

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000327-MR

DAVID LEE ROBINSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
INDICTMENT NO. 00-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

HENRY, JUDGE: David Lee Robinson appeals from an August 12, 2004 order of the Hardin Circuit Court amending his 3-year sentence to run consecutively, rather than concurrently, with a prior 30-year sentence obtained in the Grayson Circuit Court. Robinson specifically challenges the jurisdiction of the circuit court to enter the order, asserting that the amendment of his

sentence was barred pursuant to CR¹ 59.05. Upon review, we affirm.

On November 26, 2003, Robinson appeared in open court and pled guilty to a variety of charges for which he was indicted on April 28, 2000, including possession of controlled substances, possession of marijuana, possession of drug paraphernalia, carrying a concealed deadly weapon, and driving under the influence. On April 12, 2004, following a guilty plea, the circuit court entered a judgment and sentence order convicting him on those charges and sentencing him to a total of 3 years' imprisonment. Of particular note here, the judgment and sentence further provided that this sentence would run concurrently with a 30-year sentence imposed on December 16, 2003, in another criminal action in which Robinson was involved in Grayson County for offenses committed while he was released on bond and awaiting trial in the Hardin County action.

On July 21, 2004, the Kentucky Department of Corrections sent a letter to the circuit court asking for clarification on whether Robinson was in possession of a handgun at the time he committed the offenses in question and requesting an amended judgment if that was indeed the case. Subsequently, on August 12, 2004, the circuit court entered an amended judgment and sentence noting that Robinson was, in fact, in

¹ Kentucky Rules of Civil Procedure.

possession of a handgun. However, the court also amended the judgment to reflect that Robinson's sentence was to run consecutively to the 30-year sentence imposed in the Grayson County action, resulting in a total sentence of 33 years.

On December 28, 2004, Robinson filed a *pro se* pleading styled as a "Motion to Amend Sentence," contending that the amended judgment entered by the circuit court on August 12, 2004 was void, as the court lost jurisdiction over the case 10 days after the original judgment and sentence was entered. He consequently asked the court to amend his sentence from 33 years to 30, consistent with the original judgment and sentence. The Commonwealth filed a response indicating its position that the amended judgment was justified because the two sentences were required to run consecutively pursuant to KRS² 533.060(3). On January 24, 2005, the circuit court entered an order denying Robinson's motion. This appeal followed.

On appeal, Robinson again argues that the amended judgment entered by the circuit court was void because the court lost jurisdiction over the case 10 days after the original judgment and sentence were entered. Our case law does provide as a general rule that trial courts lose control over a judgment after the passage of the 10-day limitation contained in CR 59.05. See Silverburg v. Commonwealth, 587 S.W.2d 241, 244 (Ky.

² Kentucky Revised Statutes.

1979); McMurray v. Commonwealth, 682 S.W.2d 794, 795 (Ky.App. 1985); CR 59.05. This principle holds true in both civil and criminal actions. See McMurray, 682 S.W.2d at 795; RCr³ 1.10; RCr 13.04; CR 59.05.

With this said, however, this limitation does not apply when a sentence entered by a circuit court is unlawful. In Neace v. Commonwealth, 978 S.W.2d 319 (Ky. 1998), our Supreme Court expressly held that when an "unlawful sentence is recommended by the jury or an unlawful sentence is imposed following a guilty plea, the result is the same. In either instance the sentence must be corrected to conform to the law." Id. at 322. In reaching this holding, the Court cited with approval the holding of this court in Skiles v. Commonwealth, 757 S.W.2d 212 (Ky.App. 1988), that "a trial court which has imposed an unlawful sentence can correct that sentence at any time." Id. at 215 (Emphasis added).

As the Commonwealth points out, KRS 533.060(3) provides that "[w]hen a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial." (Emphasis

³ Kentucky Rules of Criminal Procedure.

added). Accordingly, under the plain language of the statute, the circuit court here was prohibited as a matter of law from running Robinson's 3-year sentence concurrently with the 30-year sentence obtained in Grayson County in its original judgment and sentence order. It therefore had the authority under Neace and Skiles to amend said order to re-sentence Robinson in compliance with the statute.

We note that Robinson has cited to a number of cases in which Kentucky appellate courts have held that a trial court lacked jurisdiction to amend a final judgment and sentence order after the passage of the CR 59.05 10-day limitation. See Viers v. Commonwealth, 52 S.W.3d 527 (Ky. 2001); Cardwell v. Commonwealth, 12 S.W.3d 672 (Ky. 2000); Commonwealth v. Gross, 936 S.W.2d 85 (Ky. 1996); Commonwealth v. Marcum, 873 S.W.2d 207 (Ky. 1994); Silverburg, supra; McMurray, supra. These cases are distinguishable and consequently inapplicable here, however, because the initial sentences imposed therein were not contrary to law.

Accordingly, we hold that because concurrent sentencing here was contrary to the provisions of KRS 533.060(3), the circuit court did not err in amending its original judgment and sentence order to impose a lawful sentence. The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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