

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

NO. 2009-CA-000839-MR

HAROLD W. GARDNER

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 04-CI-00170

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Harold W. Gardner appeals from the April 21,  
2009, Opinion and Order of the Muhlenberg Circuit Court denying his CR<sup>2</sup> 60.02

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

<sup>2</sup> Kentucky Rules of Civil Procedure.

motion wherein he sought a new sentencing hearing for multiple convictions.

Discovering no abuse of trial court discretion, we affirm.

On March 2, 2005, Gardner was convicted of one count of possession of a controlled substance while in possession of a firearm, first degree (a Class C felony), and sentenced to ten years' imprisonment. On May 17, 2005, Gardner was convicted of: 1) one count of possession of a controlled substance while in possession of a firearm, first degree (a Class C felony); 2) one count of possession of drug paraphernalia (a Class C felony); 3) one count of tampering with physical evidence (a Class D felony); and 4) one count of forgery, second degree (a Class D felony).<sup>3</sup> Gardner was sentenced to ten years for the first May 17, 2005, offense and five years each for the other three offenses, for a total of twenty-five years. It was ordered that the sentences for the first three May 17, 2005, convictions be served concurrently for ten years and that the five-year sentence for the remaining May 17, 2005, conviction be served consecutive to the other sentences, resulting in an aggregate sentence of fifteen years for the May 17, 2005, convictions.

Additionally, all of these sentences were to run consecutive to the ten-year sentence for the March 2, 2005, conviction. This resulted in an aggregate sentence of twenty-five years.<sup>4</sup>

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<sup>3</sup> The crimes for which Gardner was convicted on May 17, 2005, were committed while Gardner was awaiting trial for the crimes for which he was convicted on March 2, 2005.

<sup>4</sup> Unfortunately, the record on appeal contains only those documents that pertain to Gardner's CR 60.02 motion. Accordingly, the history of Gardner's convictions, including his sentences, is pieced together by this Court from the parties' briefs and the trial court's orders. As it is the responsibility of the appellant to properly designate the record on appeal, any omission in the record is to be construed in favor of the trial court order or judgment. *See e.g., Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985); CR 75.07.

On April 14, 2009, Gardner filed a Motion for Relief Pursuant to CR 60.02. He argued that the trial court erred when it exceeded the maximum punishment allowable by sentencing him to twenty-five years incarceration. Gardner also argued that his due process rights were violated when the jury instructions did not give the jury a choice as to how his sentences were to be served. On April 21, 2009, the trial court entered an order denying the CR 60.02 motion. This appeal followed.

Our review of a denial of a CR 60.02 motion is for abuse of discretion. “A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

On appeal, Gardner’s only argument is that the trial court erred by giving him an aggregate sentence of twenty-five years. In support of this argument, Gardner cites to KRS 532.110(1)(c), which states:

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[.]

Gardner maintains that the longest sentence he could have received was twenty years, because this was the maximum allowable sentence for a conviction of a

Class C or a Class D felony, pursuant to KRS 532.080(6)(b). Although Gardner's understanding of the cited statutes is correct, his reliance on KRS 532.110 is misplaced. Gardner committed the offenses for which he was convicted on May 17, 2005, while he was awaiting trial for the offense of which he was convicted on March 2, 2005. The controlling statute provides:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

KRS 533.060(3). This Court has previously held that KRS 533.060(3) takes precedence over KRS 532.110(1) and (2). Therefore, the trial court did not abuse its discretion when it denied Gardner's CR 60.02 motion for resentencing relief.

For the foregoing reasons, the April 21, 2009, Opinion and Order of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harold W. Gardner, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

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Attorney General of Kentucky

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