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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001789-MR

MICHAEL PARM — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 14-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: On or about September 9, 2018, the Appellant, Michael Parm, filed a CR[1] 60.02 motion with the Henderson Circuit Court. In his motion, Parm argued that the 2018 amendments to the Kentucky's violent offender statute, KRS[2] 439.3401, made his designation as a violent offender by the Kentucky Department

[1] Kentucky Rules of Civil Procedure.
[2] Kentucky Revised Statutes.

of Corrections improper. The circuit court denied Parm's motion on the basis that the Department of Corrections properly classified him as a violent offender. On appeal, Parm requests us to reverse the circuit court and order it to direct the Department of Corrections to reclassify him as a non-violent offender.

While we do not necessarily disagree with the circuit court's ultimate conclusion, we affirm on a different basis. The circuit court does not have the authority to direct the Department of Corrections to reclassify a prisoner where the Department has not been brought before the court as a party. The proper method for a prisoner to challenge his designation as a violent offender is through a civil declaratory judgment action naming the Department of Corrections as a party. Because Parm did not pursue relief by the appropriate means, the circuit court was correct to deny his petition.

I. Background

On February 7, 2014, Parm was indicted by a Henderson County grand jury for robbery in the first degree and being a persistent felony offender in the second degree. Parm was also indicted in two subsequent cases for robbery in the second degree[3] and being a convicted felon in possession of a handgun. Eventually, Parm accepted the Commonwealth's offer on a plea of guilty and was sentenced to three concurrent ten-year sentences for robbery in the first degree,

[3] KRS 515.030.

robbery in the second degree, and being a convicted felon in possession of a handgun.[4] The Commonwealth dismissed the charge of being a persistent felony offender as part of the plea deal.

On August 27, 2015, Parm filed a motion to re-docket. In this motion, he requested the court consider modifying his conviction pursuant to CR 60.02(e) and (f) and KRS 532.070. In his motion, he asked the court to modify his conviction of robbery, first degree, to robbery, second degree, so that his parole eligibility would decrease from eighty-five percent to twenty percent. In support of his request for modification, Parm noted that he was only twenty-two years old and that he was the only one of three co-defendants to plead to robbery in the first degree. On August 31, 2015, the circuit court entered an order denying the motion. The circuit court concluded that it did not have jurisdiction to modify the sentence under KRS 532.070 and that there was no substantial miscarriage of justice to justify the extraordinary relief Parm sought under CR 60.02.

On September 9, 2018, Parm filed a second motion pursuant to CR 60.02. In this motion, Parm asked the court to find that he was not a violent offender. In support of his motion, Parm argued that his status as a violent

[4] The records associated with the subsequent indictments with regard to robbery in the second degree and being a convicted felon in possession of a firearm are not included in the record before us because Parm appealed in only one of his criminal cases.

offender was erroneous because the circuit court never made a specific finding that a victim suffered death or physical injury. Therefore, Parm concluded that he should be reclassified as a non-violent offender and afforded the benefit of twenty percent parole eligibility for non-violent offenders. On September 24, 2018, the circuit court entered an order denying the CR 60.02 motion. It its order, the circuit court noted that robbery in the first degree is specifically designated as a violent offense and as such the classification as a violent offender is automatic, regardless of whether a victim suffered any injury.

This appeal followed.

II. Analysis

A CR 60.02 motion filed in a prisoner's underlying criminal case cannot be used to obtain an order directing the Department of Corrections to act on the prisoner's parole eligibility. When a prisoner has a dispute with the Department of Corrections regarding parole eligibility or the computation of his sentence, the prisoner cannot involve the courts by simply filing a motion in his criminal case for the simple reason that the Department of Corrections is not a party to the underlying criminal case. Instead, after exhausting his administrative remedies with the Department of Corrections, the prisoner should petition for a declaratory judgment pursuant to KRS 418.040. *See Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997).

