument of a retrospective application of DOC's reclassification of an inmate as a "violent offender" after the inmate began serving his sentence under a non-violent classification, the Supreme Court of Kentucky held the statute was constitutional. *Id.* at 491. The Court also held the retroactive application of the statute to the inmate under the facts presented justified relief under CR 60.02. *Id.* Additionally, the Court decided the requirement of death or serious injury of a victim had not been intended by the legislature to apply to Class A felonies. *Id.* at 488-89. The Court did not address

how the statute's general offense category would affect the specific Class B felonies listed in the statute, such as robbery in the first degree.

In considering the application of the analysis and holding in *Pate* to the case at hand, the circuit court reasoned:

[T]he language in dispute in *Pate* was not that of “Robbery in the first degree” under subsection (1), but the application of “involving the death of the victim or serious physical injury to a victim” now present in subsection (c) that qualifies overall classifications for Class B felony offenders. In [Sims's] case, he was convicted of a felony, Robbery in the first degree, that is specifically enumerated as an offense that qualifies him as a “violent offender” under the statute, just as if he were convicted of a capital offense as enumerated under subsection (a). Neither of these subsections has the additional requirement of designation as “involving the death of the victim or serious physical injury to a victim[.]”

The circuit court also observed that under the plain meaning of the statute, Sims automatically qualified as a “violent offender” due to his conviction of robbery in the first degree “with or without a specific designation that the crime involved the death or serious injury to the victim.” The circuit court did not err in concluding *Pate* was inapplicable and DOC correctly classified Sims as a “violent offender.”

Sims's argument also fails under a careful examination of our case law. “DOC correctly classified [the inmate] as a violent offender pursuant to KRS 439.3401(1) despite the absence of the ‘death or serious physical injury’ language

from the trial court's judgment." *Fambrough v. Dep't of Corrections*, 184 S.W.3d 561, 563 (Ky. App. 2006); *see also Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008).

Additionally, we also reject [the inmate's] argument that he should not be, or cannot be, classified as a violent offender under KRS 439.3401 because the trial court's final judgment did not specifically designate him as a violent offender. We agree with the Court of Appeals' recent conclusion that a defendant automatically becomes a violent offender at the time of his or her conviction of an offense specifically enumerated in KRS 439.3401(1) regardless of whether the final judgment of conviction contains any such designation.

*Benet*, 253 S.W.3d at 533 (internal footnotes and citations omitted); *see also Pate*, 466 S.W.3d at 486 (addressing the amendment in the violent offender statute to encompass other categories of crimes other than Class B felonies involving death or serious physical injury). Accordingly, the case law does not support Sims's argument that DOC improperly classified him as a "violent offender." Sims pleaded guilty in 2011 to robbery in the first degree and was thus captured by the appropriate subsection of KRS 439.3401(1) at the time, designating him a violent offender. The circuit court did not err in finding Sims failed to state a claim for relief in his petition.

For the reasons stated above, we hold that Sims was not entitled to relief. Accordingly, we affirm the October 9, 2017, order of the Franklin Circuit Court dismissing the petition for declaratory judgment.

ALL CONCUR.

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