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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000234-MR
&
NO. 2004-CA-001274-MR

CORY L. CHENAULT — APPELLANT

v.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
INDICTMENT NOS. 96-CR-00517 & 96-CR-00649 & 99-CR-00407

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Cory L. Chenault appeals, *pro se,* from orders of the Fayette Circuit Court denying his motions for post-conviction relief. We affirm in part and vacate in part and remand.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

In June 1996, Chenault was indicted on one count of first-degree trafficking in a controlled substance.[2] Case No. 96-CR-00517. In July 1996, Chenault waived formal indictment and agreed to proceed by information in a second felony case in which he was also charged with first-degree trafficking in a controlled substance as well as third-degree criminal trespass.[3] Case No. 96-CR-00649.

Chenault entered into a plea agreement with the Commonwealth that resolved both cases. As a result, Chenault pled guilty to one count of first-degree trafficking in a controlled substance and one count of first-degree possession of a controlled substance. The court sentenced Chenault to five years on the trafficking charge and one year on the possession charge to run consecutively for a total of six years. The sentence was eventually conditionally discharged for a period of five years.

Following a new indictment in April 1999 resulting in new charges, Chenault was tried and convicted in August 1999 of three counts of first-degree trafficking in a controlled substance and of being a second-degree persistent felony offender (PFO II). Case No. 99-CR-00407. The court sentenced Chenault to 13 years on each count, with counts one and two to be served consecutively and count three to be served concurrently, for a total sentence of 26 years.

As a result of the new convictions, the Commonwealth moved the court to revoke Chenault's conditional discharge in Case No. 96-CR-00517 and Case No. 96-CR-00649. The court revoked Chenault's conditional discharge on September 15, 1999, and

[2] Kentucky Revised Statute (KRS) 218A.1412.

[3] KRS 511.080.

ordered that his six-year sentence be served consecutively with his 26-year sentence, for a total sentence of 32 years.

Thereafter, Chenault appealed the revocation of his conditional discharge to this court. In his appeal Chenault argued that the trial court erred in running his reinstated sentence consecutively with the subsequent 26-year sentence. However, this court unanimously affirmed the ruling in an unpublished opinion rendered September 7, 2001.[4] Chenault also appealed his conviction and 26-year sentence in Case No. 99-CR-00407 to the Kentucky Supreme Court, where it was unanimously affirmed on October 26, 2000. *See* Case No. 1999-SC-0901-MR.

In early 2004, the trial court received a letter from Chenault requesting that his six-year sentence be served concurrently rather than consecutively with his 26-year sentence. The court treated the letter as a motion to amend the sentence and denied it in an order entered on January 6, 2004. The court noted in its order that this issue had been resolved on appeal by this court in 2001.

On January 15, 2004, Chenault filed a Kentucky Rule of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the court's order of January 6, 2004. Therein, Chenault challenged the court's authority to sentence him to more than 20 years altogether. The court denied the motion in an order on January 23, 2004, citing lack of jurisdiction. Chenault also filed a CR 52.02 motion for findings of fact and conclusions of law as well as a motion requesting return of money forfeited. These motions were also

[4] Case Nos. 1999-CA-002317-MR & 1999-CA-002416-MR.

denied. Chenault then appealed only from the order of January 6, 2004, denying the relief requested by him in his letter to the judge.

Meanwhile, on December 12, 2003, Chenault had filed a motion to amend or vacate his 26-year sentence pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 . The motion alleged that he had received ineffective assistance of counsel in Case No. 99-CR-00407. The court denied the motion in an order on June 17, 2004, on the grounds that it was not timely. Chenault then filed a notice of appeal from that order. We will consider his appeals together.

Chenault's first argument in his first appeal is that the court erred in not granting his motion to order the return of $638 that was seized from his person when he was arrested on one of the early trafficking charges. He reasons that he was not found guilty of the trafficking charge, but that he pled guilty to a reduced charge of possession. He thus asserts that pursuant to *Smith v. Commonwealth*, 707 S.W.2d 342, 343 (Ky. 1986), *overruled in part on other grounds by Clay v. Commonwealth*, 818 S.W.2d 264 (Ky. 1991), he is entitled to the return of the cash.

Chenault's argument is without merit for two reasons.[5] First, pursuant to the plea agreement, Chenault agreed to the forfeiture of the money as a condition of having the trafficking charge reduced to a possession charge. As this was a bargained-for condition of the plea, the Commonwealth was entitled to its enforcement. *See Jones v.*

[5] We also note that Chenault never actually appealed from the order entered on January 27, 2004, denying his motion concerning the forfeiture. Nevertheless, both parties treated Chenault's appeal as including that issue, and we will do the same.

Commonwealth, 995 S.W.2d 363 (Ky. 1999). Second, as this was a claim that could have been brought on direct appeal, Chenault may not assert it later in a separate post-conviction motion. *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Chenault's second argument is that the trial court erred in sentencing him to 26 years for three Class C felony offenses.[6] He maintains that the maximum sentence he could receive under the law was 20 years. In support of his motion, he cites *Dawson v. Commonwealth*, 756 S.W.2d 935 (Ky. 1988), KRS 532.110(1)(c), and KRS 532.080.

The Commonwealth, relying on *Devore v. Commonwealth*, 662 S.W.2d 829 (Ky. 1984), argues that KRS 533.060(2) controls and that *Dawson* is thus not applicable. *Devore* and KRS 533.060(2) involve consecutive sentencing when the defendant commits a felony while on parole, probation, or conditional discharge. While that is what Chenault did, KRS 533.060(2) and *Devore* require only that the previous six-year sentence received by Chenault in the earlier case and the sentence for the three Class C felonies run consecutively.[7] Those authorities do not directly address whether the three Class C felonies themselves may be run consecutively with each other.

Dawson appears to be on point. The court in *Dawson* reversed the defendant's 30-year sentence with directions that the court resentence him to 20-years where the defendant had been convicted of a Class C felony, lesser offenses, and PFO II.

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[6] The parties have treated Chenault's letter to the court and the court's order of January 6, 2004, as relating not only to the issue of whether his six-year reinstated sentence was properly ordered to run consecutively with his 26-year sentence but also as relating to whether the 26-year sentence itself could exceed 20 years. We agree and also will do so.

[7] In fact, this court cited *Devore* in affirming the consecutive sentencing of Chenault in one of his earlier appeals. See Case No. 1999-CA-002317-MR and Case No. 1999-CA002416-MR.

Id. at 936-37. Likewise, *Young v. Commonwealth*, 968 S.W.2d 670 (Ky. 1998), *overruled in part on other grounds by Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005), appears to be on point. In *Young*, the defendant was convicted of three Class C felonies and PFO II, just as in this case. The trial court there sentenced the defendant to 60 years. The Commonwealth conceded error, and the Supreme Court reversed the sentence with directions that the defendant be resentenced to 20 years. The court noted that "[t]he longest extended term authorized by KRS 532.080 for conviction of a Class C felony is twenty years." *Id*. at 675, *citing* KRS 532.080(6)(b) and *Tabor v. Commonwealth*, 613 S.W.2d 133 (Ky. 1981).

The three trafficking charges for which Chenault was convicted were Class C Felonies. A Class C felony carries a maximum sentence of 10 years. KRS 532.110(1)(c) states in part that "[t]he 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." KRS 532.080(6)(b) is applicable. *See Commonwealth v. Durham*, 908 S.W.2d 119, 121 (Ky. 1995). Pursuant to that statute, the maximum sentence that Chenault could have received in Case No. 99-CR-00407 appears to be 20 years.[8] *See Dawson*, *supra*, and *Young*, *supra*.

[8] We also note that the fact that Chenault is a persistent felony offender has no bearing on the application of the relevant statutes. *See Durham*, *supra,* where the court stated that "KRS 532.110 requires that KRS 532.080 be used to establish the maximum aggregate sentence for a person convicted for multiple offenses, without regard to whether the penalties for those offenses have been enhanced." *Id*. at 121.

However, the Kentucky Supreme Court seems to have effectively overruled the *Dawson* and *Young* cases in *Page v. Commonwealth*, 149 S.W.3d 416 (Ky. 2004). In *Page*, the defendant was convicted of two Class C felonies and two Class D felonies and was also guilty of being a second-degree persistent felony offender. The trial court sentenced him to 52 years in prison.[9] On direct appeal to the Kentucky Supreme Court, the defendant argued that the maximum sentence he should have received was 20 years. Nevertheless, citing KRS 533.060(2) and the *Devore* case, the Supreme Court affirmed the sentence and held that where KRS 533.060(2) was applicable, "KRS 532.110(c) does not act as a sentencing cap."[10] *Id*. at 423. The court made no mention of either the *Dawson* case or the *Young* case.

This court is bound by the precedent of the Kentucky Supreme Court. Kentucky Supreme Court Rule (SCR) 1.030(8)(a). Therefore, we must follow the *Page* case and affirm the 26-year sentence.

Chenault's third argument is that his six-year sentence was improperly reinstated because he did not receive notice of the revocation hearing where his six-year sentence was reinstated. He cites *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky.App. 1986), and KRS 533.050(2) to support his argument. His argument is without merit for several reasons. First, this issue was not raised in his motion before the trial court and may not now be raised for the first time on appeal. *See Todd v. Commonwealth*, 716

[9] The opinion in *Page* does not state the exact manner in which the defendant was sentenced.

[10] There is no indication in the opinion as to how long the sentence was for the previous felony that was required by KRS 533.060(2) to run consecutively with the 52-year sentence.

S.W.2d 242 (Ky. 1986). Second, as this is an issue that could have been raised on direct appeal, Chenault was precluded from raising it in a later post-conviction motion. *See Gross*, *supra*. Third, Chenault was advised by the court on September 3, 2004, that his hearing would be on September 10, 2004. Such notice was sufficient. *See Messer v. Commonwealth*, 754 S.W.2d 872 (Ky.App. 1988). Finally, we also note that the record indicates the Commonwealth filed a written motion to revoke on August 17, 1999, 24 days before the hearing.

Chenault's fourth argument is that the trial court erred by not entering findings of fact and conclusions of law pursuant to his CR 52.02 motion. Even assuming Chenault is correct in his argument, the case need not be remanded for the entry of findings because the record before us is so clear as to preclude the need for findings. *See Clark Mechanical Contractors v. KST Equip. Co.*, 514 S.W.2d 680, 682 (Ky. 1974). *See also Crain v. Dean*, 741 S.W.2d 655, 658 (Ky. 1987). The trial court properly refused to grant Chenault's motion to amend or vacate because it was an improper post-conviction motion under *Gross*, *supra*.

Chenault's second appeal relates to the trial court's order denying his RCr 11.42 motion as untimely. That motion related to Chenault's attack on his 26-year sentence based on allegations of ineffective assistance of counsel. The court denied the motion in an order dated June 17, 2004.

Chenault's case on direct appeal of his sentence became final on November 16, 2000. Thus, pursuant to the three-year rule in RCr 11.42(10), Chenault had until

November 16, 2003, to file his motion. Since November 16 was a Sunday, Chenault had until the following day to file his motion. Apparently, Chenault filed the original of the motion with a Fayette circuit judge and filed a copy of the motion with the clerk. The clerk then returned the copy to Chenault as improperly filed, and Chenault filed an original with the clerk on December 12, 2003.

The trial court denied Chenault's motion as untimely in an order entered on June 17, 2004. As the Commonwealth noted, however, that order is not in the record before us. Chenault argues that he attempted in good faith to timely file the motion by delivering it to the prison authorities for mailing on November 14, three days before the deadline.

During the pendency of this appeal, the case of *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005), was rendered by the Kentucky Supreme Court. In that case, our Supreme Court adopted the *Dunlap*[11] test for determining whether equitable tolling is applicable to an otherwise limitation-barred RCr 11.42 motion. *Robertson*, 177 S.W.3d at 792. That test holds that "if the *pro se* petitioner has otherwise complied with all the requisites for filing a petition, the deadline for such filing is tolled on the date the prisoner delivers the correctly addressed petition to the prison authorities for mailing." *Id*. at 791.

In light of the incomplete record before us, and the fact that the trial court never had the opportunity to address the facts surrounding Chenault's filing his motion,

[11] *Dunlap v. U.S.*, 250 F.3d 1001 (6th Cir. 2001).

we vacate the trial court's dismissal of Chenault's RCr 11.42 motion and remand the matter to the trial court for a determination of whether Chenault timely filed his motion.[12]

The orders of the Fayette Circuit Court are affirmed in part and vacated in part and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cory L. Chenault
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky

[12] In addition to the equitable tolling issue, there may be an issue concerning Chenault's filing of a copy of his motion rather than an original.