In *Hoskins v. Commonwealth*, 158 S.W.3d 214 (Ky. App. 2005), the defendant filed a CR 60.02(f) motion in the trial court to correct his sentence, arguing that he had been incorrectly classified as a violent offender by the Department of Corrections, thus resulting in a longer period of time before he would be eligible for parole consideration. The trial court denied the motion. On appeal, our Court refused to address the substance of Hoskins's arguments because the violent-offender classification was an action taken by the Department of Corrections and not by the sentencing court. Accordingly, we held that the circuit court properly denied Hoskins's motion because he did not follow the correct procedure necessary to bring the Department of Corrections before the court.

Our Supreme Court reached a similar result in *Mason v. Commonwealth*, 331 S.W.3d 610 (Ky. 2011). Even though the Kentucky Supreme Court appeared to agree that Mason should not have been classified as a violent offender, it refused to grant him relief on appeal because his appeal arose out of his criminal conviction and the Department of Corrections was not a party to the criminal action. The Court explained:

> It is important to focus upon the fact that there appears to have been no error committed by the Commonwealth or the trial court during Mason's trial on this issue. After all, both parties to this appeal agreed below and agree on appeal that Mason should not be subjected to the eighty-five percent rule. Because there was no discernible error committed in the penalty phase of Mason's trial, we decline Mason's invitation to order a new penalty phase.

> Instead, the apparent error was committed post-judgment by the Department of Corrections, which is not a party to this appeal.
>
> Although Mason contends that he should not be compelled to file a separate action in order to receive relief from this potential mistake, it is beyond dispute that a court generally should not issue an opinion or judgment against an entity that is not a party to the action or is not otherwise properly before the court. We decline, therefore, to order the Department of Corrections—which has not been made a party to this appeal and is not properly before us to either defend its action or to confess error—to take any affirmative action with regard to Mason's offender classification or parole eligibility. ***Mason is free to file a separate action against the Department of Corrections, such as a declaratory judgment action, seeking to have his parole eligibility recalculated.*** We trust that such an action would prove to be successful if Mason were to demonstrate satisfactorily that the Department of Corrections had materially erred in calculating his parole eligibility date.

Id. at 628-29. (emphasis added).

The Kentucky Supreme Court reached a similar decision in *Reed v. Commonwealth*, 2013-SC-000707-MR, 2015 WL 2266260, at *1 (Ky. May 14, 2015).[5] Reed, an inmate, argued that the Department of Corrections' decision to classify him as a violent offender was wrong because the trial court's judgment failed to designate that his victim suffered death or serious physical injury. The Court refused to consider the merits of Reed's arguments because the Department

[5] We recognize that *Reed* is unpublished. We cite to it as persuasive only insomuch as the procedural posture and substantive issues are similar to the present appeal. *See* CR 76.28(4)(c).

of Corrections was not a party to the appeal. It explained that it could not afford Reed the relief he desired because the Court did not have "*in personam* jurisdiction" over the Department of Corrections and was without authority to direct the Department of Corrections to take any action relating to Reed's parole eligibility status, regardless of the merits of Reed's arguments. *Id.* at *2. Instead, the Court explained that if Reed continued to believe the Department of Corrections was not classifying him correctly based on the trial court's failure to designate in the judgment that the victim had suffered a serious physical injury his remedy was to file a "declaratory judgment action in the county in which his penal institution is located bringing that challenge with the [Department of Corrections] (or the warden of his prison) named as a party to the litigation." *Id.* at *3.

As in *Hoskins*, *Mason* and *Reed*, Parm is seeking an order from the circuit court directing the Department of Corrections to reclassify him as a non-violent offender so that he is eligible for parole after serving twenty percent of his sentence. However, the Department of Corrections was not before the circuit court to either defend its action or to confess error. Thus, while we do not necessarily disagree with the circuit court's decision on the merits, we decline to undertake a review thereof. Instead of denying Parm's motion on its merits, the more appropriate action would have been for the circuit court to have summarily denied the motion as procedurally improper because the circuit court was without the

authority to grant the relief requested by Parm where the Department of Corrections was not a party to the action.

IV. Conclusion

For the foregoing reasons, we AFFIRM the Henderson Circuit Court's denial of Parm's CR 60.02 motion.

ALL CONCUR

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