

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001531-MR

RONNIE C. RODGERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
INDICTMENT NO. 88-CR-000684

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, HUDDLESTON and MILLER, Judges.

HUDDLESTON, Judge: Ronnie C. Rodgers appeals from an order denying his pro se motion to modify sentence filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f).

On February 23, 1989, Rodgers was sentenced by Jefferson Circuit Court under Indictment No. 88-CR-000684 to five years' imprisonment following a plea of guilty to theft by deception over \$100.00¹ and the sentence was probated for a period of five years. On September 27, 1990, Rodgers was indicted in Warren County under

¹ Ky. Rev. Stat. (KRS) 510.110.

Indictment No. 90-CR-00595 for rape in the first degree,² sexual abuse in the first degree,³ and sodomy in the first degree.⁴ All offenses were alleged to have occurred on September 11, 1990. On December 10, 1990, Rodgers was indicted in Warren County under Indictment No. 90-CR-00741 for criminal solicitation to commit murder⁵ and conspiracy to commit murder,⁶ offenses which were alleged to have occurred earlier that month. On January 29, 1991, Rodgers was tried on the charges under Indictment No. 90-CR-00595 and was convicted by a jury of sexual abuse in the first degree but acquitted of the other two offenses. In March 1991, Warren Circuit Court sentenced Rodgers to serve five years in prison on the conviction for sexual abuse in the first degree. On April 8, 1991, following a hearing, Jefferson Circuit Court revoked Rodgers's probation based on the Warren County conviction and ordered him to serve the suspended five-year term of imprisonment for the 1989 Jefferson County conviction of theft by deception over \$100.00. In January 1993, Rodgers entered a guilty plea under Indictment No. 90-CR-00741 to criminal solicitation to commit murder and was sentenced by Warren Circuit Court to fifteen years' imprisonment to run consecutively to the five-year sentence for sexual abuse in the first degree under Indictment No. 90-CR-00595.

² KRS 514.040.

³ KRS 510.110.

⁴ KRS 510.070.

⁵ KRS 506.030 (criminal solicitation) and KRS 507.020 (murder).

⁶ KRS 506.040 (criminal conspiracy) and KRS 507.020 (murder).

On October 4, 2000, Rodgers moved Jefferson Circuit Court to modify the five-year Jefferson County sentence pursuant to CR 60.02(f), CR 13.04 and KRS 532.070. In his motion, Rodgers stated that the Department of Corrections had calculated the Jefferson County sentence as running consecutively to the five- and fifteen-year sentences imposed by Warren Circuit Court for a total sentence of twenty-five years.⁷ Rodgers proposed three alternative types of relief by asking the trial court to either reduce the five-year felony sentence to one year, reclassify the offense as a misdemeanor with a sentence of one year, or order the sentence to run concurrently with the Warren County sentences.⁸ Rodgers argued that the court should exercise its discretion to reduce his Jefferson County sentence under KRS 532.070(1) and (2) because of his rehabilitative efforts in prison as exemplified by his successful completion of various programs and record of good behavior. He also stated that modification of the conviction to a misdemeanor and reduction of the sentence was appropriate because shortly after his conviction, the statute involving theft by deception was amended to require a threshold amount of \$300.00, rather than \$100.00, for classification as a felony, as opposed to

⁷ Rodgers has provided no official documentation supporting this assertion. Given the chronological sequence of his convictions and sentencing, it is more likely his Warren County sentences are being treated as running consecutively to the Jefferson County sentence. Rodgers also has a five-year sentence on a 1990 conviction in Bullitt County for theft by deception over \$100.00, but he states that this sentence is being treated as running concurrently with the other sentences.

⁸ On April 9, 2001, counsel for Rodgers filed a supplement to the motion stating that the Parole Board has recently denied Rogers parole and ordered him to "serve out" his sentence.

a misdemeanor offense. Finally, Rodgers contended that under KRS 532.110(2)a, the Jefferson County sentence should be treated as running concurrently with the other sentences because the judgment was silent on whether it would run concurrently or consecutively. On June 20, 2001, Jefferson Circuit Court denied the motion to modify sentence.

Rodgers is not entitled to any of the alternative types of relief he proposed. His reliance on KRS 532.070 and KRS 532.110(2) is misplaced. A circuit court loses jurisdiction to modify a sentence ten days after the entry of a final judgment subject to the timely filing of a proper post-judgment motion under RCr 11.42, CR 60.02, or the habeas corpus statute.⁹ Collateral review is limited to the grounds applicable to the particular rule or statute. KRS 532.070 does not confer continuing jurisdiction upon a circuit court to modify a sentence under its discretionary sentencing authority.¹⁰ KRS 531.070 is directed at a circuit court's exercise of discretion prior to entry of a final judgment.

KRS 532.110(2) is of no help to Rogers. While the Jefferson County judgment and sentence is silent on the concurrent/consecutive sentencing issue, KRS 532.110(2) does not prevent the Department of Corrections from running the Warren County sentences consecutively to the Jefferson County sentence.¹¹

⁹ See Bowling v. Commonwealth, Ky., 964 S.W.2d 803, 804 (1998); Commonwealth v. Marcum, Ky. 873 S.W.2d 207 (1994); McMurray v. Commonwealth, Ky. App., 682 S.W.2d 794 (1985).

¹⁰ See Silverburg v. Commonwealth, Ky., 587 S.W.2d 241, 244 (1979); cf. Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996) .

¹¹ See supra, n. 7.

The Jefferson County judgment and sentence occurred before the Warren County convictions, so it understandably was silent on the issue. Rodgers committed the Warren County offenses while he was on probation from the Jefferson County sentence. In Riley v. Parke,¹² the Supreme Court held that KRS 533.060(2), which prohibits concurrent sentencing for conviction of an offense committed while on probation from a felony offense, controls over KRS 532.110(2), and the Department of Corrections has authority to apply KRS 533.060(2) to calculate an inmate's sentences. In Brewer v. Commonwealth,¹³ this Court held that KRS 533.060(2) controls over KRS 533.040(3), and requires consecutive sentencing upon conviction of an offense committed while a defendant is on probation from a conviction, which had been revoked based on the second conviction. As a result, Rodgers's Jefferson County and Warren County sentences may not be run concurrently as a matter of law.¹⁴

Rodgers's request for a reduction in his sentence based on his good behavior or the amendment of the theft by deception statute is not addressed to the correct forum. While Rodgers's exemplary conduct in prison is commendable, it does not provide grounds for modification of his sentence under CR 60.02(f). As the

¹² Ky., 740 S.W.2d 934 (1987).

¹³ Ky. App., 922 S.W.2d 380 (1996).

¹⁴ Because the Warren County sentences were imposed after the Jefferson County sentence, they would be required to run consecutively to the Jefferson County sentence, and therefore, in addition to the lack of substantive merit, Rodgers's request for modification of his sentences to have them run concurrently was directed at the wrong court.

Supreme Court said in McQueen v. Commonwealth,¹⁵ a defendant's change of attitude and character evidenced by good behavior while in prison "afford[s] no basis for relieving [him] from the punishment legally imposed for the crimes which he has committed."¹⁶ Rogers's arguments are more properly addressed in a plea to the executive for clemency under Section 77 of the Kentucky Constitution¹⁷ or the Parole Board. As for the amendment of the theft by deception statute, under KRS 446.110, enactment of a new law does not affect a penalty imposed for violation of a former statute. Rodgers's commission, conviction and sentencing on the Jefferson County offense occurred prior to the amendment of KRS 514.040, so the amendment did not affect his sentence.¹⁸

The Jefferson Circuit Court order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹⁵ Ky., 948 S.W.2d 415 (1997), cert. denied, 521 U.S. 1130, 117 S.Ct. 2535, 138 L. Ed. 2d 1035 (1998).

¹⁶ Id. at 418.

¹⁷ Id.

¹⁸ See, e.g., Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001).