

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002622-MR

CLARENCE BIBBS, JR.

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 86-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Clarence Bibbs, Jr., appeals from an order of the Christian Circuit Court denying his CR¹ 60.02 and RCr² 10.26 motions. We find no merit to his arguments and thus affirm.

As a result of a burglary and theft at a drugstore in Christian County on June 4, 1986, Bibbs was indicted by a grand jury for third-degree burglary and for being a first-degree

¹ Kentucky Rules of Civil Procedure.

² Kentucky Rules of Criminal Procedure.

persistent felony offender (PFO). The grand jury later returned a separate indictment against him for theft by unlawful taking of property over \$100.

On July 22, 1986, Bibbs appeared in the Christian Circuit Court and pled guilty to the charges in both indictments. The terms of the plea agreement reflect that Bibbs agreed to five years in prison on the burglary charge, enhanced to ten years under the amended charge of second-degree PFO. He also agreed to five years in prison on the theft charge, enhanced to ten years under the amended PFO charge. The plea agreement indicates that the sentences under the two indictments were to run consecutively with each other for a total sentence of 20 years. On August 15, 1986, the court sentenced Bibbs to 20 years in prison in accordance with the plea agreement.

On May 20, 1987, Bibbs filed a *pro se* RCr 11.42 motion challenging his sentence. Among other things, Bibbs argued that he received ineffective assistance of counsel in that counsel allowed him to plead guilty to two PFO charges when his indictments only included one PFO count. The circuit court denied his motion, but on December 2, 1988, this court rendered a final opinion reversing and remanding the circuit court's order and instructing the court to sentence Bibbs only on the underlying principal offense of theft under the second indictment. Ultimately, on November 17, 1989, the court

sentenced Bibbs to five years on the theft charge. This time, the sentence was not enhanced under a PFO count. Thus, Bibbs's total sentence for the two indictments was 15 years.

On November 16, 2004, Bibbs filed CR 60.02 and RCr 10.26 motions. Once again, he challenged his sentences under the two indictments. It was his belief that he was still serving 20 years rather than 15 years. On December 2, 2004, the circuit court entered an order denying Bibbs's motions. This appeal followed.

Bibbs appears to now acknowledge that he is only serving five years on the theft count under the second indictment and that his total sentence is 15 years rather than 20 years. However, he continues to argue that the 5-year sentence on the theft charge should have run concurrent with, rather than consecutive to, the 10-year sentence on the burglary charge. He maintains that the statutory cap for his sentences under these indictments is 10 years and that his 15-year sentence exceeds that cap.

Bibbs maintains that he was improperly sentenced on both the underlying offense and under the PFO statute. He is incorrect. Bibbs is merely serving an enhanced sentence on the burglary charge based on his status as a persistent felony offender. He is serving a separate sentence on the theft charge. Thus, his reliance on Pace v. Commonwealth, 636 S.W.2d

887 (Ky. 1982), overruled on other grounds in Commonwealth v. Harrell, 3 S.W.3d 349 (Ky. 1999), is misplaced.

In support of his argument that his 15-year sentence exceeds the statutory cap, Bibbs cites KRS³ 532.110(1)(c) and KRS 532.080(6)(b). Based on these statutes, Bibbs argues that he should have been sentenced to no more than 10 years.

Bibbs's argument is without merit. This court addressed the interplay between KRS 532.110(1)(c) and KRS 532.080 in Milner v. Commonwealth, 655 S.W.2d 31 (Ky.App. 1983). In that case, this court recognized that the maximum sentence a person could receive for consecutive indeterminate terms when the highest offense was a Class D felony would be 20 years. Id. at 32.

More recently, in Commonwealth v. Durham, 908 S.W.2d 119 (Ky. 1995), the Kentucky Supreme Court rejected the very argument raised by Bibbs in this case. The court therein held that the maximum aggregate sentence for a person convicted of multiple Class D felonies is 20 years, regardless of whether the sentences were enhanced. Id. at 121.

In short, Bibbs received consecutive sentences for a total of 15 years. The highest offense for which he was convicted was a Class D felony. Pursuant to the aforementioned statutes and case law, the statutory cap was 20 years. As the

³ Kentucky Revised Statutes.

court sentenced Bibbs to only 15 years, his sentence did not exceed that cap.

The order of the Christian Circuit Court denying Bibbs's motions is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clarence Bibbs, Jr. *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky