

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002597-MR

TIMOTHY TAYLOR MITCHELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 92-CR-00602

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

COMBS, CHIEF JUDGE: Timothy Taylor Mitchell appeals an order of the Fayette Circuit Court denying his post-judgment motion for relief. Finding no error, we affirm.

In June 1992, Mitchell and his cousin were arrested in connection with the abduction and rape (perpetrated on separate occasions) of two Lexington women.

Mitchell was also charged at this time in connection with burglary and the rape of a third woman. At trial, the jury heard scientific evidence linking DNA specimens recovered from each of the three victims to DNA samples collected from Mitchell. The jury also

heard Mitchell's taped confession as well as his live confession from the witness stand. Following deliberations, the jury found Mitchell guilty of two counts of rape in the first degree; two counts of complicity to commit rape in the first degree; three counts of sodomy in the first degree; one count of complicity to sodomy in the first degree; one count of sexual abuse in the first degree; two counts of kidnapping; one count of burglary in the third degree; one count of burglary in the second degree; and two counts of theft by unlawful taking over \$100.00.

On January 24, 1994, the trial court sentenced Mitchell to serve two hundred twenty-five years (225) in the penitentiary. His conviction and sentence were affirmed by the Supreme Court of Kentucky.

In May 1997, Mitchell filed his first motion for relief pursuant to the provisions of Kentucky Rules of Criminal Procedure (RCr) 11.42. The trial court rejected this collateral attack in its order of September 10, 1997. Mitchell filed an appeal from that order, but a panel of this court dismissed the action because he failed to file an appellate brief.

In April 2000, Mitchell filed a second motion for relief. In a written order, the trial court summarily denied the motion as being an impermissible successive RCr 11.42 motion. This court affirmed in an opinion rendered in November 2001.

In August 2002, Mitchell filed another post-judgment motion for relief. In this motion, Mitchell requested the trial court to amend his 225-year sentence as it exceeded the maximum aggregate sentence authorized by the provisions of KRS 532.110¹

¹ KRS 532.110(1) provides, in pertinent part as follows:

and 532.080² as amended in 1998. The trial court denied the motion for relief, and Mitchell did not appeal.

In November 2005, Mitchell filed another post-judgment motion for relief, which is the subject of this appeal. The trial court considered Mitchell's motion on its merits and concluded that the 1998 amendments to the penal code did not affect Mitchell's sentence. The court concluded that Mitchell had been properly sentenced in 1994 under the law that made life imprisonment the only limit to the aggregate of multiple indeterminate prison sentences for felony convictions. Consequently, the court declined to grant the relief Mitchell sought. This appeal followed.

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(c) 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 crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

² 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. *See Commonwealth v. Durham*, 908 S.W.2d 119 (Ky. 1995). When KRS 532.080 is applied to determine the maximum aggregate penalty as opposed to being used to enhance a penalty where the underlying felonies are Class A or Class B felonies, KRS 532.080(6)(a) governs:

If the offense for which he presently stands convicted is a Class A or Class B felony . . . a persistent felony offender in the first degree shall be sentenced to an indeterminate terms of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than fifty (50) years, or life imprisonment. . . .

[Text as amended 1998 Ky. Act Chapter 505 § 76.]

On appeal, Mitchell argues that the trial court erred by failing to amend his sentence to conform to the sentencing ranges established by the 1998 amendments to KRS 532.110 and KRS 532.080. While Mitchell concedes that the provisions were amended by the legislature **after** his sentencing, he argues that they should apply retroactively to limit his sentence to a term of no more than fifty years. We conclude that Mitchell is not entitled to the relief he seeks either on procedural or substantive grounds.

Mitchell's motion of November 2005 requested relief **on the same basis** that he had argued in the motion of August 2002. His failure to appeal from the denial of the 2002 motion operates as a procedural bar to the prosecution of the subsequent motion at issue in this appeal. Furthermore, we agree with the trial court that the motion was not timely filed. The motion at issue in this appeal was filed some seven years after the relevant amendments were enacted by the legislature, and Mitchell has shown no justification for his delay in raising the issue.

Nevertheless, even if we were to address the substantive issue raised in Mitchell's motion for relief, the result would be no different. Neither the 1998 amendments to KRS 532.080 nor the 1998 amendments to 532.110 were expressly made retroactive. Under the provisions of KRS 446.080(3), no statute can be construed to be retroactive unless expressly declared to be so by the legislature. KRS 446.110, cited by Mitchell, does not afford relief as he urges. KRS 446.110 provides as follows:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any

way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be **applied to any judgment pronounced after the new law takes effect.**

(Emphasis added). Mitchell's sentence was pronounced four years **before** the 1998 amendments to the sentencing statutes were enacted. No portion of his judgment was pronounced after the effective date of the 1998 amendments. This statute is, therefore, of no relevance.

Because Mitchell's argument is barred on procedural grounds and lacks substantive merit as well, we affirm the order denying his motion for relief.

ALL CONCUR.

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