

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000618-MR

STEVEN L. BENNINGTON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NOS. 99-CR-001628, 00-CR-001966 & 01-CR-000669

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI and TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Steven Bennington appeals the denial of his motion for RCr 11.42 relief from a judgment revoking his probation and ordering him to commence service of a previously imposed sentence of ten (10) years' imprisonment. Appellant's primary contention is that the trial judge improperly enhanced his previously imposed sentences as a condition of a grant of

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.

shock probation. Because that contention is conclusively refuted by the record in this case, we are convinced that the trial court properly denied his post-conviction motion without appointing counsel or conducting an evidentiary hearing.

On June 20, 2001, appellant entered pleas of guilt to various charges filed in indictments number 99-CR-1628, 00-CR-1966, and 01-CR-0669 for which he was ultimately sentenced to one year of imprisonment on the charges in each indictment and which were ordered to run consecutively for a total of three years' imprisonment. In October, 2001, appellant filed a motion for shock probation of these sentences. The trial judge refused to consider the shock probation motion until after charges filed in another indictment, 01-CR-1965, had been resolved.

Appellant's counsel then informed the trial judge that the Commonwealth had made an offer that he wished to discuss with appellant and asked the trial judge to schedule a pre-trial conference which would afford him time to do so. On December 17, 2001, appellant and his counsel appeared before the trial court, withdrew his former plea of not guilty and entered a plea of guilty to amended charges of two counts of identity theft in indictment number 01-CR-1965. After hearing the Commonwealth's recommendation of two years to serve and three years' probation on these charges, the trial judge passed sentencing to a later date to allow the court to consider the recommended sentence

along with appellant's motion for shock probation of the three previous sentences. However, the trial judge thereafter agreed to grant appellant's shock probation motion subject to the following conditions: 1) that in indictment 01-CR-1965 he would be sentenced to five years on each count of identify theft, run consecutively for a total of ten years; 2) that the sentence in 01-CR-1965 would be probated for a period of five years; and 3) that if he violated the terms of probation in 01-CR-1965, he would be sentenced to ten years' imprisonment. The trial judge made clear that he was not increasing the sentences in 99-CR-1628, 00-CR-1966, 01-CR 0669, but was sentencing appellant to ten (10) years on indictment 01-CR-1965. The practical effect of the trial judge's offer in indictment 01-CR-1965 was a coordination of the sentence imposed in that case with a grant of shock probation in the previous cases. In accepting these terms and conditions, appellant was well-aware that violation of his probated sentence would result in ten years to serve pursuant to the probated sentence imposed in indictment 01-CR-1965.

Appellant's probation was subsequently revoked in all four cases. He thereafter entered a guilty plea to charges in yet another indictment, 03-CR-16, and was sentenced to ten years' imprisonment. Because those offenses had been committed while appellant was on probation, the sentences in 03-CR-16 were

required by law to be served consecutively with the sentences in the previously revoked cases.

Appellant next filed a pro se RCr 11.42 motion alleging that the trial judge had improperly increased his three-year sentences in indictments 99-CR-1628, 00-CR-1966, and 01-CR-0669 to ten years' as a condition of the grant of shock probation in those cases. The trial judge denied the post-conviction motion without a hearing or appointment of counsel on the basis that the record clearly demonstrated that appellant's ten-year sentence stemmed from the revocation in indictment 01-CR-1965 and that his three-year sentences were merely running concurrently with that sentence. We find absolutely no error in the trial judge's determination.

As a preliminary matter, we note that appellant's failure to appeal from the order revoking his probation operates as a procedural bar to this RCr 11.42 motion. The Supreme Court of Kentucky made very clear in Gross v. Commonwealth² that RCr 11.42 is not available for raising issues which could and should have been advanced by direct appeal.

Even if RCr 11.42 were the appropriate vehicle for lodging appellant's complaint, it would nevertheless fail to afford him any relief because his allegations are conclusively refuted by the record. As noted in the order denying the post-

² 648 S.W.2d 853 (Ky. 1983).

conviction motion, the sentencing judge specifically stated on the record that he had no authority to alter the sentences in 99-CR-1628, 00-CR-1966 and 01-CR-0669, but that he could impose a ten-year sentence in 01-CR-1965. Should that sentence be revoked, appellant would be serving ten years' imprisonment because the three-year sentences were concurrent with the ten-year sentence. On this state of the record, it is abundantly clear that appellant was not entitled to appointment of counsel, an evidentiary hearing or the relief sought.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven L. Bennington, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky