

RENDERED: January 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0873-MR

JOHNNATHON W. SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
INDICTMENT NO. 92-CR-755

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: ABRAMSON, KNOPF, and MILLER, JUDGES.

KNOPF, JUDGE. Johnnathon Smith appeals pro se from an order denying him relief under Kentucky Rule of Civil Procedure (CR) 60.02. He argues that his sentence is improper because as a second-degree persistent felony offender standing convicted of a Class D felony he was ineligible for probation, whereas similarly situated first-degree persistent felony offenders are eligible. After considering the record and the applicable law, this court affirms the circuit court order.

Smith pleaded guilty to one count of theft by deception, over \$100.00, and one count of being a persistent felony offender in the second degree (PFO II) on April 15, 1994. On May 27, 1994, the court sentenced Smith to five (5) years on

the theft charge, enhanced to ten (10) years by virtue of the PFO II in accordance with a plea agreement.

Smith filed a motion under CR 60.02 on December 11, 1996. He alleged that KRS 532.080 was unconstitutional as applied to PFO II defendants because it resulted in disparate treatment of similarly situated offenders. He moved the court to consider him for probation and allow him to present evidence on his behalf. The circuit court denied his motion, holding that his challenge could have been brought via Kentucky Rule of Criminal Procedure (RCr) 11.42. Smith moved to reconsider. The court denied the motion, and this appeal followed.

On appeal, Smith again challenges the constitutionality of KRS 532.080 as applied to Class D PFO II defendants. He argues that the circuit court improperly refused to consider mitigating circumstances which would have supported probation. The Commonwealth questions the procedural propriety of Smith's challenge and defends the constitutionality of the statute.

Generally, CR 60.02 is for relief that is not available by direct appeal or under RCr 11.42, and the movant must demonstrate why he is entitled to this extraordinary relief. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Smith pleaded guilty, did not appeal or file an RCr 11.42 motion, and is still in custody. This would be grounds for affirming the circuit court, but would leave Smith free to file a motion under RCr 11.42. In the interest of judicial economy, we turn to the

merits of Smith's underlying claim.

"A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation, or conditional discharge." KRS 532.080(5). Before 1994, KRS 532.080(7) provided: "A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years." The General Assembly amended this section, effective July 15, 1994, to make first-degree PFO defendants who currently stand convicted of Class D felonies eligible for probation, conditional discharge, and parole. 1994 Kentucky Acts, Chapter 396, Section 11, House Bill 390. KRS 532.080(5) remained unchanged, leaving Class D and all other second-degree PFO defendants ineligible for probation. Smith challenges this apparent disparity.

The legislature amended KRS 532.080 again in 1996, creating subsection (8): "The provisions of this section amended by 1994 Ky. Acts ch. 396, sec. 11, shall be retroactive." 1996 Kentucky Acts, Chapter 427, House Bill 267, effective April 4, 1996. Section 2 of the 1996 act reads: "Whereas this statute will reduce current prison and jail overcrowding, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law." The act became law on April 4, 1996.

Smith was sentenced on May 27, 1994, a month and a half before the amendment to KRS 532.080(7) became effective. The question of probation did not come up at sentencing, since it was not an option under KRS 532.080(5) or (7). Smith argues that since the amendment to KRS 532.080(7) is retroactive, he can challenge the allegedly inconsistent treatment of PFO I and PFO II defendants on equal protection and other grounds. However, even if KRS 532.080 were unconstitutional, Smith is not in a position to benefit.

The General Assembly's stated purpose in making the amendment retroactive was to reduce prison and jail overcrowding. The clear intent was to make Class D PFO I defendants sentenced before July 15, 1994, eligible for parole, not probation. Generally, circuit courts lose jurisdiction to modify criminal sentences ten (10) days after their entry. CR 59.05; Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996). We will not interpret HB 267 to grant circuit courts, by implication, the power to revisit sentences months and years later to consider probation as an option. Since Class D PFO I defendants sentenced before July 15, 1994, were and are not eligible for probation, Smith's constitutional challenges must fail.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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