RENDERED: FEBRUARY 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001135-MR

SHANNON BURL FULTZ — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 03-CR-00232

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

ACREE, JUDGE: Shannon Burl Fultz appeals the Letcher Circuit Court's denial of his motion made pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Finding Fultz is not entitled to relief, we affirm.

[1] 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 Statute (KRS) 21.580.

Following a 2003 automobile accident, Fultz entered a guilty plea to one count each of assault in the second degree, criminal mischief in the first degree, driving under the influence (first offense), driving without insurance (first offense), leaving the scene of an accident, and operating an automobile on a suspended license. Pursuant to the plea agreement, Fultz was ordered to pay fines and restitution and given two sentences of five years' imprisonment to run concurrently, probated for five years.[2] The 2005 sentence also provided, however, that if Fultz's probation was revoked, he would be required to serve the two five-year sentences consecutively for a total of ten years.

Fultz's probation was revoked in an order entered May 25, 2006. However, he was ordered at that time to serve only five years, and not the ten years required by the original sentencing order.

After a brief incarceration, Fultz was granted shock probation and began participation in Letcher County's drug court program. The circuit court again revoked Fultz's probation in early 2008. In the court's Order of Probation Revocation, Fultz was ordered to serve ten years' imprisonment pursuant to his 2005 plea agreement.

Counsel for Fultz moved to correct the sentence to five years. The circuit judge overruled the motion, stating the 2006 order's sentence of five years was the

[2] Fultz was also sentenced to thirty days' imprisonment for the DUI charge and ninety days each for the charges of no liability insurance, leaving the scene of an accident, and operating an automobile on a suspended license. They were all to run concurrently with the five-year sentences.

result of a clerical error which was not intended to amend the original judgment. Fultz did not appeal this ruling directly.

In September 2008, Fultz filed a motion pursuant to RCr 11.42 contending the ten-year sentence was void and asserting he received ineffective assistance of counsel in entering his guilty plea. The circuit court denied the motion, and this appeal followed. We review a circuit court's denial of an RCr 11.42 motion for abuse of discretion. *Bowling v. Commonwealth,* 981 S.W.2d 545 (Ky. 1998).

Sentence

An RCr 11.42 motion is one proper means of challenging an unauthorized sentence. *Myers v. Commonwealth,* 42 S.W.3d 594, 596 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky. 2007). "However, a defendant may by direct appeal challenge the legality of a sentence imposed pursuant to a guilty plea because sentencing issues are considered 'jurisdictional' and cannot be waived." *Elmore v. Commonwealth,* 236 S.W.3d 623, 626 (Ky. App. 2007) (citations omitted). Further, an RCr 11.42 motion "is limited to [the] issues which were not and could not have been raised on direct appeal." *Sanborn v. Commonwealth,* 975 S.W.2d 905, 909 (Ky. 1998); *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky. 2007). The Commonwealth urges this Court to disregard Fultz's argument about sentencing because he could have and should have raised this issue on direct appeal. We agree. RCr 11.42 cannot afford the relief Fultz seeks because he could have

appealed the circuit court's denial of his motion to correct the sentence of ten years.

Even if the matter were properly before us on this collateral attack, Fultz's sentence would not be void. His only argument on this issue is that the circuit court could not impose a lengthier sentence than that instated upon the 2006 probation revocation, despite the fact his plea agreement and the original judgment of conviction and sentence required it.

Fultz cites *Galusha v. Commonwealth* for the proposition that a circuit court may not impose a lengthier sentence upon revocation of shock probation. 834 S.W.2d 696 (Ky. App. 1992). His reliance is misplaced. The defendant in *Galusha* had been sentenced to eight years' imprisonment, was incarcerated, and then was shock-probated. *Id.* at 697. His shock probation was conditioned upon his agreement that he would serve twenty years if probation was revoked. *Id.* This agreement came subsequent to the defendant's sentencing order and constituted modification of a final sentence. *Id.* at 697-98. It was therefore improper because "a trial court loses control of its judgment 10 days after its entry[,]" and the shock probation agreement came well after the ten days had expired. *Id.* The only holding of *Galusha* was that a circuit court cannot, "as a condition of shock probation, enhance the sentence first imposed." *Id.* at 698.

Unlike *Galusha*, there was no attempt to alter a final sentencing order in the instant case; instead, in imposing the ten-year sentence, the circuit court was merely enforcing the original sentencing order. There was therefore no

impermissible modification of a final order as there was in *Galusha*. The fact that the circuit court mistakenly ordered Fultz to serve only five years in 2006, the first time his probation was revoked, did not prevent the court from entering the proper sentence in the 2008 order.

Fultz has not asserted his acceptance of the plea bargain was not knowing or voluntary because he did not understand the provision which extended his sentence, or that counsel's performance in advising him on this matter was defective; neither has he identified a statute or constitutional principle which renders the sentence excessive.[3] He has not asserted grounds which justify RCr 11.42 relief, and the circuit court did not abuse its discretion in sentencing him to ten years.

Ineffective assistance of counsel

Fultz next contends he received ineffective assistance of counsel because his attorney advised him to accept a plea to both criminal mischief and second-degree assault, in violation of the Double Jeopardy clause of the Fifth Amendment of the U.S. Constitution and Section 2 of the Kentucky Constitution. A plea agreement may be voided on an ineffective assistance of counsel claim when a defendant demonstrates: (1) his counsel's performance was deficient as measured by objective professional standards and (2) but for counsel's ineffective assistance, the defendant would not have accepted the Commonwealth's offer, but would have

[3] This case differs from the factual scenario of the Supreme Court's recent decision, *McClanahan v. Commonwealth,* 308 S.W.3d 694 (Ky. 2010), in that Fultz's ten-year sentence does not exceed the applicable statutory maximum penalty.

insisted on proceeding to trial. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In Fultz's case, his attorney's performance was not deficient because criminal mischief is not a lesser included offense of second-degree assault.

"The Double Jeopardy Clause of the Fifth Amendment provides: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'" *Yeager v. U.S.,* 557 U.S. ___, 129 S.Ct. 2360, 2365, 174 L.Ed.2d 78 (2009). However, a defendant may be convicted of two offenses arising from the same act "if each [offense] requires proof of an additional fact which the other does not[.]" *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). A charge of criminal mischief contemplates damage to property. KRS 512.020. Conviction for assault in the second degree, on the other hand, requires "serious physical injury" to a person. KRS 508.020. Each offense therefore requires an element not included in the other. Conviction of both offenses did not violate the constitutional prohibition against double jeopardy, and Fultz's trial counsel was not deficient in advising him to plead guilty to both.

Conclusions

Because imposition of the ten-year sentence was made pursuant to a valid plea agreement, and because Fultz did not receive ineffective assistance of counsel in entering the agreement, he was not entitled to RCr 11.42 relief. The order of the Letcher Circuit Court denying such relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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