

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002043-MR

KEITH A. MOORE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 84-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE. Keith A. Moore appeals from a July 12, 2000, opinion and order of the Fayette Circuit Court denying his CR¹ 60.02 motion to amend the sentencing provisions of a 1984 judgment. We affirm.

On January 17, 1984, Moore was indicted under Indictment No. 84-CR-59 on two felony counts of receiving stolen property over \$100.² and one count of being a persistent felony offender in the second degree (PFO II),³ involving the possession of a video game that had been stolen from Radio Shack and stolen

¹Kentucky Rules of Civil Procedure.

²Kentucky Revised Statute (KRS) 514.110. The requisite amount was increased to \$300 in 1994.

³KRS 532.080.

Apple Computer equipment. In a transaction recorded on videotape, Moore sold the stolen merchandise to a police officer in October 1983 in an undercover sting operation.⁴

On March 2, 1984, Moore entered a guilty plea pursuant to a plea agreement to all three counts. Under the plea agreement, the Commonwealth recommended five years on each of the two counts of receiving stolen property and moved to dismiss the PFO II count. The Commonwealth made no recommendation on running the sentences concurrently or consecutively. After receiving the guilty plea, the trial court postponed final sentencing pending review of a presentence investigation report. At the plea hearing, Moore requested that he be allowed to take a polygraph (lie detector) test, which the trial court granted without objection from the Commonwealth. Based upon his review of the answers involving whether Moore had been involved in stealing the merchandise or had received it from a third-party, the polygraph examiner opined that Moore had not been completely truthful. The polygraph report states that Moore admitted knowing that the merchandise was stolen but claimed that he was selling it for a third-party. Moore also acknowledged receiving a small sum in return for selling the items.

On March 23, 1984, after reviewing the polygraph examination report and the presentence investigation report that

⁴Also on January 17, 1984, Moore was indicted under Indictment No. 84-CR-58 on one count of receiving stolen property over \$100., and being a persistent felony offender in the second degree involving the sale of stolen computer equipment to a police officer in November 1983 in the same undercover sting operation. Moore pleaded guilty to receiving stolen property and received a five-year sentence.

showed Moore had a prior conviction for armed robbery,⁵ shoplifting, and theft by unlawful taking, the trial court sentenced Moore to serve two consecutive sentences of five years on each of the receiving stolen property counts to run consecutively with the five-year sentence he had received for receiving stolen property in Indictment No. 84-CR-58. On March 27, 1984, Moore's attorney filed a motion to modify the sentence arguing that running the sentences consecutively resulted in an unduly harsh total sentence of fifteen years for two incidents of selling stolen property in a single sting operation. On April 3, 1984, the trial court granted the motion in part and denied it in part by ordering that the two five-year sentences for receiving stolen property in Indictment No. 84-CR-59 run concurrently with each other, but stating that these sentences would still run consecutively to the sentence in Indictment No. 84-CR-58.⁶

On June 15, 1984, Moore filed a pro se motion pursuant to RCr⁷ 11.42 seeking to modify his sentence. He alleged that the trial court violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process by running the sentences consecutively. On July 13, 1984, the trial court denied the RCr

⁵Moore received a twenty-two year sentence for armed robbery in Indictment No. 77-CR-3013.

⁶Another attorney for Moore filed a second motion to modify sentence arguing for a ten-year sentence instead of a fifteen-year sentence on the two indictments consistent with an alleged similar modification in the sentences of a co-defendant prosecuted with Moore on the same offenses. The trial court granted the second motion consistent with its order granting the first motion in part and modifying the sentence.

⁷Kentucky Rules of Criminal Procedure.

11.42 motion stating that under KRS 532.110(1), it had the discretion to order sentences to run concurrently or consecutively.

On April 19, 2000, Moore filed a motion to amend judgment pursuant to CR 60.02(e) and (f). He asked the court to amend his sentence in Indictment No. 84-CR-59 to run concurrently with the twenty-two year sentence he received for armed robbery in 1977⁸ based on KRS 532.110(1)⁹. He argued that under the rule of statutory interpretation giving priority to later enacted statutes, KRS 532.110(1) controlled over KRS 533.060(2)¹⁰ because the 1998 amendments to KRS 532.110(1) rendered it the later enacted statute. He also contended that the 1998 amendments to KRS 532.110(1) indicated an intent by the Legislature to change the law and thus was properly raised in a CR 60.02 motion. On June 12, 2000, Moore filed a supplement to his CR 60.02 motion alleging the trial court inappropriately considered the results of the polygraph examination prior to sentencing.

On July 12, 2000, the trial court denied the motion on three grounds. First, it held the motion was barred as a successive motion. Second, it held the motion was untimely. Third, it held that KRS 532.110(1) and KRS 533.060(2) were not in conflict and require consecutive sentencing in this situation. This appeal followed.

⁸See supra note 5.

⁹KRS 532.110(1) allows for concurrent sentences when multiple sentences of imprisonment are imposed.

¹⁰KRS 533.060(2) requires consecutive sentencing for offenses committed while on probation or parole.

A review of Moore's brief indicates that he has abandoned the grounds for relief initially raised in his CR 60.02 motion. His brief does not mention any conflict between KRS 532.110(1) and KRS 533.060(2). Consequently, his failure to raise this argument in his appellate brief constitutes a waiver of the issue.¹¹ Additionally, we note that this Court recently rejected the position that KRS 532.110(1) should be applied retroactively or that it took precedence over KRS 533.060(2) because of the 1998 amendments.¹² Thus, this argument is without merit and the trial court correctly found that the sentence for Indictment No. 84-CR-59 must run consecutively to the 1977 sentence for armed robbery.

Moore's primary argument involves the trial court's consideration of the polygraph test results for sentencing. As an initial matter, there is a discrepancy between the record and Moore's version of the facts. The record indicates that Moore requested the polygraph examination, while Moore asserts in his brief that the trial court ordered him to take the polygraph examination. Clearly, if Moore requested the polygraph, he waived any challenge to its use and his failure to raise this issue until sixteen years after the sentencing seriously undermines his version of the facts.

Nevertheless, he is not entitled to relief on the polygraph issue for several additional reasons. First, as

¹¹See Milby v. Mears, Ky. App., 580 S.W.2d 724, 727 (1979); R.E. Gaddie, Inc. v. Price, Ky., 528 S.W.2d 708, 710 (1975); Ballard v. King, Ky., 373 S.W.2d 591, 593 (1963).

¹²White v. Commonwealth, Ky.App., 32 S.W.3d 83 (2000).

indicated earlier, consecutive sentencing was statutorily required by KRS 533.060(2) because Moore was on parole for the armed robbery conviction when he committed the receiving stolen property offenses. Furthermore, a sentencing court can consider many types of evidence that would not be admissible at trial including hearsay statements, uncharged criminal allegations, and dismissed counts of an indictment.¹³ Moore's reliance on the inadmissibility of polygraph examination¹⁴ results at trial is unavailing because the standard for admissibility of information as evidence is stricter than that for use in sentencing. Moore has not shown that the trial court abused its discretion in considering the polygraph examination report in this case.

Second, we agree with the trial court that Moore's claim was barred by the successive motions principle. In Gross v. Commonwealth,¹⁵ the Kentucky Supreme Court set out the procedure for appellate review in criminal cases. The Court stated that the structure for appellate review is not haphazard or overlapping.¹⁶ It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware, and only utilize

¹³See Aaron v. Commonwealth, Ky.App., 810 S.W.2d 60, 62 (1991).

¹⁴See Morgan v. Commonwealth, Ky., 809 S.W.2d 704 (1991).

¹⁵Ky., 648 S.W.2d 853 (1983).

¹⁶Id. at 856.

CR 60.02 for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42.¹⁷

In the current case, two motions to modify the sentence were filed shortly after the guilty plea and sentencing. The trial court granted the motions in part by ordering that the sentences for the two receiving stolen property convictions in Indictment No. 84-CR-59 run concurrently, but that the sentences run consecutively to the sentence Moore was then currently serving. In 1984, Moore filed an RCr 11.42 motion again seeking to modify his sentence challenging the consecutive nature of the sentencing. Moore could and should have raised the polygraph issue in his previous post-judgment motions.

Third, the trial court held that the CR 60.02 motion was untimely. Moore waited approximately sixteen years to file his motion. It did not involve new information unknown to him at the time of sentencing. The trial court did not abuse its discretion in holding the motion was untimely. For all these reasons, the trial court properly denied the CR 60.02 motion on both procedural and substantive grounds.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

¹⁷Id. See also McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1998) Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-09 (1998), cert. denied, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999).

BRIEF FOR APPELLANT:

Keith A. Moore-Pro Se
Lexington, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky