

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000407-MR

JAMES PROCTOR

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOSEPH R. HUDDLESTON, SPECIAL JUDGE
ACTION NO. 83-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: James Proctor, pro se, has appealed from the February 4, 2004, order of the Warren Circuit Court which denied his motion to vacate his sentence pursuant to KRS 532.080.

Having concluded that the jury properly recommended sentences on the two underlying felony convictions before the trial court sentenced Proctor to 20 years' imprisonment on a conviction as a persistent felony offender in the first degree (PFO I), we affirm.

On March 23, 1983, a jury convicted Proctor of arson in the second degree,¹ and criminal mischief in the first degree.² The jury recommended a sentence of ten years' imprisonment for the arson conviction and one year's imprisonment for the criminal mischief conviction. During the PFO phase of the trial, the jury found Proctor guilty of being a PFO I.³ Based on the PFO I conviction, the jury recommended an enhanced sentence of 20 years' imprisonment for arson in the second degree and an enhanced sentence of ten years' imprisonment for criminal mischief in the first degree. In the trial court's final judgment, entered on March 29, 1983, the jury's recommendations regarding Proctor's sentence were accepted and the trial court ordered the two sentences to run concurrently for a total of 20 years' imprisonment.

Proctor directly appealed his sentence to the Supreme Court of Kentucky; and in an opinion dated July 6, 1984, the Supreme Court affirmed the trial court's judgment of conviction and sentence.⁴ On September 20, 1984, Proctor filed an RCr⁵ 11.42 motion asking the court to vacate his sentence. The trial

¹ KRS 513.030.

² KRS 512.020.

³ KRS 532.080(3).

⁴ 1983-SC-000605-MR, not to be published.

⁵ Kentucky Rules of Criminal Procedure.

court denied his RCr 11.42 motion on March 22, 1985, and in an opinion dated April 25, 1986,⁶ this Court affirmed.

Proctor then filed a "Motion to Vacate PFO Conviction," on April 11, 1988, in which he asked the trial court to vacate the PFO I conviction. In an order entered on June 21, 1988, the trial court denied Proctor's motion to vacate the PFO I conviction⁷ without prejudice. Shortly thereafter, on November 22, 1988, Proctor filed two motions with the trial court, including a CR 60.02 motion and a request for an evidentiary hearing. Proctor's CR 60.02 motion alleged that improper evidence had been introduced against him at trial. The trial court denied both of Proctor's motions in an order entered on August 23, 1989. The trial court ruled that the evidence had been properly introduced at trial and since it was included in the record and since a previous hearing had been held there was no need to hold an evidentiary hearing.

On January 23, 2004, Proctor filed a motion to vacate his sentence pursuant to KRS 532.080. Proctor alleged that the judgment entered on March 23, 1983, which sentenced him to 20 years' imprisonment, was based on his conviction as a PFO I, and that he was not given a sentence on his convictions for arson in

⁶ 1985-CA-001481-MR, not to be published.

⁷ The trial court styled this order: "ORDER OVERRULING DEFENDANT'S CR 60.02 MOTION TO VACATE PFO CONVICTION," despite the fact that Proctor's motion did not contain the CR 60.02 language.

the second degree and criminal mischief in the first degree. Proctor apparently placed great weight on the trial court's failure to note the jury's recommended sentences for the two underlying offenses in its final judgment of conviction and sentence. The trial court denied the motion by an order entered on February 4, 2004, and this appeal followed.

Proctor relies on the Supreme Court decision of Davis v. Manis,⁸ where Davis was convicted by a jury of possession of cocaine, and the jury recommended a \$1,000.00 dollar fine, but did not impose a term of imprisonment. However, during the PFO phase of the trial, the jury found Davis guilty of being a PFO and enhanced his sentence to ten years' imprisonment. In granting a writ of prohibition, the Supreme Court determined that Davis could not be sentenced to a term of imprisonment for the PFO conviction since a term of imprisonment had not been imposed for the underlying conviction for possession of cocaine.

The facts in the case before us are easily distinguished from the facts in Davis. During the guilt phase of Proctor's trial, the jury found Proctor guilty of arson in the second degree and criminal mischief in the first degree. The jury recommended sentences of imprisonment of ten years and one year, respectively. During the PFO phase, the jury recommended an enhanced sentence for the conviction of arson in

⁸ 812 S.W.2d 505 (Ky. 1991).

the second degree to 20 years and an enhanced sentence for the conviction of criminal mischief in the first degree to ten years. The trial court ordered the two sentences to run concurrently for a total of 20 years' imprisonment.

Thus, unlike Davis, the underlying sentences for Proctor's convictions were established during the guilt phase of the trial. The jury found Proctor guilty of arson in the second degree and of criminal mischief in the first degree and recommended sentences of terms of imprisonment. Then, during the PFO phase of the trial, the jury recommended enhanced sentences after finding Proctor guilty of PFO I. When the jury recommended enhanced sentences, it had already recommended sentences of ten years for arson and one year for criminal mischief. The trial court's failure to make reference to the jury's recommended sentences for the two underlying offenses in its final judgment of conviction and sentence does not invalidate the PFO conviction and sentence.

Based on the foregoing reasons, the order of the Warren Circuit Court denying Proctor's motion to vacate his sentence is affirmed.

BARBER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

James Proctor, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky