

RENDERED: August 1, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-002308-MR

DALE LEE OWENS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
INDICTMENT NO. 76-CR-00341

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: PAISLEY and TACKETT, Judges; and HUDDLESTON, Senior Judge.<sup>1</sup>

HUDDLESTON, Senior Judge: Dale Lee Owens appeals from a Fayette Circuit Court order denying his pro se "motion to vacate

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

judgment of sentence" pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. On appeal, Owens's sole argument is that the circuit court abused its discretion "in not reducing [his] sentence from 105 years to 20 or 50 years . . . pursuant to the amended portion of [Kentucky Revised Statutes] KRS 532.080(6)(a)."<sup>2</sup>

On September 27, 1976, a Fayette County Grand Jury returned an indictment charging Owens with four counts of burglary in the first degree, a Class B felony under KRS 511.020, and three counts of rape in the first degree, a Class B felony under KRS 510.040. On October 5, 1976, Owens pled "not guilty" to all charges. Following a jury trial on February 14-15, 1977, Owens was found not guilty of one count of burglary in the first degree, guilty of three counts of burglary in the first degree and guilty of three counts of rape in the first degree.

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<sup>2</sup> KRS 532.080(6) currently provides that:

A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(a) If the offense for which he presently stands convicted is a Class A or Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than fifty (50) years [the language upon which Owens now relies], or life imprisonment[.]

Following a sentencing hearing, the court rendered a final judgment and sentence of imprisonment on March 14, 1977. Consistent with the jury's verdict and sentencing recommendation, the court fixed Owens's sentence at a maximum term of fifteen years on each count of burglary and twenty years on each count of rape to be served consecutively for a total of 105 years. In an unpublished opinion rendered on December 9, 1977, the Kentucky Supreme Court affirmed Owens's convictions on direct appeal and that decision became final when the Court denied his petition for rehearing on November 21, 1978.

Alleging ineffective assistance of counsel both before and during his trial, Owens filed a motion to vacate, set aside or correct the judgment and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 on October 1, 1997. Contemporaneous with the filing of his RCr 11.42 motion, Owens filed a motion "for the appointment of counsel to supplement or amend RCr 11.42 motion" along with a motion "for full evidentiary hearing with appearance of movant/defendant." By order of October 19, 1997, the court appointed Fayette County Legal Aid to represent Owens and directed his attorney "to file supplemental grounds, if any, for the relief requested" by Owens within fifteen days from when the order was mailed.

In a motion filed on November 13, 1997, Owens's counsel indicated that it was unnecessary to file any

supplementary grounds for the requested relief. Following a timely response by the Commonwealth, the court denied both his RCr 11.42 motion and his motion for an evidentiary hearing in an order entered on January 5, 1998, concluding that "the record in this case provides no support for [Owens] ineffective assistance of counsel claims." On January 15, 1998, Owens filed his notice of appeal from that decision. In an unpublished opinion that became final on March 11, 1999, this Court affirmed the order denying both motions.

On April 3, 2001, Owens filed his first CR 60.02 motion, arguing that the judgment of conviction and sentence of 105 years was "statutorily and constitutionally impermissible as contemplated by CR 60.02(e) and (f)"<sup>3</sup> and, therefore, should be vacated. According to Owens, once the court ordered the charges against him to be consolidated, "the charges became a single charge of burglary and a single charge of rape based on the same similar character and same acts or transactions connected

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<sup>3</sup> In relevant part, Ky. R. Civ. P. (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: . . . (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.

together as a common scheme or plan." Thus, he "should have been tried and convicted of only one count of burglary and one count of rape" and "the doctrine of collateral estoppel barred multiple prosecution on both the burglary and rape charges."

In addition, Owens argued that his sentence should be reduced since the "current law in Kentucky pursuant to KRS 532.110(c)<sup>4</sup> is that, in no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years." Acknowledging that the version of KRS 532.110(c) in effect at the time of his sentencing differs from the current version in this crucial respect, Owens maintained that the current version should nevertheless be applied. In the alternative, Owens contended that consecutive sentences "are not kept separate and distinct, but are merged into one period of years to serve not

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<sup>4</sup> According to KRS 532.110(1):

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:

(c) The 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 the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

Neither the 1998 version of this statute nor the current version contains a provision making this amendment retroactive.

to exceed the maximum sentence of the highest class of crime charged," and so his sentence is constitutionally impermissible because it exceeds the maximum length authorized by KRS 532.080.

In an opinion and order entered on May 4, 2001, the circuit court denied his motion to vacate. Rejecting Owens's merger theory, the court explained that "[a]ll charges were based on separate and distinct acts," and the Commonwealth "successfully proved the elements of the six separate offenses as indicated by the findings of the jury." As to his argument regarding KRS 532.110(1)(c), the court concluded that Owens had been properly sentenced under the governing law on March 11, 1977, since it is beyond dispute that the current version of the statute did not apply then and there is no provision indicating that the current version should be applied retroactively. Therefore, Owens failed to demonstrate any grounds for the relief sought.

On May 18, 2001, Owens filed his notice of appeal from the denial of his CR 60.02 motion. However, he failed to file a brief and, on August 29, 2001, we ordered him to show cause why his appeal should not be dismissed. Owens neglected to respond, and on November 15, 2001, we dismissed his appeal for failure to prosecute.

On October 29, 2002, Owens filed his second CR 60.02 motion to vacate judgment or correct sentence, relying on

subsections (d),<sup>5</sup> (e) and (f). According to Owens, KRS 532.110(1)(c) provides that the aggregate of consecutive indeterminate sentences "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 the sentences . . . imposed." He further contended that under the law in 1977, a sentence authorized by KRS 532.080 for a non-persistent felony offender under subsections (6)(a) and (b),<sup>6</sup> was also governed by KRS 532.060. Under his reasoning, since the 1994 amendment to KRS 532.080 was specifically made retroactive by subsections (6)(a) and (b),<sup>7</sup> the court was required to apply KRS 532.080 retroactively to his case and order his sentences to "run concurrently for a total of 20 years or at best, a total of 50 years . . . ."

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<sup>5</sup> Under CR 60.02(d), "fraud affecting the proceedings, other than perjury or falsified evidence" constitutes a basis for relief.

<sup>6</sup> In relevant part, the 1976 version of that provision under which Owens was sentenced and the 1994 version are identical. As correctly observed by the Commonwealth, the amendments upon which Owens relies "altered nothing pertinent to [Owens's] sentence." Subsection (b) contains the sentencing provision for PFOs convicted of a Class C or Class D felony and is therefore inapplicable to Owens.

<sup>7</sup> In 1996, the 1994 amendments to KRS 532.080 were specifically made retroactive by subsection (8) (now (9)) which provides: "The provisions of this section amended by 1994 Ky. Acts ch. 396, sec. 11, shall be retroactive." Pursuant to KRS 446.080(3): "No statute shall be construed as retroactive, unless expressly so declared."

On November 1, 2002, the court summarily denied Owens's motion and Owen appealed to this Court. According to the Commonwealth, his argument "is unavailing on both various procedural and substantive grounds."

In Gross v. Commonwealth,<sup>8</sup> the Supreme Court held that "the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken."<sup>9</sup> Contrary to the Commonwealth's assertion, however, Owens could not have raised the issue of whether the 1994 amendment to KRS 532.080(6)(a) applies to his case in his direct appeal in 1977 since the amendment had not yet been enacted.

RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal."<sup>10</sup> But, "[a] defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him."<sup>11</sup> Subsection (3) of RCr 11.42 provides that

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<sup>8</sup> Ky., 648 S.W.2d 853 (1983).

<sup>9</sup> Id. at 857.

<sup>10</sup> Id. at 856.

<sup>11</sup> Id.

"[t]he motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of such a motion" or a waiver of the right to pursue that avenue of relief "shall conclude all issues that reasonably could have been presented in that proceeding."<sup>12</sup>

CR 60.02, on the other hand, affords relief that is not available by direct appeal or pursuant to RCr 11.42 and requires the movant to "demonstrate why he is entitled to this special, extraordinary relief." Consistent with the foregoing, a defendant [Owens] is precluded from raising any questions under CR 60.02 which "reasonably could have been presented" in RCr 11.42 proceedings.

Pursuant to RCr 11.42(10), any motion under this rule "shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves . . . (b) that the fundamental constitutional right asserted was not established within the period provided herein and has been held to apply retroactively." Since the 1994 amendments to KRS 532.080 were not made retroactive until 1996, Owens's 1997 RCr 11.42 motion was timely under subsection (10)(b).<sup>13</sup> As grounds

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<sup>12</sup> Id. at 857.

<sup>13</sup> In the alternative, Ky. R. Crim. Proc. (RCr) 11.42 also provides that "[i]f the judgment becomes final before the effective date of this rule [October 1, 1994], [as is the case here], the time for filing the motion shall commence upon the

for his motion, however, Owens alleged only that he was "denied effective assistance of counsel and due process of law in violation of rights guaranteed him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution." Noticeably absent from his motion is any mention of the 1994 amendment to KRS 532.080(6)(a) upon which he now relies as a basis for relief. Because Owens could be imputed with knowledge regarding the 1996 provision making the 1994 amendments to KRS 532.080 retroactive, he was required to raise this ground for holding his sentence invalid in his 1997 RCr 11.42 motion. Put another way, the issue of whether the amended version of KRS 532.080(6)(a) applies to him "reasonably could have been presented" in the RCr 11.42 proceedings and, therefore, his belated attempt to present the issue necessarily fails.

Even if Owens was not barred from raising the issue regarding KRS 532.080(6)(a) on this basis, the final disposition of his initial motion pursuant to CR 60.02 would result in the same outcome. Kentucky's highest Court has consistently held "that issues which could have been presented in an initial

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effective date of this rule." Because Owens's judgment became final in March 1977 (before the effective date of this rule), the three year statute of limitations set forth in RCr 11.42(10) began to run on October 1, 1994, meaning the period during which he could file a RCr 11.42 motion expired on October 1, 1997, the date on which he filed his motion.

motion to vacate judgment cannot thereafter be raised by subsequent motions."<sup>14</sup> Further, when a prisoner fails to appeal from an order denying his motion to vacate judgment "or when his appeal is not perfected or is dismissed,"<sup>15</sup> he is not permitted to file a subsequent motion to vacate. The rationale behind this rule is self-evident: "If such a procedure were allowed there would be no end to the successive applications for post-conviction relief."<sup>16</sup> Accordingly, the dismissal of Owens's appeal from the denial of his first CR 60.02 motion in 2001 for failure to prosecute precludes discussion of his claim at this juncture.

But even if Owens's motion is not barred on these procedural grounds, his substantive argument fails on the merits. As correctly observed by the Commonwealth, the amendments to KRS 532.080 reflected by 1994 Kentucky Acts Chapter 396, Section 11 are not applicable to Owens. Rather, the only change made to KRS 532.080 in 1994 involved subsection (7),<sup>17</sup> a provision that Owens does not allege is implicated on the instant facts.

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<sup>14</sup> Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974).

<sup>15</sup> Id. at 233 (emphasis supplied).

<sup>16</sup> Id.

<sup>17</sup> In 1976, KRS 532.080(7) read as follows: "A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or

In arguing that KRS 532.080(6)(a) as amended requires his sentence to be reduced, Owens is apparently relying upon the 1998 amendment to this provision, 1998 Ky. Acts ch. 606, sec. 76, as the provision was not amended to include the critical language, i.e., "nor more than 50 years," until that time. Unlike the 1994 amendment, however, the 1998 amendment to KRS 532.080(6)(a) was not expressly made retroactive as required by KRS 446.080(3). Thus, the 1998 version of KRS 532.080(6)(a) does not afford Owens any relief.

Equally unsuccessful is Owens's alternative argument that the amended version of KRS 532.110(1)(c) applies retroactively to mandate a reduction in his sentence. Although the Commonwealth concedes that this provision was amended in 1998 to place an absolute cap of 70 years on the aggregate of consecutive indeterminate terms, this amendment was not expressly made retroactive at the time of its enactment nor does the current version contain any legislative declaration to that effect. Absent this mandatory provision, the same result follows.

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conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten years." In 1994, this provision was amended to begin with the phrase "If the offense the person presently stands convicted of is a Class A, B, or C felony, . . ." and otherwise remained intact.

Because Owens's argument is barred on procedural grounds and lacks merit as well, the order denying his successive CR 60.02 motion is affirmed.

ALL CONCUR.

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