

RENDERED: July 22, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001438-MR

FREDERICK BAKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 98-CR-002924
AND
ACTION NO. 99-CR-001067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Frederick Baker (Baker) brings this appeal from an order of the Jefferson Circuit Court, entered June 17, 2004, assessing two-hundred seventy-eight days' jail-time credit. Kentucky Revised Statutes (KRS) 532.120. He claims entitlement to additional jail-time credit.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

For the following reasons, we vacate and remand.

Pursuant to Indictment No. 98-CR-002924, Baker was charged with second-degree robbery, a class C felony. KRS 515.030. He pleaded guilty to attempted second-degree robbery, which is a class A misdemeanor. KRS 506.010. He was sentenced, however, to two years as a class D felon on the attempted second-degree robbery plea.

The trial court has the authority to correct an unauthorized sentence at any time. See Skiles v. Commonwealth, 757 S.W.2d 212, 215 (Ky.App. 1988); Neace v. Commonwealth, 978 S.W.2d 319, 322 (Ky. 1998); Myers v. Commonwealth, 42 S.W.3d 594, 596-97 (Ky. 2001). As stated in Myers, the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 or Kentucky Rules of Civil Procedure (CR) 60.02. Although not raised by either party to this appeal, in the interest of justice we vacate this felony sentence on Indictment No. 98-CR-002924 and remand for re-sentencing.

Baker's issue on appeal involves the interplay of two distinct felony cases, one involving drug and first-degree persistent felony offense (PFO I) charges (Indictment No. 99-CR-001067)² and the other involving the aforementioned second-degree

² First-degree possession of a schedule II controlled substance (cocaine), Kentucky Revised Statutes (KRS) 218A.1415, a class D felony; possession of drug paraphernalia (subsequent offense), KRS 218A.500(2),(5), a class D

robbery charge (Indictment No. 98-CR-002924). He argues that the trial court's order incorrectly concluded that the sentences were consecutive instead of concurrent. The import of this conclusion, Baker argues, is that if the sentences were correctly categorized as concurrent, he is entitled to allow the jail-time credit on both sentences to overlap.

Because Baker was erroneously sentenced as a felon on Indictment No. 98-CR-002924, the trial court's order assessing jail-time credit is erroneously founded on a conclusion that the robbery was a felony, and as such, the order must be vacated and remanded for additional proceedings. Any opinion by this Court on this issue would be merely advisory. As we are precluded from rendering advisory opinions, we will not address the merits of Baker's jail-time credit issue at this time. Commonwealth v. Deweese, 141 S.W.3d 372, 375 (Ky.App. 2003).

For the foregoing reasons, the judgment and sentence of the Jefferson Circuit Court on Indictment No. 98CR002924 is vacated and remanded for re-sentencing consistent with this opinion, and the order of the Jefferson Circuit Court on jail-time credit is vacated and remanded for additional proceedings, including recalculation, if any is needed, in light of the re-sentencing.

felony; tampering with physical evidence, KRS 524.100, a class D felony; and first degree persistent felony offender, KRS 532.080.

ALL CONCUR.

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