IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

AS MODIFIED: MARCH 30, 2006
RENDERED: MARCH 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 4-13-06 E.I.A.G.D.C.

2005-SC-000601-MR

AMY DAWN STODGELL — APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HON. THOMAS O. CASTLEN, JUDGE
INDICTMENT NO. 02-CR-00512

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment entered by the Daviess Circuit Court on July 1, 2005, sentencing the Appellant, Amy Dawn Stodgell, to a term of twenty (20) years upon conviction of manslaughter in the second degree, burglary in the first degree, receiving stolen firearms, and receiving stolen property valued at $300.00 or more. The Appellant entered a plea of guilty to the above charges and, as a part of the judgment and sentence, the trial court determined that the Appellant was a violent offender pursuant to KRS 439.3401. The Appellant appeals to this Court as a matter of right pursuant to Ky. Const. §110(2)(b).

The Appellant argues that the elements of the Class B crime for which she was convicted, burglary in the first degree, did not meet the requirements set out

in the violent offender statute, KRS 439.3401. Also, the Appellant argues that the trial court's determination of her as a violent offender is contrary to the rule of lenity and, additionally, is prohibited by the Eighth Amendment and Ky. Const. §17 as cruel and unusual punishment. She moves this Court to reverse the trial court's designation of her as a violent offender.

Final sentencing occurred on July 1, 2005 and notice of appeal was filed on July 29, 2005. After review of the record, we affirm the trial court's ruling.

FACTS

On or about October 23, 2002, in Daviess County, Kentucky, the Appellant, acting in concert with her boyfriend, Lonnie Edward Puckett (Puckett), burglarized the home of James Ronald Gant. The Appellant provided transportation for Puckett and herself to the Gant residence. Puckett entered the residence through a back window and beat Mr. Gant to death. The Appellant followed through the back window entry and helped Puckett remove items and weapons from the residence. The Appellant then sold some of the weapons in other counties while retaining other items from another burglary committed by Puckett.

The Grand Jury charged the Appellant with murder in the first degree, burglary in the first degree, receiving stolen firearms, and receiving stolen property valued at $300.00 or more. Thereafter, the Commonwealth made an offer in which the Appellant would enter a plea of guilty to the lesser offense of manslaughter in the second degree, in lieu of the murder charge, along with the other charges.

At the sentencing hearing on June 22, 2005, the Commonwealth moved to have the Appellant designated as a violent offender pursuant to KRS 439.3401. The Appellant argued that characterizing her as a violent offender was not appropriate because death or serious physical injury are not elements of any of the crimes to what she pled guilty. The trial court asked the Appellant if the designation of her as a violent offender would bring a motion to withdraw her guilty plea. The Appellant's counsel responded he would have to talk with Appellant. The trial court reset sentencing for July 1, 2005.

On July 1, 2005, the trial court heard arguments on the violent offender issue. The Appellant argued that the KRS 439.3401 required that death or serious physical injury must be an element of the Class B felony, and therefore, since they are not elements of burglary in the first degree, it was inappropriate for her to be designated as a violent offender. Moreover, she argued that because the statute is ambiguous the rule of lenity requires the benefit of the interpretation to go to her. Finally, she argued that to impose the violent offender statute would be cruel and unusual punishment in violation of the Eighth Amendment and Ky. Const. §17.

The Commonwealth argued that the statute clearly applied. The trial court ruled that the statute as drafted in 1986 and all its subsequent amendments cover this case because it states that a violent offender is a person who commits a Class B felony *involving* death or serious injury.[1]

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[1] Although there have been several amendments to KRS 439.3401, none were made to change any of the language in section one, which applies to this case. Most of the amendments were to include other offenses and also, an exemption for domestic violence cases. In fact, the amendments show that the legislature,

The trial court then asked her if she wished to withdraw her guilty plea. After consultation with her attorney, she indicated she did not wish to withdraw her plea. Judgment was entered and the Appellant was sentenced as agreed in the plea agreement, with a designation of violent offender being made in the final judgment. Appeal was filed on July 29, 2005.

ISSUES

The trial court did not err in designating the Appellant a violent offender pursuant to KRS 439.3401(1).

The Appellant argues the trial court erred in characterizing her as a violent offender. She argues KRS 439.3401(1) requires that before a defendant can be characterized as a violent offender for a conviction of a class B felony, death or serious physical injury must be an element of the Class B felony.

Pursuant to KRS 439.3401(1) a person is considered a "violent offender" if that person has been convicted of, or has pled guilty to, the commission of a Class B felony *involving* the death of the victim or serious physical injury to a victim. Under the statute, if a defendant is designated as a violent offender, he or she must complete no less than 85% of his or her sentence. KRS 439.3401(4).

"Parole is a matter of legislative grace or executive clemency," and it is not a judicial function but an executive function. Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999); Gober v. Commonwealth, 79 S.W.3d 887, 890 (Ky. App. 2002) (citing Morris v. Commonwealth, 268 S.W.2d 427 (Ky. 1954)). "[T]he circuit court's only role is to make the factual determination set forth in the violent offender sentencing statute," KRS 439.3401. Hoskins v. Commonwealth, 158

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by not changing the language through five amendments since it was enacted in 1986, thinks the statute is sound and unambiguous.

S.W.3d 214, 217 (Ky. App. 2005). After the court has made that determination, the Parole Board is free to "review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so" and "[n]othing in the [parole] statute or regulations mandates the granting of parole in the first instance and nothing therein or diminishes the discretionary nature of the [Parole] Board's authority." Huff, supra at 110 (Leibson, J. dissenting); Belcher v. Kentucky Parole Board, 917 S.W.2d 584, 586 (Ky. App. 1996) (citing Adams v. Ferguson, 386 S.W.2d 462 (Ky. 1965); Willard v. Ferguson, 358 S.W.2d 516 (Ky. 1962)).

The requirements for violent offender status set out in KRS 439.3401 "[are] not arbitrary, capricious or unconstitutionally vague." Huff v Commonwealth, 763 S.W.2d 106, 108 (Ky. 1988) (Leibson, J., dissenting) (citing Kentucky Parole Board Reg. DC-RG6(8)). "The phrase 'with regard to the offenses involving the death of the victim or serious physical injury to the victim' dictates that there be some connection or relationship between the [injury] suffered by the [victim] and the underlying offense committed by the defendant." Commonwealth v. Vincent, 70 S.W.3d 422, 424 (Ky. 2002).

In this case, the Appellant pled guilty to a Class B felony of burglary in the first degree. The appellant, using her own vehicle, transported herself and Puckett to the Gant home to burglarize it. Puckett entered the home to clear the way for them to enter. Then, she entered the home the same way. The appellant and Puckett walked around inside the home, lifting valuable items, all the while, stepping over the body of Mr. Gant. She did not at any time call for help for Mr. Gant or care for his welfare.

In Jackson v. Taylor, 153 S.W.3d 842 (Ky. App. 2004), the defendant argued the trial court did not state in its judgment that he was convicted of a Class B felony which involved the death or serious physical injury of the victim, and therefore, it was not proper for the court to characterize him as a violent offender. However, the Court held that even though the trial court had not stated that language specifically in its judgment, the defendant effectively admitted the victims of those offenses suffered serious physical injuries when he pled guilty to three assault charges, charges which included the element(s) of serious physical injury or death. Therefore, it "necessarily" meant that the defendant fell within the violent offender statute. Id. at 844. The Court did not hold, as the appellant here argues, that the defendant was a violent offender because the Class B crime had the elements of physical injury or death.

Also, in Carey, 104 S.W.3d 783 (Ky. App. 2002), the Court held that the designation of the defendant as a violent offender was proper. There, the defendant pled guilty to two Class B felonies, assault in the first degree and burglary in the first degree. The Court did not distinguish the elements of the offenses, just noted that both offenses were Class B felonies, and serious physical injury had occurred. Id. at 784.

Even though death or serious physical injury is not an element of KRS 511.020, Burglary in the first degree, the trial court's judgment is sound in two ways. First, under KRS 511.020, an element of burglary in the first degree is physical injury. The statute states that a person is guilty of burglary in the first degree if during the commission of the crime she or another participant causes physical injury to any person who is not a participant in the crime. Puckett, the

other participant, caused physical injury to Mr. Gant during their commission of the burglary and thus, the appellant is also responsible for that physical injury, which resulted in Mr. Gant's death.[2] The physical injury inflicted upon Mr. Gant not only placed the appellant within the bounds of burglary in the first degree, a Class B felony, it also placed the appellant within KRS 439.3401(1) because the offense involved a serious physical injury that caused the death of a non-participant.

Secondly, and more simply put, the appellant was convicted of a Class B felony which involved the death of the victim of the offense. Moreover, she pled guilty to manslaughter, and even though it is not one of the enumerated offenses of KRS 439.3401, this was an acknowledgement of her responsibility for the death that occurred during the burglary.

