

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001516-MR

SIDNEY PRESTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 90-CR-00143

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Sidney Preston appeals from an order of the Fayette Circuit Court denying his CR¹ 60.02 motion to vacate his convictions and sentences for theft offenses. We affirm.

In early 1990, Preston was charged with three felony counts of theft by failure to make required disposition of property, eleven felony counts of theft by deception, and six misdemeanor counts of theft by deception. After he failed to

¹ Kentucky Rules of Civil Procedure.

appear for a pretrial conference, he was also charged with first-degree bail jumping.

Following Preston's arrest, the Commonwealth made a plea offer of one year in prison on each of the three felony counts of theft by failure to make required disposition of property, with the other felony and misdemeanor theft by deception charges to be dismissed. Further, the agreement provided that the first-degree bail jumping charge would be amended to second-degree bail jumping, with a recommended sentence of twelve months in the county jail.² The agreement also stated that if Preston was granted probation, restitution would be a condition.

On May 18, 1990, Preston and his attorney appeared in court for final sentencing pursuant to the plea agreement. However, the court rejected the plea agreement and indicated that it would only agree to probation if the terms of the sentences were increased. Pursuant to RCr³ 8.10, the court gave Preston the opportunity to withdraw his guilty pleas. After conferring with his attorney, he declined to do so. The court then sentenced Preston to five years in prison on each of the three theft charges, with the sentences to run consecutively for a maximum sentence of fifteen years. The court then probated

² This sentence would run concurrently with the one-year sentences as a matter of law. See Kentucky Revised Statutes (KRS) 532.110(1)(a).

³ Kentucky Rules of Criminal Procedure.

the sentence for a period of five years on various conditions, including that Preston make full restitution in the amount of \$12,328.60 to the victims.

Preston thereafter appeared before the court after being charged as a probation violator. On March 20, 1992, the court entered an order continuing Preston's probation but not revoking it. Rather, the court extended the probation period to give Preston an opportunity to pay the balance owed for restitution.

Preston again appeared before the court on August 27, 1993, as a probation violator. The court again did not revoke Preston's probation, but it did require him to serve sixty days in jail, pay his child support, stay employed, and stay on his restitution payment schedule.

On May 30, 1994, a warrant was again issued for Preston's arrest for being a probation violator. He was finally apprehended in late July 2001, and his probation was revoked for failing to pay restitution and for absconding from supervision by an order entered on August 16, 2001.

Preston thereafter filed a CR 60.02 motion to vacate his convictions and fifteen-year sentence. As grounds for his motion, Preston asserted that the sentence constituted cruel and excessive punishment in violation of the Eighth Amendment of the

U.S. Constitution and Sections 2, 3, and 17 of the Kentucky Constitution. His motion was denied, and this appeal followed.

Preston's motion was properly denied for two reasons. First, his motion did not state proper grounds for CR 60.02 relief. "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." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). If Preston desired to challenge his sentence as being cruel or excessive, he should have done so in a direct appeal rather than wait years later and pursue CR 60.02 relief. He is precluded in this case from seeking relief on this ground by way of a CR 60.02 motion.

Second, Preston's sentences were neither cruel nor excessive. "Generally, if the punishment given is within the maximum prescribed by statute, a reviewing court will not disturb the sentence." Marshall v. Commonwealth, Ky., 60 S.W.3d 513, 524 (2001). The maximum penalties for the theft offenses were five years on each count for a total sentence of fifteen years. Preston's sentences did not exceed the permissible range.

Preston urges this court to analyze his argument of cruel and excessive punishment in accordance with the principles of Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637

(1983). In Solem, the U.S. Supreme Court set forth three factors to be considered in determining whether a punishment is cruel and unusual. Those factors are: (1) the gravity of the offense and harshness of the penalty, (2) the sentences imposed upon other criminals in the same jurisdiction, and (3) the sentences imposed for the commission of the same crime in other jurisdictions. Id. at 463 U.S. 292. These guidelines have been adopted by Kentucky courts in determining whether particular penalties violate the U.S. Constitution and Kentucky Constitution. See Commonwealth v. Fint, Ky., 940 S.W.2d 896, 898 (1997).

Although the Kentucky Supreme Court adopted these guidelines in 1997 in the Fint case, the U.S. Supreme Court declared the Solem case "wrong" and rejected the proportionality three-factor test in 1991 in the case of Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). In light of the Harmelin case, it is unclear to this court whether the three-factor guidelines adopted by our supreme court in the Fint case are still applicable.

Nevertheless, we will follow our supreme court's analysis in the Marshall case. "Only when the offense and the punishment are greatly disproportionate will the punishment be considered cruel and unusual." Marshall, 60 S.W.3d at 523,

citing Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968).

Under this analysis, Preston's argument fails.

Preston committed crimes which resulted in monetary losses to victims and restitution owing in excess of \$12,000. He received probation and was given a chance to make full restitution; yet, he failed to do so. His argument that other defendants convicted of other crimes in Kentucky have received lesser sentences despite the fact that, in his opinion, their crimes were more serious, is without merit. Preston was sentenced within the range of punishment allowed by law, and we find no error in the court's determination that his sentence was not cruel or excessive.

Next, Preston argues that CR 60.02 relief should be granted and his convictions and sentence vacated because the Commonwealth did not attempt to fulfill its plea agreement. In support of his argument, Preston cites U.S. v. Barnes, 273 F.3d 644 (6th Cir. 2002). Therein, the Sixth Circuit vacated a defendant's sentence because the Commonwealth did not follow its plea agreement by recommending to the court that the defendant be sentenced to imprisonment to a term of years at the lower end of the sentencing guidelines. Id. at 649.

The facts in the Barnes case are distinguishable from the facts herein. In Barnes, the Commonwealth failed to fulfill its plea agreement with the defendant. In the case *sub judice*,

the Commonwealth fulfilled its plea agreement by recommending sentences of one year on the charges. However, the court exercised its right under RCr 8.10 to reject the plea agreement and give Preston an opportunity to withdraw his plea.

Therefore, there was no error in this regard.

Finally, Preston argues that his probation should not have been revoked because the five-year probationary period had expired. Preston was sentenced to fifteen years in prison on May 18, 1990, but his sentence was probated for a five-year period. Therefore, the probation period would have expired on May 18, 1995. The probation violation warrant was issued on March 29, 1994. Thus, the probation warrant was issued before the probation period expired. The fact that Preston was not apprehended until seven years later and that his probation was not revoked until that time was irrelevant.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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