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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001485-MR

ELBERT PHILLIP LONG — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 18-CI-00634

RANDY WHITE, WARDEN; LELIA VANHOOSE;
AND COMMONWEALTH OF KENTUCKY
PAROLE BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Elbert Long appeals from an order of the Daviess Circuit Court which denied his petition for writ of *habeas corpus* and his petition for declaratory judgment. The trial court denied Appellant's petitions because it

found the issues had been raised before in previous court actions and were therefore barred by *res judicata*. We agree and affirm.

> In 1977, a Daviess County jury found Elbert Long guilty of murder, in violation of [Kentucky Revised Statute (KRS)] 507.020, and of attempted rape in violation of KRS 510.040 and KRS 506.010. The Daviess Circuit Court sentenced him, respectively, to life and to five years in prison. In *Long v. Commonwealth*, 559 S.W.2d 482 (Ky. 1977), our Supreme Court affirmed Long's conviction and sentence. The Parole Board granted Long parole in 1986, but apparently because he refused to participate in sex-offender counseling, his parole was revoked and he was returned to prison in 1988. Since then Long has appeared before the Board three times, but on each occasion was denied parole. Following his last appearance, in 1998, the Board ordered him to serve out his life sentence. Although the record does not include the reasons for the Board's denials, Long suggests that they resulted, at least in part, from his continuing refusal of sex-offender treatment.

Long v. Commonwealth, No. 2005-CA-002065-MR, 2006 WL 2708542, at 1 (Ky. App. Sept. 22, 2006).

Since the mid-1990s, Appellant has brought multiple actions challenging his sentence and the revocation of his parole. He has consistently argued that the jury instructions only found him guilty of rape, not murder or attempted rape; that the court erred in sentencing him to life in prison plus five years; and that he should not have been required to complete the sex offender treatment program because it did not become a requirement until after his

conviction. A list of these actions are as follows: *Long v. Commonwealth*, No. 1996-CA-003389-MR (Ky. App. September 5, 1997); *Long v. Kentucky Corrections Cabinet, et al.*, No. 1997-CA-002148-MR (Ky. App. March 5, 1999); *Long v. Commonwealth*, No. 1999-CA-002017-MR (Ky. App. June 9, 2000); *Long v. Sapp, et al.*, No. 1999-CA-002185-MR (Ky. App. October 20, 2000); and *Long v. Commonwealth*, No. 2005-CA-002065-MR, 2006 WL 2708542 (Ky. App. Sept. 22, 2006). In addition, Appellant has filed numerous *habeas corpus* petitions: *Long v. Sparkman, et al.*, No. 1994-CA-000802-MR (Ky. App. May 17, 1994); *Long v. Chapleau, et al.*, No. 1995-CA-0002473-MR (Ky. App. October 24, 1995); *Long v. Commonwealth*, No. 2003-CA-000118-MR (Ky. App. May 7, 2003); and *Long v. White, et al.*, No. 2018-CA-001412-MR (Ky. App. November 26, 2018). Finally, Appellant has also raised these issues at the federal level: *Long v. Sparkman*, 83 F.3d 422 (6th Cir. 1996); *Long v. Kentucky*, 187 F.3d 636 (6th Cir. 1999); and *Long v. Commonwealth of Kentucky*, 80 F. App'x 410 (6th Cir. 2003).

The same issues have again been raised in the appeal before us; however, these above listed actions show that Appellant has thoroughly litigated these issues. These judgments indicate that Appellant was correct that his sentence of life plus five years was unlawful, but his sentence has long since been corrected to life imprisonment. In addition, while the jury instructions did contain some typographic errors, the jury clearly and unequivocally found him guilty of murder

and attempted rape. Finally, the judgments listed above have found no error in requiring Appellant to complete the sex offender treatment program. These issues have been fully litigated and the previous actions bar further analysis. *Res judicata* applies in this case.

> "[T]he doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation *which could have been*, as well as those which were, introduced in support of the contention of the parties on the first appeal." *Burkett v. Board of Education of Pulaski County*, 558 S.W.2d 626, 627-28 (Ky. App. 1977).

Huntzinger v. McCrae, 818 S.W.2d 613, 615 (Ky. App. 1990) (emphasis in original).

The only issue not barred by *res judicata* is Appellant's argument that the trial court judge should have recused himself from the case. Appellant requested that Judge Jay Wethington recuse from the case because he was once a Commonwealth Attorney and because he believed Judge Wethington was involved in covering-up Appellant's unlawful conviction. Appellant sent an affidavit to the Kentucky Supreme Court asking for a special judge for these proceedings.[1] Chief Justice John Minton found no reason for Judge Wethington to recuse and declined to appoint a special judge.

[1] This is allowed by KRS 26A.020(1).

> KRS 26A.015(2) requires recusal when a judge has "personal bias or prejudice concerning a party ... [,]" or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment." The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal.

Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001) (citations omitted). "We review a trial judge's denial of a motion to recuse for abuse of discretion. 'The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Dunlap v. Commonwealth*, 435 S.W.3d 537, 587 (Ky. 2014) (citations omitted).

We find no abuse of discretion here. We do not believe that previously being a Commonwealth Attorney is grounds for recusal. In addition, this case has been fully litigated and there has been no cover-up. Finally, Chief Justice Minton found no grounds for recusal. We conclude that Judge Wethington was not required to recuse from this case.

Based on the foregoing, we affirm the judgment of the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elbert Phillip Long, *pro se*
Eddyville, Kentucky

NO BRIEF FOR APPELLEES.