

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002131-MR

LEWIS HENSLEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

BAKER, JUDGE: Lewis Hensley brings this *pro se* appeal from an October 3, 2002, order of the Franklin Circuit Court. We affirm.

Appellant was convicted upon multiple counts of sexual abuse in the first degree, criminal abuse in the first degree, and sexual abuse in the second degree. He was sentenced to a total of five years imprisonment. Subsequently, appellant filed a Ky. R. Civ. P. (CR) 60.02(f) motion to vacate sentence. The

circuit court ultimately denied appellant's CR 60.02(f) motion by order entered October 3, 2002, thus precipitating this appeal.

Appellant initially contends that Kentucky Revised Statute (KRS) 197.045(4) is unconstitutional as it amounts to an *ex post facto* law as applied to him. Appellant alleges that he committed the crimes before the effective date of the statute and, thus, application of the statute to him is unconstitutional.

KRS 197.045(4) specifically states that "the provisions of this section shall not apply to any sexual offender convicted before July 15, 1998, or to any mentally retarded sexual offender." As appellant was convicted on July 3, 2000, the provisions of the statute clearly apply to appellant.

As to appellant's assertion that such application amounts to an *ex post facto* law, we perceive as dispositive Lozier v. Commonwealth, Ky. App., 32 S.W.3d 511 (2000). Therein, Lozier committed her crime on August 11, 1997, and pled guilty on January 8, 1999. Lozier also attacked KRS 197.045(4) as an unconstitutional *ex post facto* law. The Court rejected such argument and specifically held:

(A)pplication of KRS 197.045(4) does not impose any additional punishment upon Lozier. A person convicted and sentenced to

a state penal institution may receive credit on his or her sentence for good behavior or for other meritorious conduct. KRS 197.045(1). Since Lozier was convicted and sentenced after the effective date of the statute, it does not deprive her of any previously earned credits. In addition, KRS 197.045(4) does not deprive Lozier of the opportunity to earn good time credit and to qualify for early parole. Rather, KRS 197.045(4) merely defers the effective date of any good time credit which Lozier may earn in prison until she has successfully completed a sexual offender treatment program. Once she completes the program, her accrued good time credit will be credited against her sentence. Consequently, we find no indication that Lozier will be disadvantaged by the application of KRS 197.045(4). . . .

. . . we also find that the application of KRS 197.045(4) does not retrospectively disadvantage Lozier's accumulation of good time credits. Consequently, we find that KRS 197.045(4) may be constitutionally applied to Lozier.

As the relevant facts in Lozier are identical to the facts in this case, we are compelled to conclude that KRS 197.045(4) does not constitute an unconstitutional *ex post facto* law as applied to appellant.

Appellant also asserts that "there was overwhelming evidence, in the way of witness testimony, that shows beyond the shadow of a doubt that the charges were false and perpetrated against the appellant by a jealous live-in girlfriend." It is well-established that CR 60.02 is limited to issues that could not have been brought on direct appeal. McQueen v.

Commonwealth, Ky., 988 S.W.2d 415 (1997); Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). We think that appellant's claim as to the sufficiency of evidence could have been brought on direct appeal and, consequently, does not constitute a valid basis for relief in a CR 60.02 motion.

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

ALL CONCUR.

BRIEF FOR APPELLANT - pro se:

Lewis Hensley
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Ian G. Sonego
Assistant Attorney General
Frankfort, Kentucky