

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001771-MR

STEVEN LEE DISMORE

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE WILLIAM LEWIS SHADOAN, SPECIAL JUDGE  
INDICTMENT NO. 86-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, JUDGE: Steven Lee Dismore appeals from an order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside or correct his judgment and sentence.

Following a jury trial, Dismore was convicted of murder<sup>1</sup> and of being a first degree persistent felony offender.<sup>2</sup> The final judgment and sentence, entered on May 15, 1987, provides as follows:

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<sup>1</sup> Ky. Rev. Stat. (KRS) 507.020.

<sup>2</sup> KRS 532.080.

. . . it is, therefore, ORDERED and ADJUDGED by the Court that the Defendant is guilty of the crimes of murder and of being a persistent felony offender in the first degree and that he shall be confined in the state penitentiary for a maximum term of ninety-nine (99) years under the murder charge (Count 1 of the Indictment) and for a maximum term of one hundred twenty-five (125) years under the charge of being a persistent felony offender in the first degree (Count 3 of the Indictment) and with the one hundred twenty-five (125) year sentence under Count 3 superseding the ninety-nine (99) year sentence under count 1.

On January 6, 1997, Dismore filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. On August 11, 1997, the circuit court<sup>3</sup> amended Dismore's sentence to 99 years but denied his request for a new sentencing hearing. On July 20, 2000, Dismore filed the RCr 11.42 motion which is the subject of this appeal claiming that the court was without jurisdiction to amend the original judgment and that he was entitled to a new sentencing hearing. The circuit court denied the motion. On appeal, Dismore makes the same two arguments with the additional argument that the judge should have recused himself.

Dismore first argues that the circuit court did not have jurisdiction under CR 60.02 when it amended the original judgment.

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<sup>3</sup> Pursuant to KRS 26A.015(2)(b), a special judge was assigned to replace the circuit court judge who had represented Dismore at his trial.

He claims that the judgment was void from the beginning and was of such a nature that it could not be properly corrected without a hearing. In Wellman v. Commonwealth,<sup>4</sup> the Supreme Court held that an unauthorized sentence is an error correctable by appeal, by writ or by motion pursuant to RCr 11.42 or CR. 60.02. In Myers v. Commonwealth,<sup>5</sup> the Court said that

A . . . the imposition of a sentence in excess of what the law permits does not render the legal and authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack, provided the valid and invalid parts are separable.@

The court imposed a valid 99-year sentence for the murder conviction. The enhanced sentence of 125 years was invalid pursuant to Berry v. Commonwealth,<sup>7</sup> in which the Supreme Court held that a conviction for murder was not properly subject to persistent felony offender enhancement. By filing his CR 60.02 motion, Dismore invoked the jurisdiction of the court to relieve him from the unauthorized portion of his sentence. While he complains that the court did not hold an evidentiary hearing on his motion, there was no reason to do so. The court set aside the unauthorized

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<sup>4</sup> Ky., 682 S.W.2d 794 (1985).

<sup>5</sup> Ky., 42 S.W.3d 594 (2001).

<sup>6</sup> Id. at 596 (quoting Manning v. Commonwealth, 281 Ky. 453, 136 S.W.2d 28,30 (1939)).

<sup>7</sup> Ky., 782 S.W.2d 625 (1990).

portion of Dismore's sentence and granted him the appropriate relief.

Dismore also claims that the circuit judge was required to recuse himself from presiding over the RCr 11.42 motion pursuant to KRS 26A.015(2)(b) because he had heard and ruled on the CR 60.02 motion. He argues that the ruling in the CR 60.02 motion was the matter in controversy in the RCr 11.42 motion. First, we reject Dismore's suggestion that his RCr 11.42 motion is somehow an appeal of his CR 60.02 motion. Clearly this is not the case. Both motions were collateral attacks on the original judgment. Recusal is not required merely because a judge makes a ruling in a case which is later questioned. Following this logic, a judge would necessarily be recused from presiding in any post-conviction action in which he presided during the original trial. It would also preclude a court from entertaining motions for reconsideration and petitions for rehearing. This reasoning was rejected by the Supreme Court in Kentucky Utilities Co. v. South East Coal Co.<sup>8</sup> Dismore also alleges that the judge's impartiality might reasonably be questioned and, therefore, he should have recused himself in compliance with KRS 26A.015(e). However, Dismore has presented no facts to support such a claim.<sup>9</sup>

The order denying Dismore's RCr 11.42 motion is affirmed.

ALL CONCUR.

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<sup>8</sup> Ky., 836 S.W. 2d 407, 408 (1992).

<sup>9</sup> Webb v. Commonwealth, Ky., 904 S.W.2d 226 (1995); KRS 26.015(2)(e).

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