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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001094-MR

JAMES HENRY BERRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 87-CR-000192

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: James Henry Berry appeals the Jefferson Circuit Court's order denying his third CR[2] 60.02 motion[3] in which he requested a new sentencing hearing. Finding no error, we affirm.

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

[2] Kentucky Rules of Civil Procedure.

[3] Neither Berry's motion nor his appellate brief indicates that the motion was filed pursuant to CR 60.02, but Berry's correspondence to the Jefferson Circuit Court Clerk and his notice of appeal so designate the motion.

In 1987, Berry was charged with the murder of Cheri Dawson and with being a persistent felony offender (PFO). In the indictment, the murder charge was designated as a Class A felony instead of a capital offense.[4] Berry made no objection to this designation. Prior to trial, Berry objected to the use of KRS 532.055, setting out the Truth-in-Sentencing provisions enacted by the General Assembly in 1986. He relied on *Commonwealth v. Reener*, 734 S.W.2d 794 (Ky. 1987), wherein the Supreme Court held that KRS 532.055 amounted to an infringement by the General Assembly on the prerogatives of the judiciary, in violation of the principles of separation of powers, although as a matter of comity the Court declined to hold the statute unconstitutional. *Id.* at 797-98. The trial court granted Berry's motion and ordered the case to "be tried in conformity with the Rules of Criminal Procedure and other applicable statutes in place of KRS 532.055."

During the guilt phase of the trial, without objection by Berry, the jury was instructed to fix a penalty for the principal offense. The jury instructions included the following:

> NO. 1 – MURDER
>
> You will find the defendant, James Henry Berry, guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

[4] Although Kentucky Revised Statute (KRS) 507.020 was amended in 1976 to make murder a capital offense in all cases (1976 Ex. Sess. Ky. Acts ch. 15, § 1), the Jefferson County Commonwealth's Attorney proceeded on the theory that a Class A felony indictment was appropriate and authorized as no statutory aggravating circumstances were present and the death penalty was not an eligible sentence. The Kentucky Supreme Court rejected this theory in Berry's direct appeal. *Berry v. Commonwealth*, 782 S.W.2d 625, 626-27 (Ky. 1990). Justice Leibson dissented, being of the opinion that "within the overall structure of the Penal Code murder is a Class A felony when the death penalty is not sought and should be so considered." *Id.* at 628.

(a) That in Jefferson County, Kentucky, on or about the 3rd day of February, 1987, he killed Cheri Dawson by shooting her.

AND

(b) That in so doing he caused Cheri Dawson's death intentionally and not while acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

If you find the defendant, James Henry Berry, guilty under this instruction, you shall fix his punishment in the penitentiary for not less [than] twenty (20) years nor more than Life, in your discretion.

The possible verdicts under Instruction No. 1 provided the following options:

MURDER

** ** **

We, the Jury, find the defendant, James Henry Berry, not guilty under Instruction No. 1.

_____
FOREPERSON

We, the Jury, find the defendant, James Henry Berry, guilty under Instruction No. 1 and fix his punishment in the penitentiary for _____ years. (Penalty: 20-Life)

_____
FOREPERSON

DATE: _____

The jury found Berry guilty of Murder under Instruction No. 1 and wrote "Life" in the blank space for punishment. During the PFO stage, the jury likewise found Berry guilty and fixed his punishment at 200 years' imprisonment.

On direct appeal, the Kentucky Supreme Court vacated the PFO conviction and remanded with directions that Berry be resentenced to life imprisonment without the PFO enhancement. *Berry*, 782 S.W.2d at 628. The court reasoned that the General Assembly designated murder as a capital offense, with sentences authorized under KRS 532.030(1), while punishment for all other felonies was provided by KRS 532.060(2). Since the PFO statute, KRS 532.080(1), enhanced only those sentences imposed under KRS 532.060, a capital offense sentence could not be enhanced. *Berry*, 782 S.W.2d at 626-27.

