

RENDERED: MAY 3, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000389-MR

SHAWN BROTHERS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-00834

KENTUCKY DEPARTMENT
OF CORRECTIONS

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Shawn Brothers, proceeding *pro se*, has appealed from the January 30, 2018, order of the Franklin Circuit Court dismissing his petition for declaration of rights in which he sought a ruling that he had been improperly classified as a violent offender pursuant to Kentucky Revised Statutes (KRS)

439.3401(1) for his convictions on two counts of first-degree robbery. Finding no error, we affirm.

Pursuant to a guilty plea, Brothers was convicted by the Jefferson Circuit Court in Indictment No. 14-CR-001866 of first-degree robbery and for being a second-degree persistent felony offender in a judgment entered May 27, 2015. He received an enhanced sentence of fifteen years' imprisonment and was delivered to the custody of the Department of Corrections (DOC) to serve his sentence. He was ultimately housed at the Green River Correctional Complex. Because of his first-degree robbery convictions, the DOC classified Brothers as a violent offender, which mandates that a prisoner serve 85% of his sentence before being eligible for parole. Brothers contested this classification based upon our Supreme Court's recently rendered decision in *Pate v. Department of Corrections*, 466 S.W.3d 480 (Ky. 2015).

When he did not obtain the desired result, Brothers filed a petition for declaration of rights in the Franklin Circuit Court on September 1, 2017, continuing to cite *Pate, supra*, in support of his claim that he was erroneously classified as a violent offender for parole eligibility. In its response, the DOC moved to dismiss Brothers' petition pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), asserting that *Pate* did not apply to his case and that the version of KRS 439.3401 in effect at the pertinent times were accurately applied to his

classification as a violent offender. The circuit court upheld the DOC's interpretation of the statute and dismissed Brothers' petition for failure to state a claim upon which relief may be granted. This appeal now follows.

Our standard of review in this appeal is set forth in *Campbell v.*

Ballard, 559 S.W.3d 869, 870-71 (Ky. App. 2018):

Upon appellate review, dismissals for failure to state a claim under CR 12.02(f) are reviewed *de novo*. *Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012). "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)). The pleadings are to be "liberally construed in a light most favorable to the plaintiff[,]" and all allegations in the complaint are to be taken as true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)); see *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968) ("For the purpose of testing the sufficiency of the complaint the pleading must not be construed against the pleader and the allegations must be accepted as true.").

With this standard in mind, we shall review Brothers' appeal.

This case involves the proper interpretation of KRS 439.3401(1). In Kentucky, it is well settled that "[t]he primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider the intended purpose of the statute – and the mischief intended to be

remedied. A court may not interpret a statute at variance with its stated language.” *Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 10, 19 (Ky. App. 2008) (internal quotation marks omitted), citing *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001).

When faced with issues of statutory interpretation we “must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent.” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (citing *Commonwealth v. Montaque*, 23 S.W.3d 629 (Ky. 2000)). “The most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language: ‘[r]esort must be had first to the words, which are decisive if they are clear.’” *Stephenson v. Woodward*, 182 S.W.3d 162, 169-70 (Ky. 2005) (quoting *Gateway Constr. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962)).

Pate, 466 S.W.3d at 488.

Prior to the submission of this appeal, this Court rendered the opinion of *Campbell v. Ballard*, *supra*, which is determinative of the present appeal. In *Campbell*, as in this case, the appellant pled guilty to first-degree robbery and was classified as a violent offender pursuant to KRS 439.3401. He contested his classification, and this Court rejected his argument as follows:

At the time of Appellant’s conditional guilty plea, KRS 439.3401(1) provided as follows:¹

¹ 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 now “(n) Robbery in the first degree.” This amendment, however, has no effect our analysis herein. [Footnote 3 in original.]

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.

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 KRS 439.3401(1) and, in part, on *Pate v. Department of Corrections*, 466 S.W.3d 480, 488-89 (Ky. 2015).² Although Appellant is correct in pointing out that the *Pate* court 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, that case 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

² Appellant also references an unpublished case from the Kentucky Supreme Court: *Al Kini v. Commonwealth*, 2015 Ky. Unpub. LEXIS 72 (Ky. Sept. 24, 2015). [Footnote 4 in original.]

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

Campbell became a violent offender when he pled guilty to robbery in the first degree. When the crime involved is first-degree robbery, the violent offender statute applies even without a designation by the trial court regarding whether the victim suffered death or serious injury. The relief Campbell sought from the circuit court, a determination that he does not qualify as a violent offender, is not authorized. Accordingly, the circuit court properly dismissed Campbell’s action for failure to state a claim.

Campbell, 559 S.W.3d at 871.

We find no error in the circuit court’s decision in the present case because it held that “[t]he plain meaning of KRS 439.3401(1)(m) [now (n)] 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.”

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Shawn Brothers, *Pro Se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Linda M. Keeton
Frankfort, Kentucky