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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002238-MR

MILTON ORR KENNEY — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 89-CR-00084

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Milton Orr Kenney, *pro se*, appeals the denial of his motion to modify and correct his sentence pursuant to CR 60.02. We affirm.

In February, 1990, following a jury trial, Kenney was convicted, in 89-CR-084, of two counts of trafficking in a controlled substance (Class C felonies). The jury also found Kenney to be a first-degree persistent felony offender. The jury fixed a sentence of ten years on each count, enhanced to twenty years each for the PFO I. The jury recommended the

sentences to run concurrently, for a total of twenty years' imprisonment. At Kenney's March 13, 1990, sentencing hearing, the trial court determined that, because Kenney committed the offenses in 89-CR-084 while on parole, Devore v. Commonwealth, 662 S.W.2d 829 (Ky. 1984), cert. denied, 469 U.S. 836, 105 S. Ct. 132, 83 L. Ed. 2d 72 (1984), required the sentences imposed in 89-CR-084 to be run consecutively with one another. In a judgment and sentence dated March 13, 1990, and entered on March 19, 1990, Kenney was sentenced to the two twenty-year terms, to be served consecutively, for a total of forty years' imprisonment. The judgment was affirmed by the Kentucky Supreme Court in an unpublished opinion (90-SC-241-MR) rendered November 21, 1991, which became final on December 12, 1991.

On March 2, 1993, Kenney, *pro se*, filed a motion to vacate sentence pursuant to RCr 11.42, on grounds of ineffective assistance of counsel. On June 16, 1993, Kenney, *pro se*, filed a "Motion to Correct Sentence Pursuant to KRS 532.110(1)(c)", on grounds that the forty-year sentence imposed in 89-CR-084 exceeded the maximum aggregate term of twenty years authorized by KRS 532.110(1)(c) and KRS 532.080. The trial court denied both motions in orders entered October 19, 1993. Kenney appealed from the denial of the RCr 11.42 motion, but did not appeal the denial of the motion to correct sentence.

On November 18, 1993, Kenney, by counsel, filed a motion for relief pursuant to CR 60.02(f), again on grounds that the forty-year sentence imposed in 89-CR-084 exceeded the maximum aggregate term of twenty years authorized by KRS 532.110(1)(c) and KRS 532.080(6)(b).[1] In an order entered March 21, 1994, the trial court denied the motion pursuant to Devore. In an unpublished opinion, consolidated appeals 93-CA-2779-MR and 94-CA-781-MR, which became final on February 15, 1996, a panel of this Court affirmed the trial court's denial of the RCr ll.42 motion and the CR 60.02 motion. As to the CR 60.02 motion, this Court held the trial court was correct that, because Kenney committed the offenses in 89-CR-084 while on parole, per Devore, the sentences were required to be run consecutively with each other pursuant to KRS 533.060(2)

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[1] KRS 532.110(1)(c) provides that "[t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed."

KRS 532.080, the persistent felony offender statute, provides, in pertinent part:

> (6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:
>
> . . .
>
> (b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

and the maximum sentence provision of KRS 532.110(1)(c) did not apply.

On January 8, 2004, Kenney, *pro se*, filed a second motion for relief pursuant to CR 60.02. In this motion, Kenney again raised the issue that his forty-year sentence in 89-CR-084 exceeded the maximum penalty authorized by KRS 532.110(1)(c) and KRS 532.080(6)(b). On May 3, 2004, the *pro se* motion was supplemented by counsel. The supplement raised, for the first time, the issue that the jury was improperly instructed as to concurrent/consecutive sentencing. Counsel argued that the trial court's interpretation of the law as requiring consecutive sentences, per Devore, did not match the instructions tendered to the jury, which specifically gave the jury the option of recommending either concurrent or consecutive sentencing. However, under the trial court's interpretation of the law, absolutely no jury recommendation of concurrent sentencing could be followed. As such, counsel argued, the instructions were clearly improper, incorrect, and misleading. Counsel requested that the court grant Kenney relief by reducing the sentence to the twenty-year sentence intended by the jury.

