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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001712-MR

TOMMY D. LANGSTON — APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 01-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY AND TAYLOR, JUDGES.

GUIDUGLI, JUDGE. Tommy D. Langston ("Langston") appeals from an order of the Webster Circuit Court denying his pro se motion for RCr 60.02 relief. For the reasons stated herein, we affirm.

On April 4, 2001, Langston was indicted by the Webster County Grand Jury on charges of complicity to manufacture methamphetamine, first-degree possession of a controlled substance, second-degree possession of a controlled substance, possession of drug paraphernalia, and second degree persistent felony offender ("PFO"). At the time of the indictment, he was

on parole from a prior conviction and six year sentence. Pursuant to an agreement with the Commonwealth, Langston pled guilty on June 20, 2001, to all charges with the exception of the PFO charge. On July 11, 2001, he was sentenced to a total of ten years in prison.

Langston subsequently filed a pro se motion seeking CR 60.02 relief. As a basis for the motion, he argued that the trial court improperly failed to order the new ten year sentence to run concurrently with the prior six year sentence. He also maintained the correctional facility where he was incarcerated improperly construed the sentence to run consecutively to the prior sentence when the new sentencing order was silent on the issue. The trial court denied Langston's motion without a hearing, and this appeal followed.

Langston now argues that the trial court committed reversible error in failing to grant his motion for CR 60.02 relief. He apparently claims that he is statutorily entitled to concurrent sentencing, and he brings double jeopardy and equitable estoppel arguments in support of his contention that the Department of Corrections improperly interpreted the sentence as requiring the service of consecutive terms. He also contends that the circuit court erred in denying his motion without the benefit of a hearing. He seeks an order reversing

the sentencing order and remanding the matter for concurrent sentencing.

We have closely examined Langston's argument and find no error. CR 60.02 provides that,

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Langston is bound by the civil rules and case law in attacking the sentencing order, if at all, first by direct appeal, then by way of RCr 11.42, and if unsuccessful, via CR 60.02. See generally Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

> A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to *any ground* of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 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. RCr 11.42(3). (Emphasis added).

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (1997), citing Gross, supra.

The trial court's alleged error in failing to order the instant sentence to run concurrently with the prior sentence is encompassed by the "any ground" language of McQueen. This fact, taken alone, forms a sufficient basis for affirming the denial of the CR 60.02 motion.

Arguendo, even if CR 60.02 was the correct mechanism for addressing the alleged error, the trial court properly relied on KRS 533.060(2) in disposing of Langston's claim. KRS 533.060(2) states,

> When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole . . . and is convicted or enters a plea of guilty to a felony committed while on parole . . . the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

The facts at bar fall squarely under KRS 533.060(2). Langston was on parole at the time he was sentenced in the instant matter, and KRS 533.060(2) sets forth mandatory language that the sentence must run consecutively with any other sentence. Contrary to Langston's assertion, the court did not err in

failing to address the effect, if any, of KRS 13A.120 and KRS 13A.130, which address the way in which administrative regulations are promulgated.

While the sentencing order did not state that Langston's sentence was to run concurrently, there is no statutory language requiring it to do so, and the Department of Corrections properly imposed the sentence in conformity with the statutory mandate. Langston's argument to the contrary is misplaced. No hearing on the motion was required as the motion was justiciable by reference to the record and the law.

Similarly, we are not persuaded by Langston's argument that equitable estoppel and double jeopardy are applicable to the facts at bar. These arguments have no bearing on the alleged sentencing error, and we find no basis for tampering with the denial of the CR 60.02 motion.

For the foregoing reason, we affirm the order of the Webster Circuit Court denying Langston's motion for relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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