Therefore, the appellant's conviction of a Class B felony, burglary in the first degree, which involved the death of Mr. Gant, satisfied the requirement of serious physical injury, or death, as required by KRS 439.3401.

Based on the record, her designation as a violent offender was not "extremely harsh or incongruous." Darden v. Commonwealth, 52 S.W.3d 574, 577 (Ky. 2001). The application of the statute in this case was proper and the statute is not unclear. "Parole is simply a privilege and the denial of such has no constitutional implications," thus, the appellant lost that privilege when she was designated a violent offender pursuant to KRS 439.3401(1) by committing

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[2] KRS 502.020 sets out the liabilities of persons for the conduct of another. The statute states that a person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he either engages or aids in the conspiracy, or fails to make a proper effort to prevent the offense.

burglary in the first degree which involved the murder of the resident of the home she burglarized. Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999). Thus, the trial court was correct in its designation.

The trial court did not violate the rule of lenity.

"[D]oubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results," or "impose punishments totally disproportionate to the gravity of the offense." Woods v. Commonwealth, 793 S.W.2d 809, 814 (Ky.1990) (citing Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465 (Ky. 1961); Boulder v. Commonwealth, 610 S.W.2d 615, 618 (Ky. 1980)); Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465, 467 (Ky.1961). The rule of lenity applies when courts are uncertain about the statute's meaning and it is not to be used in complete disregard of the purpose of the legislature. Hearn v. Commonwealth, 80 S.W.3d 432, 434 (Ky.2002)

In this case, the application of the statute in question is simple. The Appellant pled guilty to burglary in the first degree, a burglary which involved the death of the victim of the crime. The purpose of the legislature is clear in KRS 439.3401; offenders who commit such crimes as the Appellant are stricken of their privilege to a parole hearing until they have served 85% of their sentence. The rule of lenity cannot be used to completely disregard that purpose. As a result, the designation of the appellant as a violent offender, here, did not produce an extremely harsh or incongruous result. Furthermore, the designation does not impose a punishment on the appellant that is totally disproportionate to

the gravity of the offense. The Appellant's argument that the rule of lenity applies here because the statute is ambiguous is without merit.

The designation of the Appellant as a violent offender was not cruel and unusual punishment contrary to the Eighth Amendment or Ky. Const. § 17.

The Appellant argues that the designation of her as a violent offender violates the prohibition against cruel and unusual punishment. She argues she is being characterized as a violent offender through her plea of guilty to manslaughter in the second degree, which is not a crime specified by KRS 439.3401. However, this is simply not the case. "[W]here punishment is within the limits prescribed by the statute it could not be properly classified as cruel punishment." Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968) (citing Golden v. Commonwealth, 275 Ky. 208, 121 S.W.2d 21 (1938); Fry v. Commonwealth, 259 Ky. 337, 82 S.W.2d 431 (1935)); See Rummel v. Estelle, 445 US 263, 100S.Ct. 1133, 63 L.Ed.2d 382 (1980)(where the range of a sentence is a matter of legislative prerogative and life sentence for three thefts totaling $200 was permissible under statute).

The Appellant, as stated in the previous two sections, pled guilty to an offense that is specifically set out in KRS 439.3401(1) designating her as a violent offender. The trial court stated in its judgment that her classification stems from her pleading guilty to burglary in the first degree, an offense that involved the death of the resident of the home she burglarized.

We have said in Land v. Commonwealth, 986 S.W.2d 440 (Ky. 1999), that "there is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency." Id. at 442. "Parole is simply a privilege

and the denial of such has no constitutional implications." Id. at 442. "[T]he length of punishments are prerogatives of the legislature," and the statute is not unconstitutional as written. Hughes v. Commonwealth, 87 S.W.3d 850, 856 (Ky. 2002). Therefore, this argument is also without merit.

CONCLUSION

In conclusion the judgment of the Daviess County Circuit Court designating the Appellant, Amy Dawn Stodgell as a violent offender pursuant to KRS 439.3401(1) is affirmed.

All concur.

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ORDER OF CORRECTION

The Memorandum Opinion of the Court entered March 23, 2006, is modified on its face by substitution of the attached opinion in lieu of the original opinion. Modifications on pages 1, 2, 5, 6 and 7 of the original opinion affected the pagination so as to necessitate substitution of the entire opinion and does not affect the holding of the original Memorandum Opinion of the Court.

ENTERED: March 30, 2006.

CHIEF JUSTICE