

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001179-MR

JAMES BERRY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 19-CI-00380

MATTHEW G. BEVIN, GOVERNOR

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND MCNEILL,
JUDGES.

MCNEILL, JUDGE: The *pro se* Appellant, James Berry, was tried and convicted of murder and being a persistent felony offender (“PFO”). He was sentenced to life on the murder conviction, which was enhanced to 200 years’ imprisonment pursuant to the PFO charge. On direct appeal, the Supreme Court of Kentucky vacated Appellant’s PFO conviction with directions on remand that Appellant be

resentenced to life imprisonment. *Berry v. Commonwealth*, 782 S.W.2d 625, 627 (Ky. 1990), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). Appellant is currently serving that life sentence at Northpoint Training Center.

On June 4, 2019, Appellant filed a “Petition to Commute Illegal Void Life Sentence Pursuant to the Powers of the Kentucky Constitution Section Seventy Seven” (the “Petition”). The Petition was filed in Franklin Circuit Court against then-Governor Matthew Bevin. In his Petition, Appellant requested that the court order former Governor Bevin to commute his life sentence due in part to errors in his trial. The interests of former Governor Bevin were represented by the Justice and Public Safety Cabinet (the “Cabinet”), which filed a motion to dismiss for failure to state a claim under CR¹ 12.02(f).

The circuit court granted the Cabinet’s motion concluding that “[t]he power to commute sentences lies entirely within the Governor’s discretion. Ky. Const. § 77. Granting [Appellant’s] requested relief would violate Kentucky’s separation of powers doctrine.” Appellant now appeals to this Court as a matter of right. Having reviewed the record and the law, we affirm the circuit court.

¹ Kentucky Rules of Civil Procedure.

I. STANDARD OF REVIEW

In *James v. Wilson*, the Court discussed the standard trial courts apply to motions for failure to state a claim:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation marks and citations omitted).

We review orders dismissing a complaint under CR 12.02(f) *de novo*. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). We also review constitutional questions *de novo*. This means that we review the circuit court's order as a matter of law and need not defer to that court's decision. *Id.* With this standard in mind, we turn to the applicable law and the facts of the present case.

II. ANALYSIS

Appellant is correct in his argument that we are obliged to give “liberal construction” to a *pro se* litigant's pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972). However, Appellant has failed to state a claim upon which relief can be granted. In other words, even if the facts alleged by Appellant could be proven accurate, Appellant

would not be entitled to the relief he seeks—that this Court order a Governor to commute Appellant’s sentence.

The plain language of Section 77 of our Kentucky Constitution empowers the Governor exclusively to grant pardons and commutations. The case law that we are required to follow also supports this conclusion. *See, e.g., Wilson v. Commonwealth*, 381 S.W.3d 180, 194 (Ky. 2012) (citation omitted) (“There is also no substantive right to be granted clemency under Section 77 of the Kentucky Constitution [T]he decision to grant clemency is left to the Governor’s unfettered discretion.”). Other courts have reached a similar conclusion. For example, in *In re Sapp*, the Sixth Circuit Court of Appeals stated:

Section 77 of Kentucky’s Constitution simply grants the Governor the power to “remit fines and forfeitures, commute sentences, grant reprieves and pardons.” It in no way establishes specific procedures to be followed and imposes no standards, criteria, or factors that the Governor need consider in exercising his power. Thus, in Kentucky, the decision to grant clemency is left to the Governor’s unfettered discretion and the state has not made the clemency process an integral part of the state’s overall adjudicative process.

118 F.3d 460, 465 (6th Cir. 1997), *abrogated on other grounds by Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007).

We also note that the separation of power provisions under Sections 27 and 28 of the Kentucky Constitution prevent this Court from ordering the

Governor to exercise his discretion under Section 77. Therefore, Appellant's Petition has failed to state a claim upon which relief can be granted. CR 12.02(f).

III. CONCLUSION

For the foregoing reasons, we hereby affirm the decision of the Franklin Circuit Court dismissing Appellant's Petition.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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