

RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1034-MR

CHARLES MERTZ

APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE DENNIS FRITZ, JUDGE
ACTION NO. 95-CR-003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** ** **

BEFORE: EMBERTON, HUDDLESTON, and MILLER, Judges.

MILLER, JUDGE. Charles Mertz brings this appeal from an order of the Henry Circuit Court denying his motion to vacate sentence pursuant to Ky. R. Crim. P. (RCr) 11.42. We affirm.

Appellant contends he received ineffectual trial counsel when he was advised to accept and enter a plea of guilty providing for a sentence in excess of that allowed under Kentucky sentencing law.

In January 1995, appellant was indicted on six counts of sodomy in the first degree (Ky. Rev. Stat. (KRS) 510.070) and two

counts of sexual abuse in the first degree (KRS 510.110). He pled not guilty in February 1995. In July 1995, the Commonwealth offered to amend the six sodomy counts to six counts of first-degree sexual abuse in exchange for a plea of guilty. As part of the offer, the Commonwealth would recommend a total sentence of fifteen years' imprisonment. On the advice of counsel, appellant accepted the Commonwealth's offer. The court accepted the plea agreement in September 1995 and entered judgment against appellant on eight counts of first-degree sexual abuse. Appellant was sentenced to five years for each count. Counts one through three were to run consecutively, and counts four through eight were to run concurrently for a total of fifteen years' service.

On January 21, 1997, appellant filed a motion pursuant to RCr 11.42 to vacate his sentence. On March 28, 1997, the trial court entered findings and an order denying appellant's motion, thus precipitating this appeal.

Appellant argues that he received ineffective assistance of counsel because his trial counsel advised him to enter a guilty plea agreement that provided for a total sentence exceeding that allowed by KRS 532.110(1)(c). The provision reads as follows:

- (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, . . . the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

. . .

(c) The aggregate of consecutive indeterminate terms^[1] 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.

Because appellant's eight first-degree sexual abuse counts were Class D felonies, he argues that his aggregated sentence of fifteen years was impermissible under this provision since the counts could have been enhanced only to the Class C level, which carries a maximum term of ten years. KRS 532.060(2). We disagree with appellant's interpretation of KRS 532.110.

Appellant correctly states that his convictions were limited to Class D felonies. KRS 510.110. His statement, however, that his sentence must be limited to the Class C felony maximum of ten years is incorrect. The purpose of KRS 532.110(1)(c) is to place an upper limit on the maximum term of imprisonment that can be imposed through consecutive indeterminate sentences equivalent to the maximum term that could be imposed upon a persistent felony offender under KRS 532.080. See Commentary to KRS 532.110. Here, this maximum is found in KRS 532.080(6)(b):

If the offense for which he presently stands convicted is a Class C or Class D felony, a

¹The trial court found that appellant's claim is erroneous because he is relying primarily upon statutes relating to indeterminate sentences. However, although appellant was sentenced to three consecutive five-year terms, with five additional terms to run concurrently with the other three, appellant's sentences are indeterminate for purpose of the statutes at issue. Ky. Rev. Stat. (KRS) 532.060 classifies a sentence for a felony as an indeterminate sentence. See Woods v. Commonwealth, Ky. App., 712 S.W.2d 363 (1986).

persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

It is clear that twenty years is the maximum sentence authorized for a Class D felony under KRS 532.080. Appellant was sentenced to only fifteen years. In view of this, appellant's argument is without merit. See Milner v. Commonwealth, Ky. App., 655 S.W.2d 31 (1983).

To prevail on his claim of ineffective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution, appellant must show:

. . . (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.

Centers v. Commonwealth, Ky., 799 S.W.2d 51, 55 (1990), citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and Sparks v. Commonwealth, Ky. App., 721 S.w.2d 726 (1986). In the case at bar, appellant's claim clearly fails the first prong of the Strickland test. Appellant did not receive ineffective assistance of counsel.

The Commonwealth argues that the appeal of appellant's RCr 11.42 motion was not timely filed. We need not consider this

issue since the Commonwealth has prevailed upon the merits. See
West v. Commonwealth, Ky., 887 S.W.2d 338 (1994).

The fifteen-year total sentence was proper.

For the foregoing reasons, the order of the circuit court
is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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