

RENDERED: March 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2937-MR

GENE TAPP PERRY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
CRIMINAL ACTION NO. 96-CR-000706

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Gene Tapp Perry (Perry) appeals from his conditional guilty plea to a count of persistent felony offender (PFO) first degree. KRS 532.080(3)(c)(2). The PFO count enhanced Perry's five year sentence on a guilty plea to first-degree assault, to ten years. The first-degree assault in this case occurred more than five years after Perry "served out" a previous sentence of incarceration on a felony, and was "conditionally released", but less than five years before the "maximum expiration date" of that previous sentence. The question presented is whether Perry was properly indicted and convicted on the count of first-degree PFO. After reviewing the record and the applicable statutes, we affirm.

When Perry was admitted to the Kentucky Penal System on May 20, 1988, KRS 439.555 provided as follows:

Any prisoner having served the term for which he has been sentenced for a crime he has committed after June 16, 1972, less good time deduction, if any has been accumulated, shall be released by conditional release.

Perry argues that the release status of "conditional release", i.e., subject to supervision and sanctions for noncompliance with conditions of release, was rendered meaningless by the 1980 amendment to KRS 439.555, above, which removed the supervision requirements. This fact was supported in the record by an affidavit from the Offender Records Division of the Corrections Cabinet.

KRS 439.555 was again amended, effective July 14, 1992, to remove the language of "conditional release" and replace it with the words, "minimum expiration of sentence:"

Any prisoner having served the term for which he has been sentenced for a crime he committed after June 16, 1972, less good time deduction, if any has been accumulated, shall be released by minimum expiration of sentence.

This change in the language of the statute reflected the fact that there was no mechanism for continuing supervision of the discharged offender or any mechanism to return the discharged offender to prison once released. Perry argues the 1992 amendment above, should have been applied in his case to preclude the PFO count against him. We do not agree.

KRS 439.555 only deals with the "release" date of certain prisoners. The statute does not indicate how such

releases are to be treated for PFO purposes. For the answer to that specific question, we look to KRS 532.080, the PFO sentencing statute. KRS 532.080 defines a first-degree persistent felony offender as a person: (1) older than twenty-one years of age; (2) convicted of a felony after having been convicted of two or more felonies; and, (3) that:

[W]as on probation, parole, conditional discharge, conditional release, or any other form of legal release of any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted. KRS 532.080(3)(c)(2). (emphasis added).

The trial court found that Perry was on "conditional release" from April 1, 1991, (the date Perry was administratively discharged from incarceration by conditional release), until April 20, 1993, Perry's "maximum expiration date" on the previous felony. Because Perry committed the offense of assault first degree on May 18, 1996, within five years from the maximum expiration date of his previous felony sentence and while he was still on conditional release, Perry was properly charged as a first degree persistent felony offender.

We hold the trial court properly applied the applicable statute, KRS 532.080, to determine Perry's PFO status.

Whether Perry was released with or without supervision or conditions, and whether or not the legislature provided a mechanism to return Perry to prison after he was released is not relevant to the question at hand. The PFO sentencing statute clearly requires any offender classified as "conditionally

released" at the time of the commission of a new felony, or within five years prior to the commission of a new felony, to be subject to sentencing as a PFO. KRS 532.080 (3) (c) (2); Pedigo v. Commonwealth, Ky. App., 644 S.W.2d 355 (1982).

The judgment of the Fayette Circuit Court sentencing Gene Tapp Perry to five (5) years for first-degree assault, enhanced to ten (10) years by his status as a first-degree PFO, is affirmed.

ALL CONCUR.

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