

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000072-MR

DANNY CARVER

APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 06-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Danny Lee Carver, acting *pro se*, appeals from an Opinion and Order of the Allen Circuit Court overruling his motion for CR 60.02 relief from judgment. Carver argues that the trial court erred in failing to order his sentence on a first-degree Persistent Felony Offender (“PFO”) charge to run concurrently with the sentence on his first-degree burglary conviction. We find no error, and accordingly affirm the Order on appeal.

On May 1, 2007, the Allen Circuit Court rendered a Judgment of Conviction reflecting a jury verdict finding Carver guilty on one count of first-degree burglary and one count of first-degree PFO. The jury recommended a 10-year sentence on the burglary charge, enhanced to 50 years as a result of the PFO conviction.

Carver's conviction was subsequently vacated by the Kentucky Supreme Court based on faulty jury instructions, and the matter was remanded for a new trial solely on the PFO charge. Carver entered an unconditional guilty plea on the PFO charge. The circuit court then enhanced Carver's original 10-year sentence for burglary to 30 years by operation of the PFO statute.

Thereafter, Carver, now *pro se*, sought to withdraw his guilty plea on the PFO charge. As a basis for this motion, Carver argued that he was "under the impression" that he would receive a total sentence of 20 years. Carver's motion was denied by way of an Order rendered on December 1, 2010, after the court found that his guilty plea was voluntarily, knowingly and intelligently made.

In July of 2011, Carver filed a *pro se* motion for relief under RCr 11.42 and CR 60.02. As a basis for this motion, Carver argued that he received ineffective assistance of counsel, and that the circuit court improperly ran the PFO sentence consecutively with the burglary sentence. On July 19, 2011, the trial court overruled Carver's motion, noting that Carver had not received concurrent burglary and PFO sentences, but rather that the 10 year sentence for burglary was enhanced to 30 years by operation of the PFO conviction.

On December 9, 2011, Carver filed another CR 60.02 motion again arguing that he improperly received consecutive sentences for burglary and PFO. By way of an Order rendered on December 19, 2011, the circuit court overruled the motion upon finding that this sentencing issue was previously decided by way of the July 19, 2011 Order. It again found that Carver had been properly sentenced in accordance with the PFO guidelines. This appeal followed.

Carver, *pro se*, now argues that the circuit court erred in overruling his second motion for CR 60.02 relief filed on December 9, 2011. In a very brief written argument, Carver again maintains that the trial court improperly ordered him to serve a 20-year PFO sentence to run consecutively with his 10-year burglary sentence. He argues that this sentencing runs afoul of *Dawson v. Commonwealth*, 756 S.W.2d 935 (Ky. 1988), and *Gray v. Commonwealth*, 979 S.W.2d 454 (Ky. 1988) (*overruled on other grounds by Morrow v. Commonwealth*, 77 S.W.3d 558 (Ky. 2002)), and that he should have received a 20-year sentence for the PFO conviction to run concurrently with the 10-year burglary sentence for a total of 20 years in prison.

In response, the Commonwealth argues that circuit court properly overruled Carver's second CR 60.02 motion filed on December 9, 2011, and maintains that Carver's underlying argument has already been decided and is not cognizable in this proceeding. We find the Commonwealth's argument persuasive. CR 60.02 is not intended as merely an additional opportunity to raise issues which were previously decided by way of RCr 11.42 or prior CR 60.02 motions. *Gross v.*

Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983); CR 60.02. In the matter at bar, the very issue which Carver now raises was addressed by the circuit court in its response to his July, 2011 RCr 11.42/CR 60.02 motion. The circuit court did not err in so ruling. Additionally, and *arguendo*, even if this issue were properly before us, we would not conclude that Carver was improperly sentenced to consecutive terms of imprisonment. The record demonstrates that on remand from the Kentucky Supreme Court, and after Carver's unconditional guilty plea to the PFO charge, the Allen Circuit Court did not sentence him to 10 years on the burglary conviction followed by a consecutive 20-year sentence of the PFO plea as he now contends. Rather, the circuit court sentenced him to 10 years for burglary which was enhanced to 30 years by operation of the PFO conviction. We find no error.

For the foregoing reasons, we affirm the Opinion and Order of the Allen Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Danny Carver, *pro se*
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BRIEF FOR APPELLEE:

Jack Conway
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