

RENDERED: MARCH 26, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000645-MR

JAMES H. ALLEN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
ACTION NO. 81-CR-00077

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR  
JUDGE.

TAYLOR, JUDGE: James H. Allen brings this *pro se* appeal from a March 13,  
2009, Order of the Kenton Circuit Court denying a Kentucky Rules of Civil

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Procedure (CR) 60.02 motion to vacate his March 16, 1981, sentence of 180-years' imprisonment. We affirm.

In 1981, Allen pleaded guilty to ten counts of first-degree robbery, one count of first-degree wanton endangerment, and to being a first-degree persistent felony offender. Pursuant to a plea agreement with the Commonwealth, Allen was sentenced to a total of 180-years' imprisonment by final judgment entered January 26, 1982. Allen was released on parole on November 4, 1993, but later returned to prison as a result of other convictions.

In early 2009, Allen filed a CR 60.02 motion to vacate his 180-year sentence of imprisonment. The circuit court summarily denied the CR 60.02 motion by order entered March 13, 2009. This appeal follows.

Allen contends the circuit court erred by denying his CR 60.02 motion. Specifically, Allen argues that the 180-year sentence exceeded the maximum aggregate sentence of imprisonment permitted under Kentucky Revised Statutes (KRS) 532.110(1)(c) and KRS 532.080(6)(a) and that his trial counsel was ineffective for failing to inform him that the sentence exceeded the statutory sentencing caps.

It is well-established that CR 60.02 relief is extraordinary and a substantial showing must be made to demonstrate entitlement thereto. *See Ringo*

*v. Com.*, 455 S.W.2d 49 (Ky. 1970); *Bryant v. Howell*, 170 S.W.3d 421 (Ky. App. 2005).

As to Allen's argument that his 180-year sentence exceeded the sentencing caps of KRS 532.110(1)(c) and KRS 532.080(6)(a), we agree with the circuit court that the sentencing restrictions contained in these statutes were not in effect in 1982 when Allen was sentenced and, thus, have no applicability. The circuit court correctly analyzed the law as follows:

KRS §532.110(1)(c) limits the aggregate of consecutive indeterminate terms to 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 to exceed seventy (70) years. KRS §532.080(6)(a) provides that a persistent felony offender in the first degree who is then convicted of a Class A or B felony "shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty years nor more than fifty years, or life imprisonment."

The final sentence of subsection (1)(c), limiting the maximum penalty to 70 years, was not in the statute as it was in effect at the time of [Allen's] initial sentencing in 1982 – in fact it was not added until 1998, after [Allen] had been released on parole from that sentence – so his counsel at that time could not be considered ineffective for failing to inform him of a cap which had yet to be enacted. . . .

Additionally, KRS §446.110 prevents any new law from repealing any punishment incurred under former law. *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001) held that, under KRS §446.110, courts are required "to sentence a defendant in accordance with the law which existed at the time of the commission of the offense." Having pleaded guilty to first[-]degree PFO along with the first[-]degree robbery charges the

maximum penalty would have been life imprisonment and the aggregate of the consecutive sentences as set at 180 years was thus valid under KRS §532.110(1)(c) as it existed at the time of [Allen's] offenses, conviction and sentencing, as no term of years is considered to exceed a life sentence. *Hampton v. Commonwealth*, 666 S.W.2d 737, 740-741 (Ky. 1984).

Since Allen was sentenced in 1982, the statutes in effect at that time are controlling. Consequently, we perceive no merit to Allen's contention that his sentence of imprisonment violated KRS 532.110(1)(c) or KRS 532.080(6)(a).

Allen's remaining argument concerning ineffective assistance of trial counsel is, likewise, without merit. We initially point out that CR 60.02 is not the proper forum to raise allegations of ineffective assistance of trial counsel. *See Meredith v. Com.*, 312 S.W.2d 460 (Ky. 1958); *McQueen v. Com.*, 948 S.W.2d 415 (Ky. 1997). Nonetheless, in this case, Allen's trial counsel was not ineffective. As previously decided, the statutory sentencing caps of KRS 532.110(1)(c) and KRS 532.080(6)(a) were not in effect when Allen was sentenced in 1981. Allen raises no other actions of counsel that could be considered ineffective in his representation of Allen.

Accordingly, we hold that the circuit court properly denied Allen's CR 60.02 motion.

For the foregoing reasons, the Order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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