

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000798-MR

JOSEPH HANK GREENWELL

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 96-CR-0018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Joseph Greenwell (hereinafter, appellant) brings a motion to void an amended judgment, which we treat as an RCr 11.42 motion to vacate his judgment of conviction. Appellant alleges that an amended final judgment in this case violated his plea bargain with the Commonwealth, and was void because he was not present and represented by counsel at the time of its entry. For the following reasons we affirm the order of the Lincoln Circuit Court denying appellant's motion.

Appellant and another jail inmate attempted to escape from the Lincoln County Jail in June 1996. For that episode, they were indicted by a Lincoln County Grand Jury on charges of attempted escape in the first degree, criminal mischief in the

first degree, promoting contraband in the first degree, and three counts of wanton endangerment in the first degree. Appellant was further charged with six counts of being a persistent felony offender in the second degree.

Appellant accepted a plea offer from the Commonwealth. On September 13, 1996, he filed a "Motion to Enter Guilty Plea and Withdraw Prior Not Guilty Plea" which noted the plea agreement of 12 months on an amended charge of second degree escape, 5 years for first degree criminal mischief, 5 years for first degree promoting contraband, and 5 years for each count of first degree wanton endangerment, to run concurrently and to be enhanced to 8 years by one count of being a persistent felony offender in the second degree. On that same date, the trial court held a hearing and accepted appellant's guilty plea. The court held a sentencing hearing on October 11, 1996 and imposed final sentence. On October 16, 1996, apparently sua sponte, the trial court entered the following order:

It is hereby ordered that the defendant's eight (8) year sentence imposed by order dated October 11, 1996 shall run consecutively with any sentence currently being served.

Appellant's counsel and the Commonwealth Attorney were served with the order.

On January 9, 1998, appellant filed a motion seeking to void that order. He alleged that the sentence was supposed to run concurrently with all other sentences. The court below concluded that appellant did not have jurisdiction to bring the motion, and further stated that the court "may order a judgment

corrected if an oversight causes a mistake according to CR 60.01. There was a mistake in this judgment in that a [sic] one word was overlooked and mistakenly typed in." The trial court overruled appellant's motion, and this appeal followed.

Appellant's attempts to void the court's order below are unavailing. He first alleges that entry of the order served to breach the plea agreement with the Commonwealth and the Commonwealth must perform its end of the bargain, citing Workman v. Commonwealth, Ky., 580 S.W.2d 206, 207 (1979). We find that the Commonwealth fulfilled its end of the plea agreement. The agreement as set forth in appellant's motion to enter guilty plea did not address how the sentence in this case would run with any other sentence. The Commonwealth agreed to recommend a particular sentence to the court, which it did. Appellant has not established a breach of the plea agreement.

Next, appellant claims that the court's entry of the order was a void resentencing "in absentia, and without counsel." RCr 8.28 requires that a defendant be present at the imposition of the sentence. We find in the record that, at the sentencing hearing and in appellant's presence, the trial court ordered the sentences to run consecutively. At the hearing, the court asked for the recommendation and the Commonwealth Attorney responded that it was an eight year sentence consecutive to appellant's other time. Appellant's counsel remarked, "He understands by law that it has to run consecutively, so." Appellant responded negatively when asked if he had anything to say on his behalf. The court imposed the sentence, which it ordered to "run

consecutive to the original sentence judgment in the case for which he was imprisoned to begin with...." However, the trial court's written final judgment stated that the sentence would run concurrently with all other sentences.

The sentences were required to be run consecutively by KRS 532.110(4), which mandates:

The sentence imposed upon any person convicted of an escape or attempted escape shall run consecutively with any other sentence which the defendant must serve.

Thus, the judgment stating that appellant's eight year sentence would run concurrently with his other sentence was entry of an illegal sentence. The trial court acted properly since a trial court which has entered an unlawful sentence may correct it at any time. Skiles v. Commonwealth, Ky. App., 757 S.W.2d 212 (1988). Moreover, the trial court corrected the judgment within ten days, so it had not lost jurisdiction over its judgment. CR 59.05, RCr 1.10, RCr 13.04, Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979).

The order of October 16, 1996, merely altered the order to reflect the trial court's ruling from the bench and to correct an illegal sentence. The transcript of the sentencing hearing reveals that the sentence was imposed in appellant's presence. He was at the hearing, he was represented by counsel, and he did not object to running the sentences consecutively by operation of law. Appellant was not prejudiced in any way. The order of the Lincoln Circuit Court overruling appellant's motion to void his sentence is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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