Commonwealth of Kentucky
Kentucky Supreme Court

Case No. 2013-SC-000559

LAWRENCE PATE — **APPELLANT**

v.

Appeal from Bracken Circuit Court
Hon. Lewis D. Nicholls, Special Judge
Indictment No. 2003-CR-00008

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage pre-paid this 11th day of March, 2015, to: Hon. Lewis D. Nicholls, Special Judge, Bracken Circuit Court, Bracken County Courthouse, P. O. Box 205, Brooksville, KY 41004-0205; to: Hon. Margaret Ivie, Counsel for Appellant, Assistant Public Advocate, Department for Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Ky 40031 and electronically mailed to: Hon. J. Kelly Clarke, Commonwealth's Attorney. I further certify that the record on appeal was returned to the Clerk of this Court, this 11th day of March, 2015.

KEN W. RIGGS
Assistant Attorney General

INTRODUCTION

Lawrence Pate, hereinafter "Appellant" appeals from the Bracken Circuit Court's denial of his CR 60.02 motion on a grant of discretionary review after the Court of Appeals affirmed that denial.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties briefs. The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellant stands convicted in this case of manufacturing methamphetamine (second offense) for which he received a twenty (20) year sentence[1]. This Court, in Appellants direct appeal, summarized the facts of this case:

> On September 17, 2002, Kentucky State Police Sergeant Thomas Lilly was tasked to execute an arrest warrant on Appellant. When Sergeant Lilly went to Appellant's residence, he observed a black pressure tank sitting outside Appellant's door with what appeared to be a green corroded fitting on the top and a section of pipe with a valve welded to the bottom. Sergeant Lilly testified that he had been trained to look for green corrosion on the outside of pressure tanks since it is a sign that the tank has been used to hold anhydrous ammonia (a component of methamphetamine manufacture).When Lilly knocked on the door, Appellant's wife, Kathy Pate, answered. Sergeant Lilly told Mrs. Pate that he had a warrant for Appellant's arrest and inquired if Appellant was home. Mrs. Pate answered that Appellant was not in the apartment. Sergeant Lilly then asked Mrs. Pate if she minded if he came in and looked around to make sure Appellant was not in the apartment. Mrs. Pate consented. When Sergeant Lilly entered the apartment he observed numerous items in plain view. These items included: buckets with pressure fittings hooked to it and tubing attached, miscellaneous tubing, pipe fittings, a metal dish filled with metal fittings that was boiling on the stove, and two grey Tupperware bins that were filled with similar items. From his experience, Lilly believed that he had observed all of the equipment, utensils, and tubing necessary to manufacture methamphetamine in and around Appellant's

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[1]This sentence is run consecutively to another twenty(20) year sentence that the appellant received in Pendleton County. *See* Pate v. Commonwealth, 134 S.W.3d 593, (Ky 2004).

> residence. In fact, as Sergeant Lilly entered the apartment, he asked Mrs. Pate, (What is all this stuff?(She answered that Lilly knew what it was, and then stated that it was the equipment that her husband, Appellant, used to make methamphetamine. Because he was concerned with the possible health hazard located in the apartment, Sergeant Lilly immediately called for backup. The evidence was subsequently seized and used against Appellant at trial. After securing the evidence, Sergeant Lilly eventually found Appellant. Appellant was watching the seizure from a nearby apartment. When Lilly told Appellant he had a warrant for his arrest, Appellant complained that the items seized from the apartment were his and that they were being taken illegally. He also blurted out that the officers would find no methamphetamine residue on the items. Appellant and Mrs. Pate were indicted jointly for complicity to manufacture methamphetamine. Mrs. Pate pled guilty to facilitation and agreed to testify against Appellant at trial. Appellant was subsequently found guilty by jury of manufacturing methamphetamine.

Pate v. Commonwealth, 243 S.W.3d 327, 329-30 (Ky. 2007). The Appellant appealed as a matter of right to this Court, which affirmed his conviction.

Thereafter, the Appellant began a series of post-conviction filings. On May 23, 2009, the Appellant filed a (Motion for Sentence Clarification) in which he alleged that at trial, he has been sentenced to serve 20% of sentence before parole eligibility, but that the Kentucky Department of Corrections had since changed its interpretation of the Violent Offender Statute to include the crime for which the Appellant was convicted and now maintained that Appellant would have to serve 85% of his sentence before parole eligibility. (TR, Vol. III, 197-199). In a calendar order, that motion was overruled on July 16, 2009. (Id., at 204). In

response to a request from the Appellant for reconsideration, the trial court ordered that the Department of Probation and Parole investigate. (Id., at 224). Probation and Parole Officer Lisa Yeary filed an explanatory letter on September 19, 2009. In that letter, she stated that it was position of the Department of Corrections that Appellant was a violent offender, as defined in KRS 439.3401(1)(b) since Appellant was convicted of a Class A felony. (Ibid.). Based on that statute, the trial court again denied the Appellant(s motion on September 18, 2009. (Id., at 226).

Further, on November 1, 2010, with the assistance of the Department of Public Advocacy, the Appellant filed a motion to vacate and set aside his conviction based on RCr 11.42 and CR 60.02. (TR, 2ND APPEAL, 2-23).

Appellant alleged that he received ineffective assistance of counsel when trial counsel failed to impeach Appellant's wife, Kathy Pate. Appellant alleged that counsel could have called witnesses to show that he was not living with Kathy at the time that police found his methamphetamine lab in the apartment. Further, Appellant claimed that his trial counsel was ineffective for giving wrong advice regarding his parole eligibility, being 20% when Corrections now holds that it is 85%. Further, Appellant alleged that appellate counsel was ineffective for failing to raise an issue on direct appeal concerning the testimony about parole eligibility.

In the alternative, relying on CR 60.02, the Appellant alleged that equity demanded that he receive 20% parole eligibility, and requested that his sentence be vacated.

The trial court denied the Appellant's motions, in a calendar order, on February 25, 2011. (TR, 2ND APPEAL, 60).

Appellant then appealed as a matter of right to the Kentucky Court of Appeals. On July 19, 2013, that court rendered an opinion[2] in which it rejected all but one of the Appellant's RCr 11.42 claims, and remanded the matter for an evidentiary hearing on a single claim. Appellant claims as to his sentence modification and his CR 60.02 motion were also rejected.

The Appellant sought discretionary review from this Court which was granted. Also, this Court granted discretionary review from the Court of Appeals rejection of Appellant's arguments concerning his declaration of rights action in Franklin Circuit Court. That case (2013-SC-0558) has been briefed by the Department of Corrections.

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[2]The Court of Appeals combined the instant case with Appellant's appeal from the denial of a declaration of rights actions for the purpose of its opinion. (Pate v. Department of Corrections, 2009-CA-0734; 08-CI-2031 (Franklin Circuit Court).

ARGUMENT

I.

CR 60.02 IS NOT THE PROPER AVENUE FOR THE REMEDY APPELLANT SEEKS NO JUDICIAL ERROR OCCURRED

In this section the Commonwealth will respond to the Appellant's argument that he is entitled to equitable relief from DOC's interpretation of the violent offender statute via CR 60.02. As noted below, Appellant's fight is with the administrative actions of the executive, and does not implicate any judicial error. It is through an attack on the executive that he may gain any relief equity demands, and not via CR 60.02.

A. General Legal Principles Governing CR 60.02

The standard of review applicable to CR 60.02 motions is straightforward. It is clear that the trial court's denial of a petitioner's motion pursuant to CR 60.02 will only disturbed on appeal by a showing that the court abused its discretion. Bethlehem Minerals Co. v. Church and Mullins Corp.,887 S.W.2d 327 (Ky. 1994). See also Schott v. Citizens Fidelity Bank and Trust Company, 692 S.W.2d 810 (Ky. 1985); Whittington v. Cunnagin, 925 S.W.2d 455 (Ky. 1996). The decision is left to the (sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse.) Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). Relief under CR 60.02 may only be given (where a clear showing of extraordinary and compelling equities is made.) Bishir v. Bishir,698 S.W.2d 823, 826 (Ky. 1985).

CR 60.02 relief is extraordinary in nature, and should only be granted in the rarest of circumstances. A CR 60.02 motion is not a substitute for an appeal.

B. Facts Concerning Appellant's Parole Eligibility and Department of Corrections Interpretation of KRS 439.340(1)

At the center of this appeal is the past and current interpretation of Kentucky's Violent Offender Statute, KRS 439.3401(1), by the Kentucky Department of Corrections (DOC).

In 2005, when the Appellant was convicted, KRS 439.3401(1) was a single paragraph that in its relevant portion read:

> As used in this section, "violent offender" means any person who has been convicted of or plead guilty to a capital offense, Class A felony, Class B felony involving the death of the victim or serious physical injury to a victim...

In 2006, effective July 12, 2006, the form of the statute was rearranged into a more logical form:

> As used in this section, "violent offender" means any person who has been convicted of or plead guilty to the commission of:
>
> (a) A capital offense;
>
> (b) A Class A felony;
>
> (c) A Class B felony involving the death of the victim or serious physical injury to a victim;
>
> ...

At the time of the Appellant's trial, the Department of Corrections interpreted the 85% parole eligibility of KRS 439.3401(1) to apply only to Class

A felonies if the crime involved the death of the victim or serious physical injury to the victim. This is the interpretation used in the (Certification on the Calculation of Parole Eligibility) that was promulgated and certified by the Department of Corrections, and used at the Appellant's trial. (TR, Vol. II, 163-164). There is no question that the judge, jury, prosecutor, and Appellant all relied on this interpretation at trial.

With his CR 60.02 motion in the trial court, the Appellant filed an affidavit of Jonathan Hall, Branch Manager or the Offender Information Services branch of the Department of Corrections. (TR, 2ND APPEAL, 46-47). In that affidavit, Hall asserted that it was the (Department of Corrections longstanding interpretation) that KRS 439.3401 only applied to Class A Felonies when there was death or serious physical injury of the victim. (Id., at 46). However, following the textual changes to KRS 439.3401(1) in 2006, Hall noted:

> Upon reviewing the change in the textual format of KRS 439.3401, effective July 12, 2006, in comparison to all previous versions it became apparent that KRS 439.3401(1) has always defined a violent offender as any person convicted of any Capital offense, any class A felony, or a class B felony involving the death of the victim or serious physical injury to a victim. Following our discovery that our previous interpretation of KRS 439.3401(1) was incorrect, any offender standing convicted of a Capital Offense or a class A felony that was not previously considered a violent offender had their sentence recalculated pursuant to KRS 439.3401.

(TR, 2ND APPEAL, 46). Hall continued, and noted that under the new interpretation, Appellant was now a violent offender:

> Lawrence Pate, DOC #164306, presently stands convicted of (Manufacturing Methamphetamine, 2nd offense. (Pursuant to KRS 218A.1432, Manufacturing Methamphetamine, 2nd Offense is a Class A felony. Upon Inmate Pate's commitment to the Department of Corrections, his conviction was initial determined to be a non-violent offense. However, consistent with the Department's change in the interpretation of KRS 439.3401(1), Pate's sentence was subsequently recalculated as a violent offense.

(Ibid.). Thus, Appellant must serve 85% of his sentence before being eligible for parole.

C. **Appellant's equity argument involves no judicial error and CR 60.02 is not the proper avenue for any relief.**

From reviewing the amended brief of the Appellant, and the brief in his appeal against DOC (2013-SC-0558), it is crystal clear what Appellant's complaint is comprised of. He attacks the DOC interpretation and application of the violent offender statute. What he does not attack is any action by the judiciary.

Appellant asserts that "this claim is about the criminal justice system advising Lawrence he faced a certain sentence upon conviction and then subsequently altering that sentence several years after he was finally sentenced." (Appellant's Brief, 8). However, despite his characterization that the "criminal justice system" changed his sentence, there has *absolutely no judicial action* regarding his sentence. Yes, the DOC appears to have changed its interpretation of the violent offender statute. Appellant may have a cause of

action against DOC, but has no equitable basis for CR 60.02 relief. No judicial officer has done anything to change his sentence.

Appellant's complaint is not with the process of his trial, the evidence against him, or the validity of the jury verdict. If those were the issues, then this Court could easily access and correct them. Appellant is complaining about an internal change in the Department of Corrections interpretation of KRS 439.3401(1). The Appellee believes that a Declaration of Rights action, not a CR 60.02 motion off of the underlying conviction, is the best way for the Appellant to fact-seek and ultimately present his argument to this Court. The Appellant has filed a Declaration of Rights action, and it stands before this Court on a grant of discretionary review. (2013-SC-0558).

It is that Declaration of Rights action in which the Appellant can properly challenge the change of interpretation. In that action, the Appellant has better factually developed his claims, and faces the agency with he has the complaint: the Department of Corrections. That executive agency holds the power to correct the Appellant's alleged wrongs, or at the least, answer best for why it changed its interpretation of KRS 439.3401(1). Neither the Attorney General, nor the trial court, can answer for that agency without engaging in rank speculation. Nor is it anyone's place but Corrections to offer explanations. DOC has filed an Appellee Brief in 2013-SC-0558, and does an excellent job of advancing its explanation of the circumstances, and further defends its interpretation of the violent offender statute. Appellant concedes that it is not his conviction that he

alleges is unfair, but "the sentence terms being imposed." (Appellant's Brief, 9). Those sentence terms are in the hands of Corrections.

CR 60.02 is intended to be utilized in the most extreme of circumstances. Here, it does not make equitable sense to set aside a valid jury verdict, and a minimum sentence, simply because Appellant takes issue with the Department of Corrections' interpretation of KRS 439.3401(1). That battle is best fought in the Declaration of Rights action. In the posture of CR 60.02, attempting to amend the judgment, or force the Department of Corrections to allow 20% service would violate the separation of powers:

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ky. Const. § 28. It is through the declaration of rights action, in its administrative and civil nature under KRS 418.040, that the Court can best ferret out the truth of this matter, and an agreeable remedy can be crafted, if one is necessary. Disputes between inmates and the Department of Corrections are to be handled through declaration of rights actions. "A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever Habeas Corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department." Million v. Raymer, 139 S.W.3d 914, 918 (Ky. 2004), quoting Smith v. O'Dea, 939 S.W.2d 353, 355 (Ky. 1997). Thus, absent judicial error, CR 60.02 is not the proper

abuse its discretion in denying his motion, nor did the Court of Appeals err in affirming that denial.

CONCLUSION

For the above stated reasons, the decision of the Bracken Circuit Court should be affirmed.

Respectfully submitted,

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