

RENDERED: January 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000216-MR

REBECCA KINCER

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 91-CR-00093

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: COMBS AND PAISLEY, JUDGES; and JOHN D. MILLER, Special Judge.¹

PAISLEY, JUDGE: This is an appeal from an order entered by the Letcher Circuit Court denying appellant's motion requesting that the court declare her a victim of domestic violence for purposes of KRS 439.3402. For the reasons stated hereafter, we affirm.

Appellant was convicted in 1992 of murdering her husband, and she was sentenced to life imprisonment. Her

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

conviction was upheld on appeal, and her numerous postconviction requests for relief were denied. Appellant then filed a pro se motion in 1998, seeking the court's declaration that she was a victim of domestic violence for purposes of the violent offender statute. After a hearing the court denied appellant's motion, finding that she "failed to establish that she is a victim of domestic violence under KRS 439.3402." This appeal followed.

KRS 439.3402 sets out the procedures applicable to a trial court's consideration of a violent offender's claim that he or she is a domestic violence victim who is exempt from the violent offender parole restrictions set out in KRS 439.3401. Subsection (5) (formerly subsection (4)) of KRS 439.3401 provides that violent offender parole restrictions "shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim." (Emphasis added.)

The Kentucky Supreme Court recently determined that the KRS 439.3401(5) exemption applies only where a relationship existed between the domestic violence and the underlying violent offense, and that "[p]roof of history of domestic violence between the defendant and the victim is not, by itself, sufficient to trigger the statute's parole exemption." Commonwealth v. Vincent, Ky., 70 S.W.3d 422, 424 (2002). Thus, "a prior history of domestic violence between a violent crime

victim and the criminal defendant who perpetrated the violent offense does not, in and of itself, make the defendant eligible for the parole exemption of KRS 439.3401(5).” Id. at 425.

Here, appellant’s trial defense was that the murder was committed by an unidentified third party, and the issue of domestic violence evidently was not raised until the motion which is now before us. Our review of the record shows that during the hearing on this motion, appellant testified in great detail regarding her history as a victim of domestic violence. However, she did not admit to any involvement in the murder and, as in Vincent, 70 S.W.3d at 425, there was “absolutely no evidence that connected the shooting with” any history of domestic violence between appellant and the murder victim. Thus, as in Vincent and regardless of whether there was in fact a history of domestic violence between appellant and the victim, there was not sufficient evidence adduced to make her eligible for the parole exemption set out in KRS 439.3401(5). We therefore must conclude that the trial court did not err by dismissing appellant’s motion to be declared a victim of domestic violence.

The court’s order is affirmed.

ALL CONCUR.

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