

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000171-MR

MICHAEL GARDNER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE JEFFREY HINES, JUDGE  
ACTION NO. 96-CR-00357

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

BARBER, JUDGE: Appellant Michael Gardner appeals the trial court's denial of his CR 60.02 motion. Gardner was found guilty of sexual abuse following a jury trial. During the sentencing phase, the jury found that Gardner was a persistent felony offender in the second degree. The PFO enhancement was applied to both charges of sexual abuse. The PFO charges were used to increase Gardner's sentence by ten years for each charge. The trial court ordered that the PFO sentences run consecutively,

and in lieu of the sentences handed down for the sexual abuse charges, for a total of twenty years incarceration.

The Commonwealth claims that Gardner is barred from raising this issue on a CR 60.02 motion or in the present appeal because he did not raise it in his direct appeal. Sentencing is jurisdictional, and should be reviewed by this Court where issues of statutory or constitutional violations are claimed. Wellman v. Commonwealth, Ky., 694 S.W.2d 696, 698 (1985). The imposition of an unauthorized sentence may be corrected on a motion for post-conviction relief. Myers v. Commonwealth, Ky., 42 S.W.3d 594, 596 (2001).

KRS 532.080(1) provides that an individual found guilty of being a persistent felony offender shall serve the sentence for that offense in lieu of the sentence for the underlying crime of which he was convicted. The Kentucky Supreme Court has found this statute to be constitutional. See: Hardin v. Commonwealth, Ky., 573 S.W.2d 657, 661 (1978).

Gardner objects to that portion of the jury instructions which permitted the jury to fix his sentence for the PFO offense at no less than five and no more than ten years incarceration for each crime charged. He asserts that the discretion thereby allowed the jury is unlawful in that the sentence handed down exceeded the maximum allowable for the highest degree of offense charged. Gardner argues that the two

PFO sentences should be merged into one sentence, meaning that he would only have to serve one ten year sentence.

The Commonwealth claims that the sentencing was proper. The law is clear in holding that a maximum aggregate sentence permitted must be the greatest term of imprisonment allowed for the highest degree of crime for which one of the sentences is imposed. Young v. Commonwealth, Ky., 968 S.W.2d 670, 675 (1999). This is so even where the defendant is charged with multiple offenses. Meyers v. Commonwealth, Ky., 42 S.W.3d 594, 596 (2001). The longest extended term permissible for the underlying offense is the maximum sentence permitted. Dawson v. Commonwealth, Ky., 756 S.W.2d 935, 937 (1988).

Gardner was charged with two Class C felony offenses. The maximum sentence for each such offense was ten years. KRS 508.1000; KRS 532.060(2)(c). The enhancement of those charges by the PFO status raised the maximum allowable sentence to twenty years. KRS 532.080(5). Because the aggregate sentence imposed on Gardner did not exceed twenty years, the sentence imposed was permissible under law. For this reason, the sentence is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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