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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001441-MR

STEVEN PAUL HARSTON — APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 14-CR-00135

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; NICKELL[1] AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Steven Paul Harston appeals from the Simpson Circuit Court's order denying his motion to set aside, correct, or amend judgment pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(e) and (f), entered September 5, 2018. We affirm.

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[1] Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

On or about September 29, 2014, the Simpson County grand jury issued two separate indictments[2] against Harston on charges of first-degree robbery,[3] being a convicted felon in possession of a handgun,[4] and theft by unlawful taking of an automobile.[5] Pursuant to a guilty plea Harston negotiated with the Commonwealth, the trial court sentenced Harston to fifteen years' imprisonment for first-degree robbery, five years' imprisonment for being a felon in possession of a handgun, and two years' imprisonment for theft by unlawful taking. The trial court ordered these terms to be served concurrently for a total of fifteen years' imprisonment.

More than three years later, Harston filed a *pro se* motion to amend or modify his sentence pursuant to CR 60.02(e) and (f). Specifically, he argued he should not be considered a "violent offender" for his robbery conviction under KRS 439.3401 because the trial court's judgment failed to designate his victim as having suffered death or serious physical injury. The trial court denied relief on

[2] The final judgment of conviction and the denial of the appellant's relief under CR 60.02 both encompass Simpson Circuit Court Action Nos. 14-CR-00135 and 14-CR-00136. However, the appellant only references 14-CR-00135 in his notice of appeal. The discrepancy does not change our analysis, but we note it here for the sake of clarity.

[3] Kentucky Revised Statute (KRS) 515.020, a Class B felony.

[4] KRS 527.040, a Class C felony.

[5] KRS 514.030, a Class D felony when, as here, the value of the property is five hundred dollars ($500) or more, but less than ten thousand dollars ($10,000).

Harston's CR 60.02 motion in an order entered September 5, 2018. In its denial of the motion, the trial court pointed out that "[r]obbery first degree has been and remains a 'stand-alone' offense under the violent offender statute for any offense committed after July 14, 2002 without regard to whether a victim suffered death or serious physical injury." This appeal followed.

This is an appeal of the trial court's denial of a CR 60.02 motion. "We review the denial of a CR 60.02 motion for an abuse of discretion." *Diaz v. Commonwealth*, 479 S.W.3d 90, 92 (Ky. App. 2015) (citing *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The burden of proof in a CR 60.02 proceeding falls squarely on the movant to affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014) (citations and internal quotation marks omitted). "[W]e will affirm the lower court's decision unless there is a showing of some 'flagrant miscarriage of justice.'" *Id*. at 886 (quoting *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983)).

Harston's arguments on appeal center around a common misinterpretation of the violent offender statute, KRS 439.3401. The relevant

portion of this statute, which details the types of offenses falling within its purview, reads 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;
>
> . . .
>
> (n) Robbery in the first degree.
>
> The court shall designate in its judgment if the victim suffered death or serious physical injury.

Harston argues, as many have before him, that a trial court is required to recite whether a victim “suffered death or serious physical injury” in the judgment as a prerequisite before a defendant may be considered a violent offender. This is simply not accurate. The requirement of finding a victim suffered death or serious physical injury is only relevant and applicable to KRS 439.3401(1)(c), which applies violent offender status to one committing a Class B felony “involving the death of the victim or serious physical injury to a victim[.]” Other *specifically enumerated* offenses in the statute are considered to be violent

offenses without the necessity of a superfluous finding of death or serious physical injury.

Our courts have interpreted the violent offender statute in this fashion for at least a decade. In a portion of *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008), entitled "Failure to Designate Violent Offender of No Legal Significance," the Kentucky Supreme Court held as follows:

> Additionally, we also reject [the appellant'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.

Id. at 533 (footnote omitted). This Court has ruled consistently with *Benet* in multiple opinions since that time, including one recently published case concerning the statute's applicability to first-degree robbery:

> 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.

Campbell v. Ballard, 559 S.W.3d 869, 871 (Ky. App. 2018). This case is dispositive on the issues raised by Harston's CR 60.02 motion, and we need not consider the matter further.

For the foregoing reasons, we affirm the Simpson Circuit Court's order denying relief pursuant to CR 60.02.

ALL CONCUR.

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