After remand to the trial court, Berry requested that a presentence investigation be made and a sentencing hearing be held pursuant to RCr[5] 11.02. In a *pro se* pleading filed April 30, 1990, Berry stated that "the sentencing phase on the murder charge [was not] held pursuant to (KRS 532.020) [sic] which is also mandatory when a person is convicted of murder." (parentheses original). The Commonwealth, in response, noted that during the trial Berry had objected to the use of KRS 532.055, but not to the jury's single-stage determination of both guilt and penalty for the murder charge. The Commonwealth further pointed out that the trial procedure was to Berry's benefit since it prevented the Commonwealth from introducing evidence of Berry's two prior felony convictions and parole eligibility before the second stage of the trial, *i.e.*, the PFO stage. The trial court imposed the life sentence, and Berry appealed again to the Kentucky Supreme Court, arguing that his double jeopardy rights had been violated. The Kentucky

[5] Kentucky Rules of Criminal Procedure.

Supreme Court rejected this argument and affirmed the imposition of Berry's life sentence. *Berry v. Commonwealth*, No. 90-SC-794-MR (Ky. Jan. 16, 1992).

In 1995, Berry filed a combined CR 60.02 and RCr 11.42 motion, primarily arguing that his indictment and trial on murder as a Class A felony violated a number of his protections under the United States and Kentucky constitutions. Berry further argued that "[t]o resentence [him] through mandate of the Kentucky Supreme Court, without a trial under the standards of Capital Murder (**with its accompanying 'aggravating' and 'mitigating' factors**), is a denial of <u>any</u> constitutional trial for the type of Murder the Legislature calls 'Capital.'" (First emphasis added.) The Jefferson Circuit Court denied this motion and this Court affirmed. *Berry v. Commonwealth*, No. 95-CA-0403-MR (Ky.App. Sep. 6, 1996).

In 1999, Berry filed a second CR 60.02 motion, asserting that because his offense was not a Class A felony and was not treated as a capital offense, the maximum sentence he could receive was twenty years for a Class B felony. The Jefferson Circuit Court denied this motion, and again this Court affirmed. *Berry v. Commonwealth*, No. 2000-CA-001121-MR (Ky.App. June 1, 2001).

The instant motion was filed in January 2006, and likewise denied. This appeal follows. The basic gravamen of Berry's motion and this appeal appears to be that his life sentence was illegal because the trial did not contain a penalty phase at which he was permitted to present evidence of mitigating factors, as provided in KRS 532.025. In an effort to avoid the time constraints of CR 60.02, Berry further argues that an illegal sentence may be corrected at any time.[6] We disagree.

[6] A motion under CR 60.02 (d), (e) or (f) must be filed within a reasonable time. In this case, Berry has filed his motion nearly fourteen years after the original trial court judgment became final. Although not addressed by the trial court, nor argued on appeal, a strong case could be

As an initial matter, we note that KRS 532.025 has no applicability to this case. Although Berry was indicted for murder, the Kentucky Supreme Court previously held that the charge's designation as a Class A felony was ineffectual in making it into anything other than a capital offense. Still, death may be imposed "only if the Commonwealth makes known to the defendant any information it intends to offer in support of one of the statutorily authorized aggravating circumstances." *Berry*, 782 S.W.2d at 626. The fact that the Commonwealth did not do so here made the death penalty unavailable. *Id.* As such, KRS 532.025 does not apply under its clear provisions.[7] Even if the statute did apply to this proceeding, the fact that Berry certainly raised the issue in the context of his 1995 motion[8] means that he may not again raise the issue in this subsequent CR 60.02 motion. *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

While KRS 532.055 clearly mandates the bifurcation of felony trials into guilt and penalty phases, Berry argued against the statute's application at the trial level. In apparent reliance on this argument, the trial court entered an order that KRS 532.055 would not apply, and instructed the jury to consider guilt and set a penalty in the same phase of the trial. Thus, Berry is in no position to complain now. *See Gray v. Commonwealth*, 203 S.W.3d 679, 686 (Ky. 2006) ("'a party is estopped to take advantage

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made that Berry's motion is untimely.

