

RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000501-MR

TERRY G. HELM

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 02-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹
TAYLOR, JUDGE: Terry G. Helm brings this pro se appeal from a
January 8, 2004, order of the Lyon Circuit Court denying his Ky.
R. Civ. P. (CR) 60.02 motion to modify the final judgment
entered on his guilty plea to robbery in the first degree. We
affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In October 2002, appellant was indicted upon the offenses of first-degree robbery (Kentucky Revised Statutes (KRS) 515.020) and four counts of kidnapping (KRS 509.040). Pursuant to a plea agreement with the Commonwealth, appellant pled guilty to first-degree robbery, and the four kidnapping charges were dismissed. Under the terms of his sentence, appellant was considered a "violent offender" under KRS 439.3401, thus necessitating him to serve 85 percent of the sentence. Appellant was sentenced to a total of thirteen years' imprisonment.

Thereafter, appellant filed a CR 60.02 motion. Therein, he claimed that first-degree robbery was not an offense under KRS 439.3401 for which violent offender status would extend. Appellant urged the court to correct the sentence by removing the violent offender designation. On January 8, 2004, the circuit court entered an order denying appellant's CR 60.02 motion. This appeal follows.

Appellant contends the circuit court committed error by denying his CR 60.02 motion. Appellant argues that the court must "designate in its judgment 'if the victim suffered a serious physical injury or death'" to come within the ambit of KRS 439.3401. Appellant's Brief at 2. Appellant believes that commission of the offense of first-degree robbery where a victim suffers no physical injury or death is insufficient to trigger

the enhanced sentence provision found in KRS 439.3401. We disagree.

As appellant committed the offense on August 25, 2002, the current version of KRS 439.3401 is applicable:

(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, burglary in the first degree accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060, burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040, or robbery in the first degree. The court shall designate in its judgment if the victim suffered death or serious physical injury.

(8) The provisions of subsection (1) of this section extending the definition of "violent offender" to persons convicted of or pleading guilty to robbery in the first degree shall apply only to persons whose crime was committed after July 15, 2002.

Under subsection 1, first-degree robbery is clearly specified as an offense within the meaning of violent offender status. This definition of violent offender was effective for first-degree robberies committed after July 15, 2002. The following sentence stating that "[t]he court shall designate in its judgment if the

victim suffered death or serious physical injury" can only be interpreted as applying to those offenses where death or serious physical injury is explicitly contemplated by the statute. For example, the first sentence specifies that "'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 the victim" KRS 439.3401(1). Simply put, we do not read the requirement that the Court designate that the victim suffered death or serious physical injury to be applicable to the offense of first-degree robbery. As such, we are of the opinion that appellant was properly designated as a violent offender under KRS 439.3401 and the circuit court did not err by denying his CR 60.02 motion.

For the foregoing reasons, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Terry G. Helm, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky