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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000661-MR

LARRY JAMES

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 80-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Larry James appeals from an opinion and order of the Oldham Circuit Court overruling his motion to dismiss a criminal judgment and sentence. James argues that his sentence on a guilty plea to murder was improperly enhanced by his status as a PFO 2nd offender. For the reasons stated below, we affirm the opinion and order on appeal.

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In 1981, James was convicted in Oldham Circuit Court on one count each of murder with aggravating circumstances and first degree robbery. The conviction arose from the death of Barbara Helm, whose body was found on a roadside embankment in Oldham County, Kentucky. James was sentenced to death.

James filed a direct appeal with the Kentucky Supreme Court, which reversed the conviction and remanded the matter for a new trial. On remand, James accepted an offer from the Commonwealth and pled guilty to one count each of first degree robbery, murder and PFO 2nd. Under the terms of the plea, James accepted a PFO-enhanced life sentence on the charge of murder, and 20 years in prison for the robbery.

On March 5, 2004, James filed a *pro se* motion to correct the judgment and sentence. He argued in relevant part that the sentence was unlawful because the offense of murder was not subject to PFO enhancement under KRS 532.080, and that as such the judgment was void *ab initio* and should be dismissed.

On March 2, 2005, the Oldham Circuit Court entered an opinion and order overruling James's motion to correct the judgment and sentence. The court accepted the Commonwealth's argument, ruling that the purported PFO enhancement was meaningless because even without the enhancement, James's life sentence was a legally authorized sentence under KRS 532.030. As such, the court opined that irrespective of the judgment

language, no enhancement actually occurred and no basis existed for tampering with the judgment. It corrected the wording of the sentence from life in prison as enhanced by the PFO status, to simply life in prison. This appeal followed.

James now argues that the trial court erred in failing to rule that the life sentence enhanced by the PFO was void *ab initio* and merited dismissal of the judgment of conviction. He maintains that murder is a capital offense, the sentence for which is not subject to PFO enhancement. James also contends that the claim of error is not time barred, and argues that the circuit court's correction of the sentence improperly subjected him to double jeopardy. He seeks an order releasing him from custody.

James' primary argument centers on his assertion that the circuit court erred in rejecting his claim that the purported enhancement of his murder sentence required dismissal of the judgment. This argument is based in part on Berry v. Commonwealth,² wherein the Kentucky Supreme Court held that murder was a capital offense not subject to PFO enhancement. While we agree that Berry so holds, we are not persuaded by James's argument that its application to the facts at bar must result in a dismissal of the judgment.

² 782 S.W.2d 625 (Ky. 1990).

As the Commonwealth notes in its brief, James was first sentenced to life in prison. Additional language was then added purporting to enhance the sentence, though the term of imprisonment remained the same. During the guilty plea colloquy, the court stated: "[T]he court will sentence the Defendant on the offense of murder to Life Imprisonment. Will be enhanced to Life imprisonment under the PFO in The Second Degree." The Judgment and Sentence on Plea of Guilty included the following sentencing language:

ROBBERY-1ST DEGREE (Count 1) and is sentenced to imprisonment for a maximum term of 20 YEARS consecutive to any other sentence he may be serving.

MURDER (Count 3) and that the penalty is enhanced under Persistent Felony Offender-2nd Degree (Count 4) as amended, to imprisonment for a maximum term of LIFE in Bureau of Corrections consecutive to any other sentence he may be serving.

The apparent purpose of this ambiguous language was to place in the record the court's recognition that James had a PFO 2nd status. Whatever the reason, it cannot reasonably be argued that James's PFO status operated to increase his sentence beyond a term of life in prison. Furthermore, the sentence was the result of a plea agreement, the effect of which was to waive all

defenses except that the indictment failed to charge a public offense.³

As the circuit court properly noted, the life sentence imposed on James falls within the statutory scheme of KRS 532.030. The purported enhancement was meaningless as it had no effect on James's sentence, and the circuit court properly so found.

In an ancillary argument, James maintains that the foregoing claim of error is not time-barred. He apparently raises this argument in anticipation of a counter-argument by the Commonwealth - an argument that the Commonwealth raised before the circuit court. Because the Commonwealth does not now contest whether James's underlying argument is time-barred, and because we agree that a motion to correct a sentence may be raised at any time, this argument is moot.

Lastly, James argues that the correction of his sentence constitutes an improper and unconstitutional imposition of double jeopardy. This argument is misplaced and not persuasive. It was not raised below, and because it does not rise to the level of palpable error it does not entitle James to relief.

Even if this claim of error were properly before us, it would not form a basis for reversing the opinion and order on

³ Bush v. Commonwealth, 702 S.W.2d 46 (Ky. 1986).

appeal. The Constitutions of the United States and of the Commonwealth provide that a conviction or acquittal shall bar an additional prosecution for the same offense. These provisions have no bearing on the facts at bar, because the correction of James's sentence - which is nothing more than a semantic correction - does not constitute an additional prosecution. As such, the circuit court's correction of James's sentence did not run afoul of the prohibition against double jeopardy.

For the foregoing reasons, we affirm the opinion and order of the Oldham Circuit Court.

ALL CONCUR.

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