

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001993-MR

JAMES L. MOORMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN MERSHON, JUDGE  
INDICTMENT NOS. 01-CR-002060-12  
AND 02-CR-001628-9

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel on his guilty pleas. Appellant maintains that his counsel was ineffective for failing to advise him that his sentence could only be enhanced under KRS 218A or KRS 532.080 but not under both statutes, and when he failed to have the PFO I amended to PFO II. Appellant also argues that the Department of Corrections violated his due process rights when it ran his present sentences consecutive with a prior sentence.

Appellant's first ineffective assistance of counsel argument is without merit and his second is unpreserved. Appellant's argument challenging the actions of the Department of Corrections is not properly before us in an RCr 11.42 motion. Accordingly, we affirm.

While out on release from a ten-year sentence, appellant, James Moorman, committed several offenses on May 27, 2001, which resulted in a nine-count indictment being issued against him in August 2001. The indictment (01-CR-2060-12) charged Moorman with: trafficking in a controlled substance (cocaine), first degree; possession of a firearm by a convicted felon; illegal possession of a controlled substance (codeine), second degree; illegal possession of a controlled substance (marijuana); resisting arrest; terroristic threatening; criminal mischief, third degree; operation of a motor vehicle by a person whose operator's license has been revoked, suspended, cancelled or denied; and persistent felony offender, first degree ("PFO I"). On July 25, 2002, Moorman was indicted (02-CR-1628-9) for trafficking in a controlled substance (cocaine), first degree (subsequent offender) and trafficking in a controlled substance (cocaine), first degree, both offenses committed on March 29, 2001.

On June 3, 2003, pursuant to a plea agreement, Moorman entered an Alford plea in 01-CR-2060-12 to trafficking in a

controlled substance in the first degree while in possession of a firearm (subsequent offender) and entered a guilty plea to: possession of a firearm by a convicted felon; illegal possession of a controlled substance in the second degree while in possession of a firearm; possession of marijuana while in possession of a firearm; resisting arrest; terroristic threatening; criminal mischief in the third degree; operation of a motor vehicle on a revoked, suspended, cancelled or denied operator's license; and PFO I. On June 4, 2003, the lower court sentenced Moorman according to the Commonwealth's recommendation to a total of twenty years to run concurrently with the sentence in 02-CR-1628-9.

On June 3, 2003, pursuant to a plea agreement, Moorman entered a guilty plea in 02-CR-1628-9 to trafficking in a controlled substance in the first degree (subsequent offender). On June 4, 2003 the court sentenced Moorman per the Commonwealth's recommendation to twenty years to run concurrently with his twenty-year sentence in 01-CR-2060-12.

Prior to the above guilty pleas, the United States Attorney from the Northern Division of Indiana faxed a letter to the Commonwealth Attorney in Moorman's case stating that the United States Attorney's office would dismiss its case against Moorman if Moorman received a twenty-year sentence in 02-CR-1628-9 and 01-CR-2060-12, and serves the time in the state

penitentiary. The letter did not state what charges were pending against Moorman in federal court, but during Moorman's guilty pleas in state court, Moorman's attorney stated that the federal charges carried a sentence of 420 months to life. It was noted during the state plea hearing that the Commonwealth Attorney and the United States Attorney had reached a resolution to the effect that if Moorman pled guilty in both cases in state court on June 3, 2002, and received a twenty-year sentence, the federal charges would be dismissed.

On December 2, 2003, Moorman filed a motion pursuant to CR 52.02, CR 52.04 and RCr 11.42 to vacate, set aside, or correct the judgments in 02-CR-1628-9 and 01-CR-2060-12. Moorman argued that his counsel on the guilty pleas rendered ineffective assistance when he failed to accurately advise him regarding the enhancement of his sentences, and that his due process rights were violated when the Department of Corrections ran his sentence consecutive with a prior sentence. On August 26, 2004, the trial court entered an order denying Moorman's motion. This appeal followed.

