

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001855-MR

JAMES C. SAVAGE

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 07-CR-00174

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James C. Savage appeals from an order of the Muhlenberg Circuit Court denying his motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 seeking relief from an amended judgment. He alleges the trial court did not have jurisdiction to amend the judgment entered and that the original judgment imposed an illegal sentence. We affirm.

Savage entered guilty pleas to first-degree robbery, a Class B felony, Kentucky Revised Statute (KRS) 515.020; possession of a handgun by a convicted felon; and being a first-degree persistent felony offender (PFO I). Count 2, of the indictment charging theft by unlawful taking, \$300 or more, was voluntarily dismissed by the Commonwealth for lack of sufficient evidence. A judgment was entered in February 2008, and he was sentenced to a total of twenty-five years' imprisonment. However, the judgment contained a typographical error in that it erroneously stated the count numbers. The judgment was amended on January 27, 2009, to correctly sentence Savage to "confinement in the penitentiary for twenty (20) years on Count 1, enhanced by five (5) years on the persistent felony offender in the first-degree status, for a total of twenty-five years on Count 1 [first-degree robbery], and for five (5) years on [possession of a firearm by a convicted felon] all to be served concurrently."

Meanwhile, Savage filed a motion to vacate his conviction under Kentucky Rules of Criminal Procedure (RCr) 11.42 alleging ineffective assistance of counsel. The circuit court denied Savage's motion and this Court affirmed. *Savage v. Commonwealth*, 2009–CA–000353–MR, 2010 WL 1926382, (Ky.App. 2010).

Savage filed a second motion to vacate the amended judgment and final sentence, claiming the five-year sentence for the PFO I charge was illegal because it ran afoul of KRS 532.080. The circuit court denied Savage's motion and Savage appealed.

In that appeal, Savage alleged the circuit court's amended judgment illegally imposed a five-year sentence for the "offense" of being a PFO I in violation of KRS 532.080. *Savage v. Commonwealth*, 2013-CA-001335-MR, 2014 WL 4377899, 2 (Ky.App. 2014). This Court rejected Savage's contention that he received a "standalone sentence" for the PFO I count and held:

[T]he circuit court, as authorized by KRS 532.080, enhanced the twenty-year sentence for first-degree robbery by five years due to Savage's status as a PFO I, thereby imposing a total sentence of twenty-five years' imprisonment for the first-degree robbery conviction. The circuit court certainly did not, as suggested by Savage, run a five-year sentence for PFO I consecutively to the twenty-year sentence for first-degree robbery. Savage misinterprets the circuit court's amended judgment and sentence.

Id. at 2.

Savage filed a third post-conviction motion pursuant to CR 60.02 alleging the trial court lost jurisdiction to amend the judgment and sentence ten days after its entry. The motion was denied and this appeal followed.

CR 60.02 is designed to provide defendants with the opportunity to obtain special and extraordinary relief when the particular circumstances of a case justify post-judgment relief. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). However, CR 60.02 only provides relief that is not available by direct appeal or through an RCr 11.42 action. *Id.* CR 60.02 cannot be used to relitigate matters which could reasonably have been raised by direct appeal or in an RCr 11.42 motion. *Id.*

In this successive post-conviction proceeding, Savage contends the trial court lacked jurisdiction to amend its original judgment because more than ten days elapsed since its entry. Generally, “a trial court lacks power to amend a judgment ten days after the entry of that judgment.” *Winstead v. Commonwealth*, 327 S.W.3d 479, 485-86 (Ky. 2010). As stated in *McMurray v. Commonwealth*, 682 S.W.2d 794, 795 (Ky.App. 1985):

When our criminal rules do not supersede our civil rules or are not inconsistent with them, our civil rules apply. Since our criminal rules do not provide for trial court control of criminal judgments, our civil rule 10 day control provision applies.

In his previous post-conviction motions, Savage could have, but did not, raise any allegation that the trial court lacked jurisdiction to amend its original judgment. Additionally, there is no merit to his claim that the trial court lacked jurisdiction to correct what was clearly a clerical error regarding the count numbers. RCr 10.10 expressly permits the trial court to correct a clerical error “at any time on its own initiative or on the motion of any party[.]”

Finally, the law-of-the-case doctrine precludes this Court from revisiting the issue regarding the legality of Savage’s sentence. Under that doctrine, “an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court[.]” *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). “In simple parlance, [Savage] only gets one bite at each apple, and this apple was bitten long ago.” *St. Clair v. Commonwealth*, 451 S.W.3d 597, 612 (Ky. 2014).

For the reasons stated, the order of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James C. Savage, *Pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky