

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000787-MR

LUTHER KING

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CR-00405

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹
McANULTY, JUDGE: Luther King appeals, pro se, the denial of his motion to vacate his conviction pursuant to RCr 11.42. King was convicted following his plea of guilty but mentally ill in the Fayette Circuit Court to the charges of escape and of being a persistent felony offender (PFO) in the first degree. The PFO charge was based on two previous convictions, a wanton

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

endangerment conviction in the Jackson Circuit Court for which King completed service of the sentence in approximately December 1982, and a conviction in the Menifee Circuit Court for cultivation of marijuana in 2001. King was serving the latter sentence when he received the charges in the instant case.

King argued in his RCr 11.42 motion that his conviction for PFO was not valid under KRS 532.080 because one of his convictions was not within five years prior to commission of the new felony offense. The court below denied the motion on the basis that the proper interpretation of the persistent felony offender statute is that

only one of the defendant's prior felonies need be within the described five-year window. The other felony or felonies can be outside the described five year window so long as the defendant was over the age of eighteen at the time the offense was committed.

King appeals the court's decision.

The Commonwealth argues that King's argument is not proper because his RCr 11.42 motion is an attack on the sufficiency of the evidence to convict him of being a PFO. The Commonwealth notes that pleading guilty waives all defenses other than that the indictment fails to charge an offense. Quarles v. Commonwealth, 456 S.W.2d 693 (Ky. 1970). Thus, the Commonwealth contends that King may not now attack the basis of

his PFO conviction since he did not raise these issues but instead plead guilty.

King responds that his argument deals with sentencing which is jurisdictional and may be raised at any time. Wellman v. Commonwealth, 694 S.W.2d 696, 698 (Ky. 1985). However, we agree with the Commonwealth that King is not merely arguing that the trial court entered an incorrect sentence in this case, he is attacking the basis for his conviction. We agree that King has waived this issue by pleading guilty.

Furthermore, we believe the trial court was correct in its decision below. The language of the statute King cites, KRS 532.080, was construed in Howard v. Commonwealth, 608 S.W.2d 62 (Ky.App. 1980), to mean that it is only necessary that the Commonwealth establish that as to any one of the previous felonies the defendant has completed service of sentence or has been discharged from parole within the past five years or has not yet completed his sentence or has not yet been discharged from probation or parole. King does not manage to convince us that Howard was decided incorrectly.

For all the foregoing reasons, we affirm the decision of the Fayette Circuit Court which denied King's RCr 11.42 motion to vacate.

ALL CONCUR.

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