

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000247-MR

GLOSTER B. HAYES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 98-CR-00324

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS and EMBERTON, Judges; and MARY COREY, Special Judge.¹

COMBS, JUDGE: Gloster Hayes (Hayes) appeals the order of the Fayette Circuit Court denying his post-conviction motion for relief from his sentence of imprisonment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Finding no error, we affirm.

The underlying facts are not in dispute. On July 12, 1996, Hayes entered a plea of guilty to the crime of trafficking in a controlled substance, first degree, and was sentenced to a

¹Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

term of five-years' imprisonment. The sentence was "withheld" and Hayes was placed on probation for a period of five years subject to several conditions – including his participation in a drug court program.

In January 7, 1998, Hayes was housed in the Fayette County Detention Center for violating the terms of his probation with respect to the drug court program. When he failed to return to the facility on January 17, 1998, after a period of work-release, a warrant was issued for his arrest. In March 1998, Hayes testified before the grand jury to explain his departure from the detention center. He was subsequently indicted for the offenses of second-degree escape and first-degree perjury as well as for being a second-degree persistent felony offender (PFO II). Following a jury trial on these charges, Hayes was sentenced on August 27, 1998, to serve ten years in prison.

On September 15, 1999, while his direct appeal from the judgment of conviction was pending,² Hayes filed a motion to be relieved from the sentence, alleging that his previous probated sentence did not qualify as a "conviction" under Kentucky Revised Statutes (KRS) 532.080(2) for PFO II enhancement purposes. The motion was summarily overruled and this appeal followed.

Hayes continues to argue in this Court that he was not eligible to be tried as a persistent felony offender because his 1996 conviction for trafficking "resulted in a sentence of Probation." Hayes contends that KRS 532.080(2) requires that one

²On June 9, 2000, Hayes's conviction was affirmed in an unpublished opinion rendered by this Court in case number 1998-CA-002268-MR.

be imprisoned for the underlying felony conviction before he can be convicted as a PFO II. KRS 532.080(2) reads:

A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

- (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and
- (b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and
- (c) That the offender:
 - 1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
 - 2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or;
 - 3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
 - 4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or

5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.

Hayes relies on Commonwealth v. Tiryung, Ky., 709 S.W.2d 454 (1986), for the proposition that his sentence of probation was not a sentence as contemplated by KRS 532.080(2)(a); that is, "a sentence to a term of imprisonment" which was "imposed." Tiryung indeed holds that a sentence of probation, "standing alone," does not constitute an authorized disposition of a criminal case. Id. at 455. Otherwise, a trial court could withhold a sentence of conviction and impose a "greater punishment for the offense committed than is deserved" because of a subsequent violation of the terms of probation. Id. at 456.

However, unlike the situation in Tiryung, when the Fayette Circuit Court sentenced Hayes on the 1996 trafficking conviction, it explicitly imposed a term of imprisonment of five years. Imposition of this sentence was withheld subject to his successful completion of a probationary period. Thus, the record reveals that at the time Hayes was indicted and tried for PFO II, he had been convicted of a felony (trafficking), he had been sentenced to five years of imprisonment, and he was on probation. Hayes's status as a probationer did not remove or excuse him from the provisions of the PFO statute, and his probated felony

sentence was properly used as a prior conviction in accordance with KRS 532.080(2)(c).³

Next, Hayes argues that the trial court erred by allowing his "convictions to be manipulated to fit within the statutory framework to make him eligible for PFO II." This argument is premised upon the fact that his probation was not revoked until after his trial on the 1998 charges and just a few days before his sentencing on the more recent crimes. However, we have already noted that it was not necessary for Hayes to have had his probation revoked in order to fit within the definition of a second-degree persistent felony offender. Indeed, the unequivocal language of KRS 532.080(2)(c)(2.) provides that a defendant might be on probation. Additionally, it was Hayes's status at the time he committed the more recent felony offenses of escape and perjury that is relevant – not his status at the time of his subsequent trial or sentencing.

Hayes also argues that he was denied a fair trial because the Commonwealth "knew" that he "was not eligible to be tried, or indicted for PFO II" and "did nothing to correct it." Since we have held that Hayes's indictment and sentence were consistent with the statutory scheme for PFO enhancement, this argument is without merit.

³Prior to 1976, KRS 532.080(2) explicitly required prior incarceration before a defendant could be given a PFO-enhanced sentence. However, the statute was amended in 1976 to its current version to include prior convictions resulting in probation as a proper basis for enhanced sentences. See, Commonwealth v. Hinton, Ky., 678 S.W.2d 388 (1984).

Although we have disposed of this appeal on the merits, we note that if Hayes had been correct in his contention that the elements of KRS 532.080 had not been met, he would have been required to move for a dismissal of the indictment or to move for a directed verdict at trial – and to have included the issue in his direct appeal. CR 60.02 is designed for relief that is not available either by direct appeal or under Kentucky Rules of Criminal Procedure 11.42. See, Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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