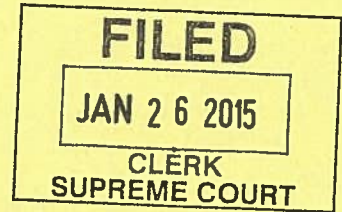


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2013-SC-000558



(On Appeal from Ky. Court of Appeals, Case No. 09-CA-000734)

LAWRENCE E. PATE

APPELLANT

VS.

Appeal from Franklin Circuit Court, Division II
Hon. Thomas Wingate, Judge
Case No: 08-CI-02031

DEPARTMENT OF CORRECTIONS

APPELLEE

REPLY BRIEF FOR APPELLANT

Respectfully Submitted,

MARGARET A. IVIE

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, the foregoing "Reply Brief for Appellant" was served by first class mail upon the following:

- Hon. Thomas D. Wingate, Judge, Franklin County Judicial Center, 222 St. Claire Street, Frankfort, KY 40601
- Hon. J. Todd Henning, Counsel for Appellee, Justice & Public Safety Cabinet, Office of Legal Services, P.O. Box 2400, Frankfort, KY 40602-2400
- Mr. Lawrence Pate, #164306, Little Sandy Correctional Complex, 505 Prison Connector, Sandy Hook, KY 41171

The record on appeal has not been checked out from the Supreme Court of Kentucky.

MARGARET A. IVIE

PURPOSE OF REPLY

This Reply Brief responds to the Department of Corrections' (DOC) argument that its interpretation of KRS §439.3401(1) is not entitled to contemporaneous construction. (Brief for Appellee, page 3-4, hereinafter "BA, 3-4").

ARGUMENT

DOC argues that its previous interpretation of KRS §439.3401(1) is not entitled to controlling weight because it was based upon a mistake under the theory of contemporaneous construction. (BA, 3-4). DOC's basis for claiming that the interpretation was a mistake is the legislature's 2006 amendment to KRS §439.3401(1), and this Court's opinion in Famborough v. Department of Corrections, 184 S.W.3d 561 (Ky. App. 2006).

KRS §439.3401 was passed into law in 1986. At the time of its original passage, section 1 read:

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 rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to a victim.¹

KRS §439.3401 was amended by the legislature in 1991 and 1992, but no changes were made to section 1. In 1998, the legislature again amended KRS §439.3401, and changed the language in section 1 to read:

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. **The court shall designate in its judgment if the victim suffered death or serious physical injury.**

¹ In its Brief, DOC quotes all versions of KRS §439.3401(1) prior to 2006, but fails to include the comma following Class A felony.

(Emphasis denotes added language). In 2000, KRS §439.3401 was amended again, but no changes were made to section 1. In 2002, KRS §439.3401 was amended with the following changes to section 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.

(Emphasis denotes added language). In 2006, the legislature amended KRS §439.3401 for the sixth time and changed section 1 to read:

As used in this section, “violent offender” means any person who has been convicted of or pled 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;**
- (d) **The commission or attempted commission of a felony sexual offense described in KRS Chapter 510;**
- (e) **Use of a minor in a sexual performance as described in KRS 531.310;**
- (f) **Promoting a sexual performance by a minor as described in KRS 531.320;**
- (g) **Unlawful transaction with a minor in the first degree as described in KRS 530.064(1)(a);**
- (h) **Promoting prostitution in the first degree as described in KRS 529.030(1)(b);**
- (i) **Criminal abuse in the first degree as described in KRS 508.100;**
- (j) **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;**

(k) Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040; or
(l) Robbery in the first degree.

The court shall designate in its judgment if the victim suffered death or serious physical injury.

(Emphasis denotes added language).

DOC had interpreted KRS §439.3401 to apply only to Class A felonies involving death or serious physical injury of the victim from 1986 to 2006, when the statute was drastically amended. The action taken by the legislature to drastically alter KRS §439.3401(1) and to use a different textual layout and include a greater number of offenses does not suggest a disagreement with the agency's interpretation regarding a single phrase, but a general overhaul of the statute.

DOC cites support for this erroneous interpretation in this Court's rendering of Famborough v. Commonwealth, *supra*. Further, the language quoted by DOC as its sole basis for this contention is merely dicta by this Court. 184 S.W.3d at 563. Black's Law Dictionary defines dicta as "observations or remarks made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; **any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.**" See Railroad Co. v. Schutte, 103 U.S. 118, 143 (1880); In re Woodruff, 96 F. 317 (D.C. 1899); Hart v. Stribling, 6 So. 455 (1889); Buchner v. Railroad Co., 19 N.W. 56 (1884); Rush v. French, 25 P. 816 (1874); State v. Clarke, 3 Nev. 566 (1867). The reason why dicta cannot be relied upon is because it is not an issue upon which the court has been

briefed and heard argument, and its irrelevance to the holding means that neither party can ever challenge the statement.

The holding in Famborough was that when a defendant is convicted of those offenses specifically delineated in KRS §439.3401(1), there does not need to be any language in the court's judgment regarding death or serious physical injury of the victim. 184 S.W.3d at 563. In Famborough, the defendant was convicted of first-degree sodomy, an offense specifically listed in the statute, and not a Class A felony. Id. Thus, the statement regarding Class A felonies, made off-handedly by this Court, was for purpose of illustration only; it was dicta.

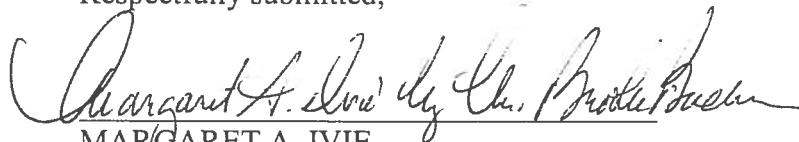
Furthermore, this contention, that it had wrongly interpreted the statute for twenty years, is undermined by DOC's subsequent treatment of Class A felonies. DOC is only applying this new interpretation to offenses committed after July 15, 1998. (TR I, 21, 26). However, acceptance of such a statutory interpretation of KRS §439.3401(1), even by DOC's own admission, would require it to alter the sentences of *all* individuals convicted since 1986 of Class A felonies where the victim did not suffer serious physical injury or death. However, as the record clearly indicates, DOC has not altered those convictions. (TR I, 21, 26). If DOC is not applying the new interpretation to those defendants convicted prior to July 15, 1998, then it cannot honestly contend to this Court that it had erroneously interpreted the statute from its inception. The result is that DOC has determined that it significantly misinterpreted a statute for twenty years, that the change in the interpretation was a big mistake but defendants were not entitled to rely on it through contemporaneous construction, and that DOC is entitled to selective apply this new interpretation of the statute to a select group of individuals and disregard other

individuals who should be covered by its new interpretation. Because DOC is not applying its new interpretation consistent with its newly proclaimed interpretation of the statute, its credibility and the legitimate interpretation of the statute should not be accepted by this Court.

CONCLUSION

For the foregoing reasons, and those in the Brief for Appellant, Pate respectfully requests this Court reverse the court below, and conclude that KRS §439.3401(1) did not always apply to all Class A felonies, regardless of injury or death to a victim. Alternatively, Pate requests this court reverse the court below and remand this case to the Franklin Circuit Court for an evidentiary hearing, or for any and all other just and proper relief as determined by this Court.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Margaret A. Ivie by Ch. Brooke Bush".

MARGARET A. IVIE
COUNSEL FOR APPELLANT

