

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000259-MR

JOHN E. CARPENTER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 86-CR-00163

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: John E. Carpenter, pro se, has appealed from an order entered by the Kenton Circuit Court on January 11, 2002, that denied his CR¹ 60.02 motion for modification or correction of sentence without appointing counsel or holding an evidentiary hearing. Having concluded that the trial court did not abuse its discretion by denying Carpenter relief, we affirm.

This case has a lengthy procedural history. On December 2, 1986, Carpenter was convicted in the Kenton Circuit

¹ Kentucky Rules of Civil Procedure.

Court of two counts of criminal abuse in the first degree, a Class C felony.² The jury initially set Carpenter's prison sentence for each conviction at ten years; but when it convicted him of being a persistent felony offender in the second degree (PFO II),³ his sentences were enhanced to two 20-year terms. The trial court ran the two 20-year terms consecutively for a total of 40 years.

In Carpenter's direct appeal, the Supreme Court on June 8, 1989, affirmed his conviction and sentence, without any mention of a sentencing issue.⁴ On August 14, 1989, Carpenter filed a motion to vacate judgment pursuant to RCr⁵ 11.42. This motion was denied by the Kenton Circuit Court, and this Court affirmed on October 11, 1991.⁶ On July 10, 1995, Carpenter filed a motion to proceed in forma pauperis and a motion to modify or correct judgment. On September 7, 1995, Carpenter's pro se motion to proceed in forma pauperis was sustained; however, his motions to modify or correct judgment pursuant to CR 60.02 and for appointment of counsel were denied. Carpenter appealed, but

² Kentucky Revised Statutes (KRS) 508.100.

³ KRS 532.080(2).

⁴ 1987-SC-000098; Ky., 711 S.W.2d 822 (1989).

⁵ Kentucky Rules of Criminal Procedure.

⁶ 1990-CA-000576-MR. (The Supreme Court denied discretionary review.)

this Court entered an order on June 5, 1996, dismissing the appeal due to Carpenter's failure to file a brief.⁷

On November 30, 2001, Carpenter again filed a motion to proceed in forma pauperis, a motion to appoint counsel, a motion for a full evidentiary hearing, and a motion for relief from final judgment. On January 11, 2002, his pro se motion to proceed in forma pauperis was granted and his motions for modification or correction of sentencing, appointment of counsel, and an evidentiary hearing were denied. This appeal followed.

Carpenter claims that the trial court erred to his prejudice and denied him due process of law when it refused to appoint him counsel and to conduct an evidentiary hearing concerning his allegations in his CR 60.02 motion. In order for us to address these claims, it is necessary for us to review Carpenter's CR 60.02 motion, which unfortunately, like his brief, is disorganized and difficult to follow. However, his motion appears to include the following claims: (1) that he received an improper sentence of 40 years; (2) that he received ineffective assistance of counsel; (3) that the parole board failed to properly consider his record while in prison; (4) that the elements of KRS 532.080, the persistent felony offender statute, were not satisfied; and (5) that the jury was never

⁷ 1995-CA-002544-MR.

reassembled to further deliberate a question under the correct instructions.

We first note that these claims made by Carpenter are not appropriately addressed pursuant to CR 60.02. Our Supreme Court has discussed CR 60.02 as follows:

CR 60.02 was enacted as a substitute from the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.⁸

Meanwhile, RCr 11.42(1) provides that "[a] prisoner in custody under sentence . . . who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it." This motion must state all of the grounds for holding a sentence invalid of which the defendant has knowledge. Furthermore, "[f]inal disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding."⁹

⁸ Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983)(citing Black's Law Dictionary 487, 1444 (5th ed. 1973)).

⁹ RCr 11.42(3).

As our Supreme Court has noted, “[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete.”¹⁰ Kentucky’s structure is provided for in the rules relating to direct appeals, then in RCr 11.42, “and thereafter in CR 60.02” [emphasis original].¹¹ CR 60.02 “is not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.”¹² “In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.”¹³

Therefore, CR 60.02 relief is available to Carpenter only for relief unavailable to him by either direct appeal or an RCr 11.42 motion. The burden is on Carpenter to demonstrate why he is entitled to extraordinary relief under CR 60.02.¹⁴ He has failed to meet this burden since all of the claims raised in his CR 60.02 motion were either addressed, or could have been

¹⁰ Gross, 648 S.W.2d at 856.

¹¹ Id. at 856.

¹² McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997)(citing RCr 11.42(3); and Gross, supra).

¹³ McQueen, supra at 416.

¹⁴ Gross, 648 S.W.2d at 856.

addressed, in his direct appeal or RCr 11.42 motion; or, as to the parole board issues, are before the wrong circuit court.

Carpenter was convicted of two counts of first degree criminal abuse, a Class C felony.¹⁵ Our Legislature has authorized the maximum term of imprisonment for a Class C felony to be not less than five years nor more than ten years.¹⁶ Since Carpenter was also convicted of being a persistent felony offender in the second degree, we must consider KRS 532.080(5), which provides: "A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions KRS 532.060(2) for the next highest degree than the offense for which convicted." Thus, because of Carpenter's status as a persistent felony offender in the second degree, his sentence was subject to enhancement in the sentencing range of a Class B felony, and he was subject to a sentence of ten years to 20 years on each conviction.¹⁷

KRS 532.110(1)(c), the sentencing statute concerning concurrent and consecutive terms of imprisonment, provides as follows:

¹⁵ KRS 508.100(2).

¹⁶ KRS 532.060(2)(c).

¹⁷ KRS 532.060(2)(b).

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that . . . [t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of these sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

Carpenter argues that under KRS 532.110(1)(c) his two 20-year terms must run concurrently, rather than consecutively. He cites Dawson v. Commonwealth,¹⁸ in support of his position.

In Dawson, the defendant was convicted of various narcotics-related offenses and of being a second degree persistent felony offender. The trial court sentenced Dawson to the following terms: ten years' imprisonment for the conviction for possession of a Schedule II controlled substance; ten years' imprisonment for the conviction for trafficking in a Schedule III controlled substance; and 20 years' imprisonment for being a PFO II in lieu of punishment for the conviction for possession of a Schedule II controlled substance, to run consecutively with the ten years for the trafficking conviction. Thus, Dawson's total prison sentence was for 30 years.

¹⁸ Ky., 756 S.W.2d 935 (1988).

In Dawson our Supreme Court held that the trial court erred by ordering Dawson to serve consecutive sentences and stated:

This 30-year sentence violates KRS 532.110(1)(c) which limits the "aggregate of consecutive indeterminate terms" to "the longest extended term which would be authorized by KRS 532.080 (PFO sentencing) for the highest class of crime for which any of the sentences is imposed." [Dawson's] crime of possession of a Schedule II narcotic, second offense, subsequently enhanced, was a Class C felony. PFO enhancement elevated the possession conviction to a Class B felony for which the maximum penalty is 20 years. This matter must be remanded for resentencing for all three offenses to a maximum term of 20 years.¹⁹

Thus, Carpenter argues that the trial court exceeded the maximum indeterminate sentence provided for under KRS 532.110(1)(c) when it sentenced him to a total of 40 years' imprisonment.

However, Carpenter ignores Devore v. Commonwealth,²⁰ and this Court's previous Opinion rendered on October 11, 1991, in 1990-CA-000576-MR, where this Court cited Devore in affirming the trial court's denial of RCr 11.42 relief based on Carpenter's claim that trial counsel had erred by not opposing the imposition of consecutive 20-year sentences of imprisonment. Not only is this claim in Carpenter's CR 60.02 motion procedurally barred; but as this Court previously held, the 40-

¹⁹ Id. at 936-37.

²⁰ Ky., 662 S.W.2d 829 (1984).

year sentence was proper. In Devore our Supreme Court held that when a defendant commits a crime while he is on parole or probation KRS 533.060(2) modifies the limit otherwise set on aggregate sentences by KRS 532.110(1)(c). Since Carpenter was on probation at the time he committed the two offenses of criminal abuse, it was proper to run the two 20-year sentences consecutively.

Carpenter also argues that the parole board did not properly consider his prison record. He alleges that he was given a form that contained neither information as to how to improve his chances for parole nor the specific information relied upon in assessing a deferment. Carpenter maintains that he "has completed several of the programs that have been suggested to him throughout the course of the sentence handed down by this Court." He claims that "[t]he action of the parole board was nothing more than an arbitrary decision that the sentence imposed by this Court was insufficient." It appears from these statements that Carpenter is arguing that he was improperly denied parole. However, the procedure invoked by Carpenter is not the proper procedure for such a challenge.²¹

Carpenter next argues that the elements of KRS 532.080, the persistent felony offender statute, were not

²¹ Belcher v. Kentucky Parole Board, Ky.App., 917 S.W.2d 584 (1996).

satisfied. This question has been previously decided adversely to Carpenter and will not be reconsidered.

Carpenter lastly argues that the jury "was never reassembled to further deliberate a question under corrected instructions but was reassembled to consider the same issue it had previously decided." There is an absence in the record of any information regarding jury instructions. It is unclear what argument Carpenter advances or what relief he seeks. This argument is incomprehensible.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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