RENDERED: October 29, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001227-MR

FRANK W. BRIGHT — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE WILLIAM M. HALL
INDICTMENT NO. 96-CR-00128(1)

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Frank W. Bright appeals pro se from a Taylor Circuit Court order that denied his motion (Kentucky Rule of Criminal Procedure (RCr) 11.42) to vacate, alter, amend or correct sentence. We affirm.

In August 1996, a Taylor County grand jury charged Bright in Indictment No. 96-CR-128 with assault in the first degree (Kentucky Revised Statute (KRS) 508.010), two counts of burglary in the first degree (KRS 511.020), one count of robbery in the first degree (KRS 515.020) and one count of being a persistent felony

offender in the first degree (PFO I)(KRS 532.080). The charges were based on Bright's involvement in a break-in and theft and the beating of an elderly man. Following negotiations with the Commonwealth, Bright entered a guilty plea to the two counts of first-degree burglary and the one count of first-degree robbery. Under the plea agreement, the Commonwealth moved to dismiss the first-degree assault and the PFO I counts, and recommended sentences of twenty years for each of the two counts of first-degree burglary and twenty years for first-degree robbery, all to run concurrently for a total of twenty years.

On January 21, 1997, the parties appeared for sentencing. At that time, the Commonwealth moved to reduce one of the burglary counts to second-degree burglary. The prosecutor also amended his sentencing recommendation on the amended burglary charge to ten years. The circuit court sentenced Bright to a total sentence of twenty years. In its judgment, the court described the sentence as imprisonment for a maximum term of "20 yrs each on burglary 1st & Robbery 1st & 10 years on burglary 2nd — all to run concurrent (sic) with each other but consecutive(sic) with all prior sentence (sic) on which he was on parole when these offenses occurred." Bright was on parole from a 1994 conviction in Indictment Nos. 93-CR-31, 93-CR-32, and 93-CR-33, for three felony offenses of trafficking in a controlled substance at the time of the 1996 offenses.

In April 1998, Bright moved the court pursuant to RCr 11.42 to amend the judgment by ordering his twenty-year sentence in Indictment No. 96-CR-128 to run concurrently with the sentences in

the 1994 conviction. He argued that all of the sentences should run concurrently with each other because his parole had not been revoked. He also requested an evidentiary hearing on the motion. On April 22, 1998, the circuit court denied the motion without a hearing. This appeal followed.

RCr 11.42 allows an individual in custody under sentence to raise a collateral attack to the judgment or sentence entered against him. RCr 11.42(5) permits the trial court to summarily dismiss the motion without a hearing where the movant fails to make a substantial showing of entitlement to relief. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. See Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, ___ U.S. ____, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, ___ U.S. ____, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

Bright argues on appeal that the sentences for the 1996 conviction should not run consecutively to the sentences for the 1994 convictions because his parole was not revoked following a hearing before the Parole Board. He notes that at the sentencing hearing, the trial judge stated that the twenty-year sentence for the 1996 conviction would run consecutively with the sentence he received for the offenses for which he was on parole at that time, if his parole was revoked. Bright maintains that under KRS 439.330(1)(e) and Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct.

2593, 33 L. Ed. 2d 484 (1972), he was entitled to a parole revocation hearing.

KRS 439.330(1)(e) states: "(1) The board shall: (e) issue warrants for persons charged with violations of parole and conduct hearings on such charges, subject to the provisions of KRS 439.341." A review of the Probation and Parole statutes, Chapter 439, and the language of KRS 439.330(1) itself indicates that this statute merely provides a listing of the duties of the Parole Board and does not create a statutory right by mandating a parole revocation hearing in all instances. Similarly, Morrissey v. Brewer, supra, does not create a constitutional due process right to a hearing before a person's parole may be revoked.

In Sneed v. Donahue, 993 F.2d 1239 (6th Cir. 1993), the Sixth Circuit Court of Appeals addressed the application of KRS 439.352 and Morrissey with respect to the right to a revocation of parole without a hearing. KRS 439.352 provides as follows:

> Recommitment of a parolee to prison on a new sentence received for commission of a crime while on parole shall automatically terminate his parole status on any sentence on which he has not received a final discharge, or a restoration of civil rights, prior to the date of recommitment. The prisoner shall, at the time of the recommitment on the new sentence, begin to accrue additional time credit toward conditional release or expiration of sentence on the sentence on which he had previously been paroled unless he has been finally discharged from parole on the sentence or has been

> restored to civil rights prior to the date of the recommitment.

The court in Sneed held that KRS 439.352 did not deprive the defendant of his Fourteenth Amendment right to due process even though it provided for automatic revocation of a defendant's parole without a hearing upon conviction for an offense while on parole. The court recognized that given the mandatory character of the statute withdrawing any discretion by the Parole Board, a revocation hearing would be superfluous. Sneed, 993 F.2d at 1243 (emphasis in original). See also Kellogg v. Shoemaker, 46 F.3d 503 (6th Cir.)(reaffirming Sneed), cert. denied, 516 U.S. 839, 116 S. Ct. 120, 133 L. Ed. 2d 70 (1995); Pickens v. Butler, 814 F.2d 237 (5th Cir.)(holding parole revocation hearing not required under Louisiana statute), cert. denied, 484 U.S. 924, 108 S. Ct. 284, 98 L. Ed. 2d 245 (1987).

Bright also relies on KRS 533.040(3)[1] in arguing that the circuit court could not order his sentences to run consecutively because his parole was not revoked within ninety days following the date his violation of the conditions of parole came to the

[1] KRS 533.040(3) provides:
> A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation shall take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.

attention of the Corrections Department. See Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432 (1992).

Bright's reliance on KRS 533.040(3) is misplaced for several reasons. First, this statutory provision applies to revocation of probation or conditional discharge, not revocation of parole. Parole is an executive function within the authority of the Department of Corrections, while probation or conditional discharge is a function of the judicial branch within the authority of the courts. See Mullins v. Commonwealth, Ky. App., 956 S.W.2d 222, 223 (1997)(discussing the different functions of probation and parole). Furthermore, as indicated earlier, under KRS 439.352, parole is automatically revoked without a hearing upon conviction for a subsequent offense while on parole. Therefore, even if KRS 533.040(3) applied to impose a time limitation on a parole revocation procedure (which we believe it does not), any time limitation for running the sentences consecutively was satisfied.

Second, in Brewer v. Commonwealth, Ky., 922 S.W.2d 380 (1996), the Supreme Court held that KRS 533.060(2) takes precedence over KRS 533.040(3) in situations involving conviction for a felony committed while on parole or probation. KRS 533.060(2) states as follows:

> When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony

committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

Consequently, applying KRS 533.060(2), the circuit court and the Department of Corrections properly found that Bright's twenty-year sentence in Indictment No. 96-CR-128 should run consecutively to the six-year sentence he received in Indictment Nos. 93-CR-31, 93-CR-32, and 93-CR-33, for which he was on parole at the time he committed the offenses in the 1996 conviction. See also Riley v. Parke, Ky., 740 S.W.2d 934 (1987)(Department of Corrections has authority to apply KRS 533.060(2)). Indeed, KRS 533.060(2) mandates that Bright's sentences run consecutively regardless of whether his parole had been revoked. The circuit court did not err in denying Bright's RCr 11.42 motion without a hearing.

The order denying Bright's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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