

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001543-MR

WAYNE GRAHAM

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 80-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: Wayne Graham, pro se, appeals the denial of his CR 60.02(f) motion to set aside his 1980 PFO, first-degree, conviction on the grounds that one of the underlying convictions occurred prior to January 1, 1975, and could not be used for PFO purposes. The PFO statute does not create a new crime. It is a status offense which enhances a sentence on a subsequent offense. Hence, we affirm.

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.

Wayne Graham was convicted of Second-Degree Forgery² and being a First-Degree Persistent Felony Offender³ on June 16, 1980, for which he received a twenty-year sentence. His appeal was affirmed by this Court. A subsequent RCr 11.42 motion was filed and denied. That denial was also affirmed by this Court. Graham's first CR 60.02 motion, filed on January 31, 1983, was denied, and that denial was affirmed by this Court on July 20, 1984. Graham is still serving time on this and subsequent convictions.

Graham filed the current CR 60.02 motion to set aside the PFO portion of his conviction on April 13, 2004. Graham argued that the use of convictions before 1975 (as evidence of his being a persistent felon) violated KRS 500.040, the *ex post facto* statute of the penal code. The trial court denied the motion for two reasons: the motion was untimely and the grounds should have been known when the original appeal was taken. On appeal to this Court, Graham contends the trial court abused its discretion in denying his CR 60.02 motion as untimely; that there were extraordinary circumstances which would allow the court to overlook the tardiness of his motion; and that the denial of his motion results in a miscarriage of justice.

There are a number of reasons why Graham's motion should be denied. First, Graham already has had a direct

² KRS 516.030.

³ KRS 532.080(3).

appeal, an RCr 11.42 appeal, and a prior CR 60.02 motion which was appealed. The grounds of the current CR 60.02 motion, that the use of convictions before 1975 violates the *ex post facto* provisions of KRS 500.040, were, or should have been known at the time of his first appeal, and should have been argued in his earlier appeal. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997); Gross v. Commonwealth, 648 S.W.2d 853, 855-856 (Ky. 1983); Brown v. Commonwealth, 788 S.W.2d 500 (Ky. 1990).

Second, and more important, is the nature of the PFO designation. The United States Supreme Court noted in Weaver v. Graham, 450 U.S. 24, 30, 101 S. Ct. 960, 965, 67 L. Ed. 2d 17, 24 (1981), that "the *ex post facto* prohibition . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." In Casey v. Commonwealth, 994 S.W.2d 18, 22 (Ky.App. 1999), we stated that:

Although the *ex post facto* prohibition technically applies only to legislative action, the U.S. Supreme Court has recognized a similar limitation on judicial action under the Due Process Clause. . . . The *ex post facto* principles applicable to judicial action give a person the right to "fair warning" of the type of conduct that will give rise to criminal penalties, prevent punishment for acts that were not criminal when the act was performed, and prohibit increasing punishment for acts committed prior to the change in law. (citations omitted).

Analyzing the PFO provisions of KRS 532.080, one can recognize that an indictment for a PFO is not a charge or a crime in itself, but a status offense, the enhancement of a sentence for a subsequent crime committed after the enactment of KRS 532.080. See Hardin v. Commonwealth, 573 S.W.2d 657, 661 (Ky. 1978)

wherein the Court stated:

There is no additional punishment imposed by a persistent felony offender conviction, merely a more severe punishment. KRS 532.080 does not create or define a criminal offense. It recognizes a status and, in a proceeding separate and apart from the initial trial, fixes a penalty which is to be imposed rather than the one fixed by the jury on the initial trial.

For the foregoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne Thomas Graham, pro se
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky