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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000852-MR

JOSEPH YOCUM

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 01-CR-00134

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.
VANMETER, JUDGE. This is an appeal from a final judgment and subsequent order of the Boyle Circuit Court. The appellant, Joseph Yocum, who entered a conditional guilty plea, challenges the circuit court's decision to permit evidence of a prior offense to be admitted at trial. Yocum also challenges the jurisdiction of the court to enter an order vacating his initial sentence of two years and imposing a sentence of five years. For the reasons stated hereafter, we affirm.

On September 30, 2001, Danville police officers stopped a car driven by Yocum. Three passengers were in the car. Yocum was arrested after he failed a field sobriety test. The police searched the car and found a handgun under the driver's seat. Neither the car nor the gun was registered to Yocum. Yocum was thereafter charged with possession of a handgun by a convicted felon, carrying a concealed deadly weapon, driving under the influence of intoxicants and resisting arrest. Yocum pled guilty to the latter two charges, which are not at issue here.

In regard to the two charges relating to the handgun, the Commonwealth prior to trial notified Yocum of the testimony of Amanda Yates, one of the passengers in the car. Yates, Yocum's ex-girlfriend, was to testify that she could identify the gun found in the car as Yocum's because he had once held it to her head. This incident had previously led to unlawful imprisonment charges against Yocum in Mercer County. Yocum moved to suppress this evidence. Following a hearing on the motion, the circuit court ruled that Yates' testimony was admissible pursuant to KRE 404(b)(1) in order to prove the ownership of the gun. As a result of the court's ruling, Yocum entered a guilty plea to the charges of carrying a concealed deadly weapon and possession of a handgun by a convicted felon, conditioned on the outcome of appealing the issue. Yocum was sentenced to two

years in prison; the final judgment on sentencing was entered on June 28, 2002. The record indicates that he did not, however, file an appeal.

In late September 2002, the Department of Corrections notified the Boyle Circuit Court Clerk and the Commonwealth Attorney by letter that the minimum sentence allowed by statute for possession of a handgun by a convicted felon is five years, not two years. On November 15, 2002, the Commonwealth made a motion to clarify judgment of the sentence. On March 19, 2003, following a hearing, the circuit court entered an order vacating the sentence of two years on the grounds that it was unlawful, and re-sentencing Yocum to five years in prison.

This appeal challenges both the jurisdiction of the circuit court to re-sentence Yocum and the admissibility of Amanda Yates' testimony.¹

Yocum's contention that the circuit court lacked jurisdiction to vacate his original sentence and impose an increased sentence is based on Kentucky Civil Rule ("CR") 59.05, which provides that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not

¹ In imposing the new sentence, the circuit court explained that Yocum's right to appeal the evidentiary issue had thereby been revived. The Commonwealth does not challenge this ruling.

later than 10 days after entry of the final judgment.”² The Commonwealth’s motion to clarify was made almost five months after the entry of the final judgment; and the circuit court entered its second order vacating and altering Yocum’s sentence four months later. Yocum argues that a judicial error in sentencing, unlike a clerical error, may not be corrected after the ten day deadline for vacating judgments has passed.³

This limitation does not apply, however, when the erroneous sentence imposed by the circuit court is unlawful. In Yocum’s case, the original sentence imposed by the circuit court undeniably fell outside the prescribed statutory range.⁴ The sentence was not merely erroneous, it was unauthorized and unlawful. *Neace v. Commonwealth*, Ky., 978 S.W.2d 319, 321

² This civil rule is applicable to criminal judgments pursuant to Kentucky Rule of Criminal Procedure (RCr) 1.10 and RCr 13.04. “When our criminal rules do not supersede our civil rules or are not inconsistent with them, our civil rules apply. Since our criminal rules do not provide for trial court control of criminal judgments, our civil rule 10 day control provision applies.” *McMurray v. Commonwealth*, Ky. App., 682 S.W.2d 794, 795 (1985).

³ See *Viers v. Commonwealth*, Ky., 52 S.W.3d 527, 529 (2001) (“question of whether an error is ‘judicial or ‘clerical’ turns on whether the amended judgment embodies the trial court’s oral judgment as expressed in the record;” if so, the error is clerical; if not, the error is judicial and may not be amended); *Cardwell v. Commonwealth*, Ky., 12 S.W.3d 672, 674-75 (2000) (provision that sentences were to run consecutively was orally stated by the court but not included in written order; it was therefore clerical error and the trial court had the authority to correct the judgment pursuant to RCr 10.10).

⁴ The sentence initially imposed on Yocum for possession of a handgun by a convicted felon was clearly contrary to law. KRS 527.040(2) provides that [p]ossession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a handgun in which case it is a Class C felony.” Under the relevant provisions of KRS 532.060, the authorized maximum term of imprisonment for a Class C felony is “not less than five (5) years nor more than ten (10) years [.]” KRS 532.060(2)(c).

(1998). The Court in *Neace* expressly stated that "whether the unlawful sentence is recommended by the jury or an unlawful sentence is imposed following a guilty plea, the result is the same. In either instance the sentence must be corrected to conform to the law." *Id.* at 322. The Court also cited with approval the holding of this court in *Skiles v. Commonwealth*, Ky. App., 757 S.W.2d 212, 215 (1988), that "a trial court which has imposed an unlawful sentence can correct that sentence **at any time.**" (Emphasis added).

Yocum has cited a series of cases⁵ in which Kentucky appellate courts have held that a trial court lacked jurisdiction to amend a final judgment and sentence after the passage of the ten-day limit pursuant to CR 59.05. These cases are distinguishable, however, because the initial sentences imposed therein were not contrary to law.

Yocum has also argued that the delay in amending his sentence constituted laches on the part of the Commonwealth, and that the only proper avenue for redress was by means of a timely appeal.⁶ The doctrine of laches was never invoked before the

⁵ *Viers v. Commonwealth*, Ky., 52 S.W.3d 527 (2001); *Silverburg v. Commonwealth*, Ky., 587 S.W.2d 241 (1979); and *McMurray v. Commonwealth*, Ky. App., 682 S.W.2d 794 (1985).

⁶ "The basis of the doctrine of laches is that neglect or omission to assert one's rights within a reasonable period of time, where it causes prejudice, injury, disadvantage or a change of position to the other party, will bar enforcement of that claimant's rights." *Brumley v. Seabold*, Ky. App., 885 S.W.2d 954, 956 (1994) (relying on *Fightmaster v. Leffler*, Ky. App., 556 S.W.2d 180 (1977)).

trial court, even though Yocum and his counsel were present for the resentencing hearing. The issue was therefore not properly preserved for appeal. Furthermore, in light of the rule that an unlawful sentence may be revised "at any time,"⁷ the doctrine of laches is not applicable.

Yocum further argues that because he would be without redress had he failed to file a timely appeal (if the sentence imposed had been greater than that allowed by law) the Commonwealth should be similarly constrained. Requiring the Commonwealth to file a timely appeal on such cases would in effect be imposing a limitations period for the correction of lawful judgments. Furthermore, as Yocum himself acknowledges, had the situation been reversed, the remedy of a petition for writ of habeas corpus would be available to him.

We conclude therefore that the circuit court properly exercised jurisdiction to vacate and amend Yocum's sentence more than ten days after entry of the final judgment because the original sentence was unlawful.

Next, Yocum argues the circuit court erred in holding that the testimony of Amanda Yates was admissible pursuant to KRE 404(b)(1).⁸ "[E]vidence of criminal conduct other than that

⁷ *Skiles*, 757 S.W.2d at 215.

⁸ KRE 404(b)(1) states, as follows:

being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." *Billings v. Commonwealth, Ky.*, 843 S.W.2d 890, 892 (1992).

When such an issue arises,

[t]he balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge. The standard of review is whether there has been an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999)

(citations omitted).

The evidence provided by Yates' testimony was highly probative to show the identity and ownership of the gun. The circuit court explained that it would allow Yates to testify specifically as to the incident when the gun was held to her head because she would have seen it very closely under those circumstances. In other words, it was a crucial part of the identification that the gun had been held to Yates' head.

(b) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

In Moore v. Commonwealth, Ky., 771 S.W.2d 34, 39
(1988), *overruled on other grounds by McGuire v. Commonwealth,*
Ky., 885 S.W.2d 931 (1994), the court stated the standard for
admissibility of evidence of other crimes:

In all instances, the question is whether the proposed evidence is primarily to prove the commission of another disconnected crime, or whether it is material to some issue in the case. If it is material and logically relevant to an issue in the case, whether to prove an element of the crime, or to controvert a material contention of [the] defendant, it is not inadmissible because in making the proof the commission of an independent disconnected crime is an inseparable feature of it.

(quoting *Bates v. State, 405 So.2d 1334, 1338 (Ala. Cr. App. 1981)*)).

In *Barth v. Commonwealth, Ky., 80 S.W.3d 390 (2001),* the defendant, Michael, was charged with burglary, robbery and assault. Frazier, a friend of the defendant's mother, was prepared to testify that on the day of the crimes, she drove Michael and his brother to the town where the crime took place. She was further prepared to testify that the defendant pulled a gun on his brother to enforce his insistence that he be allowed to ride "shotgun." The trial court allowed Frazier to describe the entire incident. In affirming the conviction, the Kentucky Supreme Court held that Frazier's testimony was admissible based on the identity exception to KRE 404(b), stating that "[f]or Frazier to testify to the identity of the weapon, it was

necessary for her to relate the incident behind her observation: that Michael flourished the weapon and threatened to use it against his codefendant." *Id.* at 403.

Similarly, in this case, the trial judge did not abuse his discretion. In order for Yates to testify effectively to the identity of the weapon, it was necessary for Yates to relate the incident of Yocum holding the gun to her head.

Yocum finally argues that having a gun under the front seat of a car does not constitute possession in Kentucky, and that therefore Yates' testimony would not even meet the fundamental requirement that it be of probative value. The case relied on by Yocum, *Commonwealth v. Nunnelley*, 247 Ky. 109, 56 S.W.2d 689 (1933), discusses what constitutes "carrying" a concealed weapon. Yocum, however, was charged with possession of a handgun by a convicted felon, in which possession could be proven through constructive possession. "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others." *Johnson v. Commonwealth*, Ky., 90 S.W.3d 39, 42 (2002)(citations omitted). In *Johnson*, the court held that a jury could reasonably find the defendant had constructive possession of a handgun given that handguns were in his ex-wife's house where he occasionally resided.

Here, the placement of the handgun under the seat of the car Yocum was driving was sufficient evidence to establish grounds for a charge of possession of a handgun by a convicted felon, based on constructive possession.

The Boyle Circuit Court's order is affirmed.

ALL CONCUR.

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