In an order entered August 31, 2004, the trial court denied this second CR 60.02 motion. As to the argument that the forty-year term imposed in 89-CR-084 exceeded the maximum penalty allowed under KRS 532.110(1)(c) and 532.080(6)(b), the

trial court concluded that it was bound by the February 15, 1996, opinion of the Court of Appeals. As to the issue of the erroneous jury instruction, the trial court found that this issue could have been raised previously, was raised too late, and a different sentencing outcome was only speculative. Therefore, the trial court concluded the extraordinary relief of CR 60.02(f) was not warranted. From the trial court's August 31, 2004, order denying the motion, Kenney appeals, *pro se*, to this Court.

As to Kenney's argument that his forty-year sentence exceeds the maximum sentence allowed under KRS 532.110(1)(c) and KRS 532.080(6)(b), we agree with the trial court that the decision of the Court of Appeals in 93-CA-2779-MR and 94-CA-781-MR, is binding on this issue and precludes further review.

However, Kenney's argument of improper jury instructions has merit. The jury was instructed to fix a term of 10-20 years on each count. The jury also received (erroneous) instructions that it could select to run Kenney's terms concurrently or consecutively with one another. Under these instructions, the jury recommended twenty years on each count, to run concurrently, for a total of twenty years imprisonment. At the sentencing hearing the trial court acknowledged having given the (erroneous) concurrent/consecutive

option to the jury, but that Devore required consecutive sentencing. The trial court stated:

> The Court recalls at the trial of this action, or this case, that it submitted the question as to whether or not the sentences should be run consecutively or concurrently to the jury out of caution. The court has reviewed the Devore case and does believe that it compels a running of these sentences consecutively. The Court believes that it is obligated to follow the law in this case and will rule that Devore compels a consecutive service of these sentences.

At the hearing, defense counsel requested that, if the trial court felt compelled to follow Devore, that each count be reduced to ten years, which would run consecutively for a total of twenty years, in accordance with the jury's intent. The request was denied, and the twenty-year terms were run consecutively for a total of forty years.

In Stoker v. Commonwealth, 828 S.W.2d 619 (Ky. 1992), our Supreme Court rejected the contention that errors in jury instructions as to concurrent or consecutive sentencing are harmless because the trial court makes the ultimate decision. This holding was recently and strongly reaffirmed by the Supreme Court in Lawson v. Commonwealth, 85 S.W.3d 571, 581 (Ky. 2002). "[A] jury's recommendation as to concurrent or consecutive sentencing is far from meaningless or pro forma, and [] the jury's recommendation in this regard has 'significance, meaning,

and importance.'" Id., quoting Dotson v. Commonwealth, 740 S.W.2d 930, 931 (Ky. 1987).

This Court is faced with a legal dilemma. The jury instructions were clearly erroneous in instructing the jury that it could recommend that the sentences run consecutive or concurrent, where Devore mandates consecutive. Lawson and Stoker instruct us that this error is not harmless, and on appeal, the remedy would be to remand for a jury to resentence. However, we have a conflicting rule, which we are compelled to follow, which is that CR 60.02 is for relief that is not available on direct appeal or in an RCr 11.42 motion. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997), cert. denied, 521 U.S. 1130, 117 S. Ct. 2535, 138 L. Ed. 2d 1035 (1997). The error in the jury instructions raised by Kenney in this CR 60.02 motion was an issue which was known at the time of trial, and could have and should have been raised in his direct appeal. See Gross, 648 S.W.2d 853. Additionally, this was Kenney's second CR 60.02 motion, in addition to the RCr 11.42 and previous motion to correct sentence, and this was the first time the error was ever raised. Accordingly, we cannot say the trial court erred in denying the motion.

For the aforementioned reasons, the order of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

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