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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000335-MR

RODNEY L. LITTLE

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 01-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: COMBS, Chief Judge; TACKETT, Judge; and EMBERTON,
Senior Judge¹.

COMBS, CHIEF JUDGE. Rodney L. Little appeals *pro se* from an order of the Crittenden Circuit Court, entered on January 28, 2003, which amended his one-year sentence for third-degree rape to run consecutively rather than concurrently with a prior sentence. Little challenges the jurisdiction of the circuit

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court to enter the order and asserts that the amendment of his sentence was barred by the terms of KRS² 532.110(2). We affirm.

In April 2001, Little was indicted for rape in the second degree and for being a persistent felony offender in the second degree. At that time, he was on probation from a five-year sentence imposed by the Livingston Circuit Court on December 3, 1997. In consideration of his plea of guilty, the Commonwealth offered to amend the charge of rape in the second degree to rape in the third degree and to dismiss the PFO charge. The Commonwealth recommended a sentence of one year -- to run consecutively with any prior sentence.

On June 7, 2001, Little entered a plea of guilty, which provided in relevant part as follows:

In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the following amended charges and sentences: Dismiss the charge of persistent felony offender in the second degree; amend rape in the second degree to rape in the third degree; a sentence of one (1) year to run **consecutively** with any prior sentence; and to oppose probation. (Emphasis added.)

Following a hearing, the circuit court entered judgment and sentence on the guilty plea. The judgment and order, entered on August 16, 2001, accepted Little's guilty plea and sentenced him to imprisonment for a maximum term of one year in the penitentiary to run **concurrently** with any previous

² Kentucky Revised Statutes.

sentence imposed. Little's probation on the Livingston Circuit Court sentence was revoked approximately three months later.

On January 21, 2003, Little filed a Motion for Clarification with the Crittenden Circuit Court pursuant to CR 60.01, explaining that the records of the Department of Corrections indicated that his sentences were to be served consecutively while the final judgment had stated that his sentences were to run concurrently. The circuit court accordingly issued a corrective order, amending the judgment entered on August 16, 2001, to reflect that the sentence of one year in the penitentiary would run consecutively rather than concurrently with any previous sentence imposed. This appeal followed.

Little's first argument is that under the provisions of KRS 532.110(2), he is statutorily entitled to serve his sentences concurrently. At the time he was sentenced, KRS 532.110(2) provided as follows: "If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve."

Little asserts that because KRS 532.110 is the more recently revised statute, its provisions must take precedence over KRS 533.060 (2), which specifies as follows:

When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, 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.**

KRS 533.060(2). (Emphasis added.)

This Court has already addressed this issue of statutory interpretation in White v. Commonwealth, Ky. App., 32 S.W.3d 83 (2000), disc. rev. denied Nov. 15, 2000. In that case, we discussed the fact that the 1998 amendment of KRS 532.110 was directed to an issue other than the dispute over concurrent *versus* consecutive sentencing. The purpose of the statutory re-enactment was to place a 70-year limitation on the aggregate of consecutive indeterminate sentences. Therefore, it did not affect the primacy of 533.060(2). We held as follows:

In addition, the July 1998 amendment to KRS 532.110 **did not involve an aspect of the statute that is pertinent to White's situation.** The only change in the statute in 1998 was a provision in Subsection (1)(c) placing a 70-year limitation on the aggregate of consecutive indeterminate sentences. Under Section 51 of the Kentucky Constitution, the entire statute is required to be re-enacted even though only a portion of the statute is amended. The re-enactment and amendment of KRS 532.110(1) **do not evidence an intent by the Legislature to**

**have that statute take priority over KRS
533.060(2).**

* * * *

Long existing case law interpreting KRS 532.110 and KRS 533.060(2) has clearly established the primacy of the latter statute.

Id. at 86. (Emphasis added.)

As additional reinforcement of the intent of the Legislature in this regard, we note that KRS 532.110(2) was revised in 2002 to reflect this interpretation clearly and unambiguously, specifically providing that multiple sentences shall not run concurrently if required under KRS 533.060 to run consecutively. It states in relevant part as follows:

If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve unless the sentence is required by subsection (3) of this section or KRS 533.060 to run consecutively.

KRS 532.110(2).

Little's second argument is that the Crittenden Circuit Court lacked the authority to enter the order amending his sentence because a trial court loses jurisdiction over a judgment ten days after its entry pursuant to CR 59.05.³ See Silverburg v. Commonwealth, Ky., 587 S.W.2d 241, 244 (1979).

³ Kentucky Rules of Civil Procedure.

The Commonwealth has responded by arguing that the wording of the final order was merely a clerical error as both the plea agreement and the guilty plea specified that Little's sentences were to run consecutively. A clerical error on the part of the court may be corrected **at any time** pursuant to RCr⁴ 10.10.

The record before us does not contain a transcript or a tape of the guilty plea proceedings. Therefore, we are unable to determine if the circuit court orally sentenced Little to serve concurrent sentences, a result which would render the error judicial in nature rather than a clerical mistake committed while reducing the oral judgment to writing. See Cardwell v. Commonwealth, Ky., 12 S.W.3d 672, 674-75 (2000). Nonetheless, the circuit court would have had jurisdiction to amend the sentence pursuant to the principle that "when a trial court has imposed an unlawful sentence, the trial court can correct that sentence at any time." Neace v. Commonwealth, 978 S.W.2d 319, 322 (1998), reh'g denied 1998, citing Skiles v. Commonwealth, Ky. App., 757 S.W.2d 212, 215 (1988). Because concurrent sentencing in this case was clearly contrary to the provisions of KRS 533.060(2), the circuit court did not err in correcting its order to impose a lawful sentence.

We affirm the order of the Crittenden Circuit Court.

⁴ Kentucky Rules of Criminal Procedure.

ALL CONCUR.

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