

RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000815-MR

ROBERT C. MITCHELL

APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 04-CI-00131

KENTUCKY DEPARTMENT OF CORRECTIONS;
COMMISSIONER VERTNER TAYLOR;
KAREN DEFEW CRONEN;
AND DEBBIE KAYS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Following the plea agreement between Robert C. Mitchell and the Commonwealth, the Montgomery Circuit Court sentenced Mitchell to a maximum sentence of twelve years for first-degree assault and driving under the influence of alcohol. These convictions arose out of Mitchell's involvement in a motor vehicle collision in which the victim sustained personal

injuries. Mitchell, the Commonwealth, and the sentencing judge understood that the plea agreement contained the stipulation that the victim had sustained "no serious physical injury." The significance of this stipulation was to allow Mitchell to be classified in the corrections system as a non-violent offender for more favorable parole eligibility. But the Department of Corrections (DOC) did not honor this stipulation, and it classified Mitchell as a violent offender under KRS¹ 439.3401—a classification that significantly delays his parole eligibility. To enforce the intent of stipulation, Mitchell sued the DOC in the Franklin Circuit Court. That court dismissed his complaint based on a lack of authority to review the judgment of another circuit court and Mitchell appealed. We agree with that court's dismissal; so we affirm.

On October 10, 2000, Mitchell pled guilty in Montgomery Circuit Court. During the plea colloquy, Mitchell acknowledged his guilt and stated that his plea was voluntary. The court noted that the plea was entered "[w]ith the exception of the Commonwealth agreeing [to] . . . the finding of no physical injury."

During the sentencing hearing on December 8, 2000, Mitchell's attorney specifically requested that the court

¹ Kentucky Revised Statutes.

include in its judgment the finding of "no serious physical injury." The judge again acknowledged the court's finding of no serious physical injury and stated that the judgment would reflect the parties' agreement. The court utilized AOC's² Form No. 445, Judgment and Sentence on Plea of Guilty (revised July 1998), to write its judgment; and the clerk entered this judgment on December 12, 2000. The judgment was silent as to a physical injury to the victim and the "no serious physical injury" stipulation.

Because Mitchell was convicted of first-degree assault, DOC classified him as a violent offender under KRS 439.3401;³ as such, Mitchell would not be eligible for parole until he had served 85 percent of his twelve-year sentence.⁴

Mitchell then apparently filed an RCr⁵ 11.42 motion in the Montgomery Circuit Court to alter, amend, or vacate the judgment and sentence. Before he could proceed with his motion, the Montgomery Circuit Court signed an agreed order correcting

² Kentucky's Administrative Office of the Courts.

³ KRS 439.3401 reads: "'[V]iolent 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" First-degree assault is a Class B felony.

⁴ If classified as a non-violent offender, Mitchell would have been eligible for parole after serving 20 percent of his sentence.

⁵ Kentucky Rules of Criminal Procedure.

Mitchell's judgment citing CR⁶ 60.01, the procedural rule applicable to correcting clerical mistakes in judgments. The agreed correction stated:

It appearing to the Court from the undersigned signature that the Commonwealth has no objection to correcting the movant's judgment in 99-CR-00115 to include the omitted finding that the movant be sentenced as a non-violent offender, and after review of the guilty plea and sentencing transcripts which clearly reflect the same, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the movant's journal entry in 99-CR-00115 be corrected to expressly include the finding that the movant be sentenced as a non-violent offender.

The Montgomery Circuit Court judge also sent a letter to the DOC regarding Mitchell's parole eligibility status. The letter stated:

The issue of serious physical injury has been dealt with in this case, and you will find an agreed order signed by the Commonwealth, agreeing that Mr. Mitchell was sentenced as a non-violent offender.

This case involves a plea agreement which specifically set out that the defendant would not be found to be a violent offender, so that he would be eligible for parole in twenty percent (20%) of his time, as opposed to eighty-five percent (85%). Again, this was part of the plea agreement, and it is my understanding that the Commonwealth and the Corrections [sic] have concurred with this. I am bringing this to your attention simply because Mr. Mitchell should be

⁶ Kentucky Rules of Civil Procedure.

evaluated based upon this agreement and judgment of the Court. If Mr. Mitchell was evaluated based upon your belief that he was classified as a violent offender, I would request that you take another look at this.

Satisfied that the circuit court had taken the requested corrective action, Mitchell "dropped his motion to have the judgment vacated."

The DOC evidently responded to the corrected judgment or to the circuit judge's letter initially by amending Mitchell's parole eligibility date to reflect his status as a non-violent offender. And on May 8, 2003, the Kentucky Parole Board granted Mitchell a twenty-four month deferment on his sentence.

But four months later, Mitchell received an order from the Kentucky Parole Board setting aside the deferment. The order stated that the Board had been informed that Mitchell was not eligible for parole consideration; therefore, his deferment was deemed a "nullity."

Mitchell then filed a declaratory judgment action against the DOC in Franklin Circuit Court. In his complaint, Mitchell alleged that "[i]t was the understanding of the Petitioner, the Commonwealth of Kentucky, and the Montgomery Circuit Court that the Petitioner would be classified as a non-violent offender"; thus, he argued that the DOC's actions in refusing to honor the terms of his plea agreement violated his

due process rights. Mitchell requested that the DOC be enjoined from "calculating the sentence in a manner inconsistent with the intent of the Court and the parties regarding parole eligibility."

The Justice and Public Safety Cabinet responded on behalf of the DOC with a motion to dismiss for failure to state a claim upon which relief could be granted. The Cabinet argued that to be guilty of first-degree assault, a person must cause "serious physical injury" to another;⁷ therefore, by definition, the Montgomery Circuit Court could not have found Mitchell guilty of first-degree assault without also finding that he caused serious physical injury to the victim. Moreover, because Mitchell was convicted of first-degree assault, a Class B felony, the Cabinet argued that he was, by statute, a "violent offender."⁸ Thus, the Cabinet asserted that the Montgomery Circuit Court's judgment was a legal impossibility and that "[a]ttempting to order the Department of Corrections to calculate and apply the Plaintiff's sentence in a patently unlawful manner is not the right solution."

The Franklin Circuit Court granted the motion to dismiss. It ruled that "[i]n essence, the Plaintiffs and the Defendants are requesting that this Court decide the validity of

⁷ KRS 508.010(1)(b).

⁸ See KRS 439.3401.

orders of another Circuit Judge in relation to statutory authority." Because "[t]he rule in Kentucky is that one Circuit Court does not have the authority to review a decision of another Circuit Court," the Franklin Circuit Court decided it was without authority to review the judgment entered by the Montgomery Circuit Court. So Mitchell's complaint was dismissed and this appeal follows.

The DOC did not file a brief in this appeal. Under CR 76.12(8)(c), if an appellee fails to file a brief, "the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case."

The language of CR 76.12(8)(c) is not mandatory; rather, "[t]his rule merely provides penalty options which an appellate court **may, in its discretion**, impose for failure to file a brief."⁹ We do not believe that reversal based solely upon the DOC's failure to respond is warranted in this case; so we will address the merits of Mitchell's argument.

Mitchell contends that the Franklin Circuit Court erroneously dismissed his complaint for lack of jurisdiction.

⁹ Kupper v. Kentucky Board of Pharmacy, 666 S.W.2d 729, 730 (Ky. 1983) (emphasis added).

He asserts that an actual controversy exists and that declaratory judgment against the DOC is the "proper vehicle for relief." We disagree.

In dismissing Mitchell's complaint, the Franklin Circuit Court properly cited the rule in Commonwealth v. Hampton.¹⁰ In Hampton, the Kentucky Supreme Court held that a circuit court does not have authority to review a decision made by another circuit court.

The underlying issue in the case before us stems from the judgment entered by the Montgomery Circuit Court. For relief to be granted, the Franklin Circuit Court would necessarily have to review that judgment, an action in violation of the rule in Hampton. Therefore, we find no error in the Franklin Circuit Court's decision to dismiss Mitchell's complaint based on its lack of authority to act.

Moreover, even if the Franklin Circuit Court had the authority to proceed, we do not believe that Mitchell stated a claim against the DOC upon which relief could be granted. The statute controlling first-degree assault, KRS 508.010(1), states that "[a] person is guilty of assault in the first degree when: . . . (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in

¹⁰ 814 S.W.2d 584 (Ky. 1991).

conduct which creates a grave risk of death to another and **thereby causes serious physical injury to another person.**"

There is no dispute that Mitchell pled guilty to first-degree assault with the stipulation that there was to be no finding of serious physical injury; the plea colloquy, sentencing transcript, and agreed order all verify that this arrangement was settled upon by Mitchell, the Commonwealth, and the Montgomery Circuit Court.

Of course, the flaw in the parties' agreement is that the crime of "first-degree assault with no serious physical injury" does not exist. Based on the statutory definition of first-degree assault, "serious physical injury" is a necessary element of the offense. The fact that the parties agreed to a contrary arrangement is inconsequential to Mitchell's parole eligibility. The DOC was bound by the statutory definition of the crime to which Mitchell pled, not the conditions agreed upon by the parties; therefore, the DOC was obligated by law to classify Mitchell as a violent offender.

As such, it appears to us that Mitchell's complaint did not state a claim against the DOC upon which relief could be granted in the Franklin Circuit Court. This does not leave Mitchell without a remedy. His argument is best addressed by the appropriate motion before the sentencing circuit court where the plea bargain was struck and where the parties and the

sentencing judge are in apparent agreement that Mitchell did not receive the full benefit of his plea bargain agreement with the Commonwealth.

But because the Franklin Circuit Court is without authority to review the judgment of the Montgomery Circuit Court and because Mitchell failed to state a valid claim against the DOC, we affirm the decision to dismiss the complaint.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES.

Richard Edwin Neal
Frankfort, Kentucky