[7] In 1987, KRS 532.025(1) provided for the consideration of aggravating and mitigating circumstances "[u]pon conviction of a defendant in cases where the death penalty may be imposed. . . ."

[8] Berry arguably also raised the issue in his April 30, 1990 pleading, in which he stated "[n]or was the sentencing phase on the murder charge held pursuant to (KRS 532.020) [sic] which is also mandatory when a person is convicted of murder." KRS 532.020 addresses designation of offenses defined outside the Penal Code, whereas KRS 532.025 deals with presentence hearings when the death penalty may be imposed.

of an error produced by his own act'") (quoting *Wright v. Jackson*, 329 S.W.2d 560, 562 (Ky. 1959)).

Berry's argument, that his sentence is illegal and may be corrected at any time, warrants discussion. Berry was charged with murder under KRS 507.020. The fact that the offense was designated in the indictment as a Class A felony did not make it other than a capital offense, albeit one for which the death penalty was unauthorized. At the time Berry was tried, the authorized penalties under KRS 532.030 for a capital offense, without aggravating circumstances, were "a sentence of life, or . . . a term of not less than twenty (20) years." Berry's sentence of life imprisonment therefore was an authorized sentence, *i.e.*, one within the range of penalties established by statute. Moreover, the cases which Berry cites in support of his argument that an illegal sentence is jurisdictional and may be corrected at anytime do not mandate a different result, as each of the cited cases involved the imposition or recommendation of a sentence which was not authorized by statute. *See Neace v. Commonwealth*, 978 S.W.2d 319, 322 (Ky. 1998) (trial court properly corrected jury's recommended sentence of five years which fell outside the required statutory range of twenty years to life); *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985) (PFO statute, KRS 532.080, authorized imposition of only one life sentence, not two); *Skiles v. Commonwealth*, 757 S.W.2d 212, 215 (Ky. App.1988) (plea agreement and judgment sentencing defendant to five years was not authorized by statute, which required penalty range of ten to twenty years). Further, we are not persuaded that a different result is compelled by *Myers v. Commonwealth*, 42 S.W.3d 594, 597 (Ky. 2001), in which the court held that "a defendant may validly waive the maximum aggregate sentence limitation in KRS

532.110(1)(c) that otherwise would operate to his benefit." However, it suffices to note for this opinion that Berry's sentence was an authorized sentence under KRS 532.030.

Furthermore, we agree with the Commonwealth that the 1990 Kentucky Supreme Court decision in Berry's direct appeal, directing that he be resentenced to life imprisonment, constituted the law of case. As stated in *Buckley v. Wilson,* 177 S.W.3d 778, 781 (Ky. 2005),

> [t]he law-of-the-case doctrine describes a principle which requires obedience to appellate court decisions in all subsequent stages of the litigation. Thus, on remand, a trial court must strictly follow the mandate given by an appellate court in that case. "The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision. It necessarily follows, therefore, that if a party is aggrieved by an adverse appellate determination, his remedy is in an appellate court at the time the adverse decision is rendered."

(Footnotes omitted.)

In the context of criminal appeals, the law of the case doctrine is impacted somewhat by RCr 11.42 and CR 60.02. However, as noted in *Gross*, 648 S.W.2d at 856:

> RCr 11.42 provides a procedure for a motion to vacate, set aside or correct sentence for "a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge." It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. In subsection (3) it provides that "the motion shall state *all* grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude *all* issues that could reasonably have been presented in the same proceeding." (emphasis added).
>
> Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that "the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure."

> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.
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> CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition*, 487, 1444.

In this instance, Berry knew of his life sentence when the Kentucky Supreme Court's opinion was rendered. Any procedural errors made by the trial court in arriving at that sentence were precipitated by Berry's trial strategy. If Berry or his counsel believed that the sentence or sentencing procedures did not comport with the law, the remedy was to either file a petition for rehearing with the Kentucky Supreme Court, or seek review in the federal courts. Further review of the sentence in the Kentucky courts, or a new sentencing hearing, is inappropriate. *Buckley*, 177 S.W.3d at 781.

The Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

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