

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001743-MR

RICO PENIX

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-00595

DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON,
JUDGES.

COMBS, JUDGE: Appellant, Rico Penix (Penix), appeals from an Order of the Franklin Circuit Court denying his Petition for Declaration of Rights and granting the Motion to Dismiss filed by the Appellee, Department of Corrections (DOC).

After our review, we affirm.

Penix is an inmate in the custody of DOC at Western Kentucky Correctional Complex. On September 8, 2016, he pled guilty to Robbery, First Degree, and Assault, First Degree. On September 19, 2016, the Boyle Circuit Court entered judgment and sentencing following his plea of guilty and sentenced Penix to fifteen-years' imprisonment.

On July 21, 2017, Penix, *pro se*, filed a Petition for Declaration of Rights in the Franklin Circuit Court pursuant to KRS¹ 418.040. He was classified as a "violent offender" by the DOC, requiring him to serve 85% of his sentence pursuant to KRS 439.3401. He contended that the classification was improper because the circuit court did not designate in its judgment that his victim suffered death or serious physical injury. The version of KRS 439.3401 in effect at the time of Penix's conviction provided as follows in relevant part:

- (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;
 -
 - (m) Robbery in the first degree.

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

....

¹ Kentucky Revised Statutes.

(3) (a) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.

....

(4) . . . In no event shall a violent offender be given credit on his or her sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence.

On August 1, 2017, the DOC filed a response and a motion to dismiss. On August 11, 2017, Penix filed a reply.

By an order entered October 5, 2017, the Franklin Circuit Court granted the DOC's motion to dismiss, concluding that Penix failed to state a claim upon which relief may be granted under CR² 12.02(f). The court explained that *Pate v. Dep't of Corrections*, 466 S.W.3d 480 (Ky. 2015), upon which Penix relied, involved an earlier version of KRS 349.3401. The court recited that:

the language in dispute in *Pate* was not that of "Robbery in the first degree" under subsection (m) In Penix'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," therefore, this Court finds that [Penix] was properly classified as a "violent offender" pursuant to KRS 439.3401(1)(m).

² Kentucky Rules of Civil Procedure.

KRS 439.3401(4) states that “[i]n no event shall a violent offender be given credit on his or her sentence if the credit reduces the term of imprisonment to less than eight-five percent (85%) of the sentence.” The plain meaning of KRS 439.3401(1)(m) is that “Robbery in the first degree” automatically qualifies an offender as a “violent offender” under the statute, with or without a specific designation that the crime involved the death or serious injury to the victim. . . .

On October 27, 2017, Penix filed a Notice of Appeal to this Court.

“We review dismissals under CR 12.02(f) *de novo*. . . .” *Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012).

Penix argues that the circuit court improperly interpreted KRS 439.3401 to find that the “violent offender” designation applied to him because the judgment did not designate that the “victim suffered death or serious physical injury” or that Penix was “ineligible for probation, probation with an alternative sentencing plan, or conditional discharge.”

Shortly after Appellant’s brief was filed, this Court rendered its decision in *Campbell v. Ballard*, 559 S.W.3d 869 (Ky. App. 2018). Campbell entered a conditional guilty plea to robbery, first degree, in 2013. The DOC classified him as a violent offender under KRS 439.3401. The same version of the statute was in effect then as in the case before us.³ Campbell filed a declaratory

³ As explained in *Campbell*, “KRS 439.3401 has been amended several times over the years. Most recently, in 2018, the statute was amended such that ‘(m) Robbery in the first degree’ is

judgment action in Franklin Circuit Court seeking a determination that the DOC could not legally classify him as a violent offender because his judgment did not recite that the victim suffered death or serious physical injury. The Franklin Circuit Court disagreed. This Court affirmed and held as follows:

On appeal, Appellant argues that Class B felonies are only classified as violent offenses when a court’s judgment designates that a victim has suffered death or serious physical injury. Appellant bases this argument . . . in part, on *Pate v. Department of Corrections*, 466 S.W.3d 480, 488-89 (Ky. 2015). . . . *Pate* . . . interpreted the 2005 version of KRS 439.3401(1) as applying the qualifier, “involving the death of the victim or serious physical injury to a victim[,]” to Class B felonies, [*Pate*] neither addressed nor involved the provision of the statute regarding robbery in the first degree.

Some Class B felons cannot be classified as violent offenders unless the crime involved the death or serious injury to the victim, and the trial court so designates. However, where the Class B felony is robbery, the felon is automatically considered a violent offender. The violent offender statute is clear that any person who has been convicted of or pled guilty to the commission of robbery in the first degree qualifies as a violent offender. No designation by the trial court is required. *See Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008); *see also Pollard v. Commonwealth*, 2017-CA-000608-MR, 2018 WL 2277170, at *2 (Ky. App. May 18, 2018) (“Pollard became a violent offender upon pleading guilty to robbery in the first degree, and the trial court correctly found its failure to designate whether a victim suffered

now ‘(n) Robbery in the first degree.’ This amendment, however, has no effect our analysis herein.” *Id.* at 872, n.3.

death or serious physical injury did not provide grounds to modify his sentence.”).

Id. at 871 (footnote omitted).

The Franklin Circuit Court did not err in dismissing Penix’s action for failure to state a claim in the case before us.

Penix also argues that KRS 439.3401 is unconstitutionally vague. In *Grider v. Com.*, 404 S.W.3d 859, 861 (Ky. 2013), our Supreme Court explained as follows:

KRS 418.075(1) states that “[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard[.]” We have found the notification requirement of KRS 418.075(1) to be mandatory. *Adventist Health Systems/Sunbelt Health Care Corp. v. Trude*, 880 S.W.2d 539, 542 (Ky. 1994) (overruled on other grounds by *Sisters of Charity Health Systems, Inc. v. Raikes*, 984 S.W.2d 464 (Ky. 1998)). Raising a constitutional issue for the first time on appeal is insufficient. *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (“[W]e reject any contention that merely filing an appellate brief, which necessarily occurs post-judgment, satisfies the clear requirements of KRS 418.075.”).

Although Penix certified that he served copies of his appellate briefs upon the Attorney General, he did not raise the issue in the circuit court or notify the Attorney General in that proceeding. Therefore, the issue is not properly before us, and we must decline to consider it.

Accordingly, we affirm the Order of the Franklin Circuit Court entered on October 5, 2017.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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