

RENDERED: October 29, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002658-MR

WILLIAM BURNEY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 99-CR-00296

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: William Burney appeals pro se from an order entered by the Kenton Circuit Court denying his motion for declaratory relief. Burney asserts that the trial court erred by failing to declare that he shall not be classified as a violent offender since the final judgment did not state that the victim suffered death or serious physical injury. However, as Burney pled guilty to multiple offenses including first-degree

sodomy and two counts of first-degree rape, it is clear on the face of the judgment that he is a violent offender who is subject to the parole restrictions set out in KRS 439.3401.

Burney pled guilty in September 1999 to ten counts involving a single victim, including attempted murder, first-degree rape (two counts), first-degree sodomy, first-degree burglary, first-degree robbery, kidnapping, felony theft by unlawful taking, and fraudulent use of a credit or debit card (two counts). He was sentenced to a total of forty years' imprisonment.

In June 2002, Burney filed a pro se motion seeking clarification of the terms of the judgment against him. He stated that he pled guilty with the understanding that he would be eligible for parole after serving 20% of his forty-year sentence, and that there had been no recommendation that he be considered as a violent offender for purposes of KRS 439.3401. Burney requested the court to declare that he was not a violent offender and that he would be eligible for parole after serving 20% of his sentence. The trial court denied the motion without discussing its merits.

Next, in October 2003 Burney filed the motion now before us. He sought declaratory relief and requested the trial court to direct the Department of Corrections that the violent offender provisions of KRS 439.3401 are inapplicable to him

since the judgment did not address whether the victim suffered death or serious physical injury. The court denied the motion for several reasons, including on the grounds that the court had addressed the issues in its June 2002 order, that the court lacked jurisdiction to enter the requested order, and that on the face of the judgment Burney was a violent offender by virtue of his conviction of first-degree sodomy and first-degree rape. This appeal followed.

Although mentioned in the order from which Burney appeals, we will not address the issues of res judicata and jurisdiction since it is clear on the face of the judgment that Burney is a violent offender for purposes of the parole restrictions set out in KRS 439.3401. At the time of the offenses and Burney's guilty plea, KRS 439.3401 provided in pertinent part¹:

- (1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim. The court shall designate in its judgment if the victim suffered death or serious physical injury.

¹ KRS 439.3401 was amended in 2000 and 2002 to add additional categories of offenses to subsection (1), and to prohibit release on probation under the terms set out in subsection (3). These amendments are not pertinent to the issues on appeal.

. . . .

- (3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least eight-five percent (85%) of the sentence imposed.

(Emphasis added.) Burney asserts that he is not a violent offender, and that he therefore is not subject to the restrictions set out in KRS 439.3401(3), because the judgment did not address whether the victim suffered death or serious physical injury. However, this argument overlooks the fact that KRS 439.3401(1) specifically identifies one who commits first-degree rape or first-degree sodomy as a violent offender, regardless of whether the victim is identified as having died or suffered serious physical injury. As Burney pled guilty to two counts of first-degree rape and one count of first-degree sodomy, he clearly was identified as a violent offender on the face of the judgment. Hence, there is no merit to Burney's contention that he is not subject to the parole restrictions applicable to violent offenders under KRS 439.3401.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Burney, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

No brief for appellee filed