

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001679-MR

DAVID N. HARDING

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NOS. 01-CR-00086 & 01-CR-00119

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND VANMETER, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

BARBER, JUDGE: Appellant, David Harding, appeals the Jessamine Circuit Court's denial of his motion for modification of judgment. We affirm.

Harding was charged with three counts of Sexual Abuse in the First Degree and one count of Sodomy in the First Degree. The sodomy charge was added by information and later reduced and merged into the other indictment. Harding pled guilty to all

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<sup>1</sup> 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.

charges and the additional count of being a Persistent Felony Offender in the Second Degree. Harding was sentenced to five years on the sodomy charge. He was sentenced to serve five years on each sexual abuse count, enhanced to ten years on each count by the PFO charge. The court ordered the sentences to run so that Harding's total sentence was twenty years, with counts 1 and 2 running consecutively, and count 3 to run concurrently.

Harding moved for amendment of the judgment pursuant to CR 60.02 and RCr 11.42. Harding contends that the sentence he was given exceeded the aggregate time limit permitted by KRS 532.070. The trial court denied the motion, stating that more than three years had passed since the original sentence, and that Harding did not present the court with reasons of an extraordinary nature justifying relief.

Harding asserts that he did not properly understand the plea agreement when he entered it. The record shows that the court questioned Harding regarding the knowing and voluntary nature of his plea in open court. Harding complains that he was unaware that the plea offered him was in excess of the sentence permitted by law. The Commonwealth contends that the sentence imposed on Harding was lawful and permissible, and that for this reason, no error was shown.

KRS 532.110(1)(c) provides that:

The 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 time for which any of the sentences is imposed. . . .

KRS 510.110(2) classifies sexual abuse in the first degree as a Class D felony. KRS 532.060(2)(d) provides that the maximum term of imprisonment for a Class D felony is "not less than one (1) year nor more than five years." Harding pled guilty to three counts of sexual abuse in the third degree. The charges were enhanced to Class C felonies, by the plea of guilty to the charge of being a persistent felony offender in the second degree.

Harding complains on appeal that his counsel informed him prior to entry of the plea agreement that the maximum sentence was lifetime imprisonment and a \$10,000 fine. The Commonwealth shows this court that the charges Harding faced, coupled with a charge of first degree sodomy (prior to the reduction and merger of that charge with the other charges) and the PFO charges, made Harding potentially eligible for a lifetime sentence.

KRS 532.080 governs sentencing of persistent felony offenders. KRS 532.080(5) provides that the longest permissible sentence is the longest term permissible for the highest class

of offense charged. The Kentucky Supreme Court held, in Hendley v. Commonwealth, 573 S.W.2d 662 (Ky. 1978) that:

The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for highest class of crime for which any of the sentences is imposed.

Id. at 668. In Dawson v. Commonwealth, 756 S.W.2d 935 (Ky. 1988), the Court stated that:

The trial judge incorrectly ordered Dawson to serve consecutive sentences. This 30-year sentence violates KRS 32.110(1)(c) which limits the "aggregate of consecutive indeterminate terms" to "the longest extended term which would be authorized by KRS 532.080 (PFO sentencing) for the highest class of crime for which any of the sentences is imposed." His crime of possession of a Schedule II narcotic, second offense, subsequently enhanced, was a Class C felony. PFO enhancement elevated the possession conviction to a Class B felony for which the maximum penalty is 20 years. This matter must be remanded for re-sentencing for all three offenses to a maximum term of 20 years.

Id., 756 S.W.2d at 937-938. This issue was clarified by the Court's decision in Commonwealth v. Durham, 908 S.W.2d 119 (Ky. 1995), where the Court stated:

KRS 532.110(1) requires that KRS 532.080 be used to establish the maximum aggregate sentence for a person convicted of multiple offenses, without regard to whether the penalties for those offenses have been enhanced. When KRS 532.080 is applied to determine the maximum aggregate penalty, as opposed to being used to enhance a penalty,

the appropriate reference in a case where the underlying felonies are Class D or C felonies is to subsection (6)(b) rather than to subsection (5).

Id. at 121. Harding asserts that the maximum term of imprisonment for a class C felony is ten years. He argues that therefore he should have been sentenced to serve no more than a total of ten years. The Commonwealth contends that the law permits a twenty-year aggregate sentence. KRS 532.080(6)(b) pertains to persons charged with being persistent felony offenders, and provides a maximum sentence of twenty years.

Harding made a motion to modify the judgment. The circuit court denied the motion, finding that the sentence was in accordance with the plea agreement that Harding had entered in open court on July 3, 2001. We are in agreement with the trial court and the Commonwealth in finding that Commonwealth v. Durham, 908 S.W.2d 119 (Ky. 1995), permits a total aggregate sentence of twenty years under these circumstances. The denial of the motion to modify the sentence on this ground is affirmed.

The trial court held that Harding's motion was outside the three-year time limit imposed by RCr 11.42, and that Harding had shown no reason of an extraordinary nature justifying relief. A motion filed more than three years after judgment is entered must show that facts upon which the claim is predicated were unknown to the movant and could not have been ascertained

by the exercise of due diligence. Palmer v. Commonwealth, 3 S.W.3d 763, 764 (Ky.App. 1999). Harding argues that he had limited access to legal authority, and therefore, was unable to determine the error in sentence any earlier than the time the motion was filed. The trial court also determined that Harding had shown no facts of an extraordinary nature justifying relief, as required by CR 60.02.

ALL CONCUR.

BRIEF FOR APPELLANT:

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