

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001119-MR

JOHN DUNN

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
CASE NO. 04-CI-00923

JOHN REES

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: John Dunn was convicted of two counts of rape, third degree, and one count of sodomy, third degree. He was sentenced to three concurrent five-year terms of imprisonment. He was initially referred to the Sex Offender Treatment Program (SOTP), but failed to keep two scheduled appointments. He was nevertheless granted shock probation, which was shortly revoked for his positive test for cocaine, curfew violation, contact with the victim's family, failure to register as a sex offender, and failure to enroll in the SOTP.

Pursuant to KRS 197.045(4), a sex offender may earn "good time" credit against his sentence, but the time earned is not credited to his sentence until he completes the SOTP. Nor can he be eligible for parole until he completes the SOTP. The statute includes an exemption from those requirements for "any mentally retarded offender." Thus this action, and appeal.

Dunn claims that he is mentally retarded, and therefore exempt from the requirement that he complete the SOTP. Following exhaustion of his administrative remedies, he filed this action in the Franklin Circuit Court seeking a declaration that he was exempt. The circuit court disagreed; we affirm.

Dunn argues that the evidence is uncontradicted that he is mentally retarded, and there is therefore no genuine issue of material fact. The General Assembly has given the task of determining whether a convict is an eligible sexual offender to the sentencing court, the Department of Corrections, or both. KRS 197.410(2). Dr. Richard T. Purvis, Director of the Department of Corrections Mental Health Services, determined that Dunn has not proven that his "level of mental retardation is sufficient to prevent program completion" Dunn is correct that there is no genuine issue of material fact; it is just that the uncontradicted facts are against him.

We find no error, clear or otherwise, in the trial court's finding that Dunn is an eligible offender.

Dunn also argues that the sentencing court determined him to be mentally retarded when it granted him shock probation. This does not equate to a finding that Dunn is retarded and therefore exempt from the SOTP requirement. Nor was this argument presented to the trial court, so it will not be the basis of action by this court.

Dunn's final argument is that the trial court erred in not appointing him counsel to assist him in orally arguing his case before the trial court. He was not entitled to counsel in an action which he initiated. May v. Coleman, 945 S.W.2d 426, 427 (Ky. 1997); CR 17.04.

The order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Dunn, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Holly Harris-Ray
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