Moorman's first argument on appeal is that his counsel on the guilty pleas was ineffective when he failed to advise him that his sentences in 01-CR-2060-12 could not be enhanced under both KRS 218A.1412(2)(b) and KRS 532.080. To prevail on a claim of ineffective assistance of counsel on a guilty plea, the

defendant must show that counsel's performance was deficient relative to current professional standards and that, but for the deficient performance, there is a reasonable likelihood that the defendant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 808 L. Ed. 2d 203 (1985), accord, Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

According to Moorman, under the holding of Gray v. Commonwealth, 979 S.W.2d 454 (Ky. 1998) (which has since been overruled by Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002)), the Commonwealth could not have convicted him of both first-degree trafficking in a controlled substance (subsequent offender) and PFO I because the Commonwealth cannot seek enhancement penalties under both the Controlled Substance Act (KRS 218A) and the PFO statute (KRS 532.080). Moorman misstates the law espoused in Gray. In Gray, it was held that a single prior conviction cannot form the basis for enhancement under both the Controlled Substance Act and the PFO statute. Gray, 979 S.W.2d at 456. In the instant case, the Commonwealth relied on a 1990 prior conviction for first-degree trafficking in a controlled substance to enhance Moorman's current sentence for first-degree trafficking in a controlled substance as a subsequent offender under KRS 218A.1412(2)(b). The prior convictions relied on to establish the PFO I were separate 1995

and 1996 convictions for felony possession of a controlled substance and tampering with physical evidence. Hence, the holding in Gray would have no application in the case at bar because a single prior conviction was not the basis for both enhancements. Accordingly, Moorman's counsel on the guilty pleas could not have been ineffective for failing to advise him regarding the ramifications of Gray.

Moorman's second argument on appeal is that his counsel was ineffective for failing to have the PFO I charge in 01-CR-2060-12 amended to PFO II because the Commonwealth improperly relied on prior convictions in which the sentences ran concurrently or consecutively uninterrupted with the other prior convictions in violation of KRS 532.080(4). Thus, Moorman contends that he only had one prior felony conviction for purposes of KRS 532.080. Moorman concedes that this argument was not preserved for review as it was raised for the first time on appeal. See RCr 10.12; McDonald v. Commonwealth, 554 S.W.2d 84 (Ky. 1977). Nevertheless, Moorman seeks review of the issue under RCr 10.26. RCr 10.26 allows an appellate court to review unpreserved error if the error is palpable error affecting the substantial rights of the party, and relief may be granted if it is determined that manifest injustice has resulted from the error. We adjudge there was no palpable error in this case. Under the plea agreement, Moorman received a total of twenty

years in 01-CR-2060-12. Even without the PFO I, Moorman was facing a maximum of over 42 years on the other charges in that indictment. Considering that the plea agreement further allowed Moorman's sentence in 01-CR-2060-12 to be served concurrently with the twenty-year sentence in 02-CR-1628-9, and his federal charges (420 months to life) were dismissed, Moorman received a very favorable deal, even with the PFO I conviction.

Finally, Moorman argues that the Department of Corrections violated his due process rights when it ran his sentences in 01-CR-2060-1 and 02-CR-1628-9 consecutively with a prior thirteen-year sentence. This argument is not properly before us in the context of an RCr 11.42 motion since Moorman is not collaterally attacking his judgment or sentence. See RCr 11.42(1). Moorman is challenging the Department of Corrections' authority to run his sentences in the present case, which were silent as to how they would run with any prior sentences, consecutively with a prior sentence. The proper avenue for Moorman to raise this issue is via a declaratory judgment action (KRS 418.040). Polsgrove v. Kentucky Bureau of Corrections, 559 S.W.2d 736 (Ky. 1977).

For the reasons stated above, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James L. Moorman, pro se  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Robert E. Prather  
Assistant Attorney General  
Frankfort, Kentucky