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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 14, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000707-MR

THOMAS REED — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES LOUIS CUNNINGHAM, JR., JUDGE
NO. 11-CR-000058

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In this direct but belated appeal from his Jefferson Circuit Court conviction, Appellant Thomas Reed challenges his classification by the Department of Corrections (DOC) as a "violent offender" and seeks relief from the unfavorable impact of that designation on parole eligibility. For the reasons expressed below, we affirm the judgment of the Jefferson Circuit Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted by a jury in Jefferson Circuit Court of first-degree assault, first-degree wanton endangerment, and possession of a handgun by a convicted felon. Prior to the commencement of the penalty phase, Appellant agreed to plead guilty to being a first-degree persistent felony offender (PFO). He further agreed to a sentence of twenty years for the assault conviction, enhanced to thirty years by his PFO status; five years for the wanton endangerment conviction, enhanced to ten years by his PFO status;

and ten years, enhanced to twenty years, for the possession of a handgun conviction. Pursuant to the plea agreement, the sentences would run concurrently for a total of thirty years. As the greatest of the three concurrent sentences, the first-degree assault conviction sets the parameters for Appellant's total incarceration time, and consequently, his parole eligibility period. The trial court entered a final judgment incorporating the jury's verdicts and Appellant's sentencing agreement.

KRS 439.3401(1), the basis of our statutory scheme of parole eligibility for violent offenders, provides in relevant part that "[a]s used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of: . . . (c) A Class B felony involving the death of the victim or serious physical injury to a victim[.]" First-degree assault is a Class B felony that qualifies *per se* as a violent offender offense because in order to be convicted of that offense, a defendant must, pursuant to the statutory definition of the offense, have caused "serious physical injury to another person." KRS 508.010.[1] Moreover, we are assured that Appellant's victim suffered a serious physical injury because that fact was decided by the jury in connection with its determination that Appellant was guilty of first-degree assault; and he did not challenge that finding when he subsequently accepted the sentencing deal based upon that verdict.

[1] "(1) A person is guilty of assault in the first degree when: (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person. (2) Assault in the first degree is a Class B felony."

KRS 439.3401(1) also mandates that "The [trial] court shall designate in its judgment if the victim suffered death or serious physical injury." Despite this provision, the trial court did not reference Appellant's status as a violent offender, nor did it "designate in its judgment that the victim suffered death or serious physical injury." Notwithstanding this omission, and based upon the fact that Appellant's crime inherently requires that he caused "serious physical injury to another person," the DOC classified Appellant as a violent offender. In accordance with that classification, the DOC applied KRS 439.3401(3)(a) to set Appellant's parole eligibility service time at the eighty-five percent violent offender rate, rather than the lower rate of twenty percent provided in 501 KAR 1:030 § 3(b) for non-violent offenders.

Appellant did not timely exercise his right to appeal his conviction, but some two years after the entry of the final judgment, we granted Appellant's motion to file a belated appeal. However, the only issue raised by Appellant in his belated appeal is his challenge to the DOC's classification of him as a violent offender. He argues that his classification by the DOC as a "violent offender" was wrong because the judgment of the trial court fails to designate that his victim suffered death or serious physical injury. He seeks to have that designation rescinded. As explained below, we are unable in this appeal to afford the relief Appellant desires because the DOC is not before us as a party to this action. Because we do not have *in personam* jurisdiction over the DOC, we are without authority to direct the agency to take any action relating to his parole eligibility status, regardless of the merits of Appellant's argument.

In addition, as further explained below, the proper procedural vehicle for Appellant to challenge the DOC's classification of him as a violent offender is by way of a petition for a declaratory judgment pursuant to KRS 418.040, with the DOC named as the defendant in the petition.[2] Since Appellant does not otherwise challenge the judgment of the Jefferson Circuit Court, we affirm.

II. ANALYSIS

The controversy raised by Appellant concerns his post-conviction classification as a violent offender by the DOC, not the propriety of the final judgment from which this appeal is belatedly taken. The record includes Appellant's "Resident Record Card," which contains the notation that his first-degree assault conviction is a "violent crime" and correspondingly lists his parole eligibility threshold as being eighty-five percent. Accordingly, Appellant's complaint is against the DOC, the state agency that classified him as a violent offender and set his parole eligibility at the eighty-five percent threshold. *See Newcomb v. Commonwealth*, 410 S.W.3d 63, 89-90 n. 93 (Ky. 2013) (the decision to classify an inmate as a violent offender is an action taken by the DOC, not the trial court."). The DOC, however, is not a party to this appeal.

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[2] In practice it appears that, as in a habeas action, the custom has developed in declaratory judgment litigation for the inmate to designate the warden of the DOC penal institution in which he is incarcerated as the defendant rather than the DOC itself. *See, e.g., Smith v. O'Dea*, 939 S.W.2d 353 (Ky. App. 1997). *Cf. Jackson v. Taylor*, 153 S.W.3d 842 (Ky. App. 2004) (with Vertner L. Taylor, acting in his official capacity as Commissioner of the Kentucky Department of Corrections, representing the DOC in an action by an inmate challenging his classification as a violent offender).

In *Mason v. Commonwealth*, 331 S.W.3d 610, 628 (Ky. 2011), we were presented with a similar situation in a direct appeal from a final judgment, wherein Mason, the appellant in that case, was convicted of a crime (first-degree criminal abuse, a Class C felony) not subject to an eighty-five percent violent offender enhancement. Despite the non-applicability of the violent offender parole enhancement, the DOC nevertheless classified Mason as a violent offender.

In addition to the more conventional issues raised on direct appeal, Mason attempted to bring before us a challenge to the DOC's classification of him as a violent offender. We addressed the issue as follows:

> 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.[3] 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

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[3] The trial court's failure to note in the judgment that the victim had suffered a serious physical injury does not distinguish this case from *Mason* upon the critical point: our lack of *in personam* jurisdiction over the DOC in this appeal. Indeed, correction of the trial court's omission would simply result in a remand for entry of a new judgment noting that the victim had suffered a serious physical injury.

> 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.

Mason, 331 S.W.3d at 628-629 (footnote omitted) (emphasis added).

It being "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," and that being precisely the situation at hand, as in *Mason*, we are obligated to decline to address the issue raised by Appellant on the merits. *Id.*

As alluded to in *Mason*, "[a] petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever Habeas Corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department." *Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997) (KRS 418.040 is the proper vehicle for an inmate to challenge a finding by the prison disciplinary committee); *Polsgrove v. Kentucky Bureau of Corrections*, 559 S.W.2d 736 (Ky. 1977) (declaratory judgment action is the proper action to resolve a dispute concerning good-time credit for pre-institutional custody time in a county facility).

Accordingly, if Appellant continues to believe that the trial court's failure to designate in the judgment that the victim had suffered a serious physical injury that precludes the DOC from classifying him as a violent offender, his remedy is a declaratory judgment action in the county in which his penal

institution is located bringing that challenge with the DOC (or the warden of his prison) named as a party to the litigation. *Cf. Jackson v. Taylor*, 153 S.W.3d 842, 844 (Ky. App. 2004) (since a conviction for assault in the first degree necessarily means that the victim suffered 'serious physical injury,' a conviction for assault in the first degree appearing on a defendant's final judgment satisfies the statute's designation requirement).

III. CONCLUSION

Having presented no grounds challenging the validity of the judgment of the Jefferson Circuit Court, we affirm.

All sitting. All concur.

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