

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001376-MR

TROY DARRELL GARDNER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CR-01122

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

DIXON, JUDGE: Troy Darrell Gardner appeals a judgment of the Fayette Circuit Court, alleging that his constitutional rights to due process of law were violated during the trial court proceedings. Upon review we affirm.

In September 2008, a Fayette Circuit Court grand jury returned a five-count indictment against Gardner, which charged: (1) possession of a controlled

substance first-degree, second or subsequent offense; (2) tampering with physical evidence; (3) assault in the fourth degree, domestic violence; (4) possession of marijuana; and (5) persistent felony offender, first-degree. In support of the PFO charge, the indictment cited a March 2001 felony conviction from Jessamine Circuit Court (99-CR-00148) and an April 2007 felony conviction from Fayette Circuit Court (06-CR-01462).

On June 3, 2009, Gardner moved the Fayette Circuit Court to dismiss the first-degree PFO charge, alleging that the indictment relied on a prior conviction that was pending on direct appeal before this Court. Specifically, Gardner opined that his appeal in 06-CR-01462 was listed in this Court's database as an "active" appeal, 2009-CA-000162. In response, the Commonwealth argued that Gardner had filed an untimely notice of appeal in that case, and following dismissal by this Court, Gardner filed a motion to reconsider, which was pending before this Court at the time of the hearing. The Commonwealth asserted that Gardner's belated procedural motions should not affect the finality of the underlying conviction for enhancement purposes. The Commonwealth also asserted that the PFO indictment was supported by the 2001 felony conviction from Jessamine Circuit Court.

After hearing arguments from counsel, the circuit court denied Gardner's motion, concluding that Gardner's belated appellate motions did not preclude using 06-CR-01462 to establish PFO status. On June 5, 2009, Gardner entered a conditional guilty plea to amended charges of first-degree possession of a

controlled substance (first offense), and PFO second-degree. On July 21, 2009, the circuit court withheld judgment imposing a sentence of ten years' imprisonment and sentenced Gardner to five years' probation, conditioned upon completion of the drug court program.

Gardner now appeals the circuit court's ruling regarding his prior convictions. Gardner contends he was denied due process of law because, though he pled guilty to an amended charge of PFO second-degree, he would have chosen to go to trial if he had known that his prior convictions were insufficient to support the indicted charge of PFO first-degree.¹ After careful review of the record herein, we conclude the trial court correctly denied Gardner's motion.

In *Melson v. Commonwealth*, 772 S.W.2d 631, 633 (Ky. 1989), the Kentucky Supreme Court addressed issues regarding the finality of prior convictions that are used in subsequent criminal proceedings. The Court stated:

It is the holding of this court that a prior conviction may not be utilized under KRS 532.055 (the truth-in-sentencing statute) or under KRS 532.080 (the persistent felony offender act) unless:

(1) The time for appealing the convictions has expired without appeal having been taken, or

¹ Our review indicates that Gardner's appellate argument is premised on his mistaken belief that case number 04-CR-00164 is his conviction in Jessamine Circuit Court. As previously noted, the Jessamine conviction is case number 99-CR-00148. Case number 04-CR-00164, however, relates to an April 2005 felony conviction in Fayette Circuit Court. At the hearing on Gardner's motion, the parties addressed 04-CR-00164 because it was also "active" in this Court's database (2009-CA-001006). We reiterate that the indictment in the case at bar relied on Gardner's convictions in 99-CR-00148 and 06-CR-01462 to support the PFO charge. As a result, our review will only address the status of 06-CR-001462, and the use of that conviction for PFO enhancement.

(2) Matter of right appeal has been taken pursuant to § 115 of the Constitution of Kentucky and the judgment of conviction has been affirmed.

Id. at 633.

In case number 06-CR-01462, Gardner pled guilty, and the Fayette Circuit Court rendered a final judgment on April 27, 2007. Gardner did not attempt to appeal this conviction until January 29, 2009, when he filed a *pro se* notice of appeal. On April 13, 2009, this Court dismissed Gardner's appeal as untimely, and he then filed a motion to reconsider, which was pending at the time he pled guilty in the case at bar.

Despite Gardner's argument to the contrary, we are not persuaded that his belated notice of appeal in 06-CR-01462 – filed approximately eighteen months late - suspended the finality of his conviction, thereby preventing the use of that conviction to establish PFO status. Under the facts presented, it is clear that the time for appealing the conviction in 06-CR-01462 “expired without appeal having been taken,” *Id.*; consequently, we conclude the conviction was properly utilized to support the PFO charge in the case at bar.

For the reasons stated herein, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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