

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000444-MR

JOSEPH A. MCINTYRE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 98-CR-00186

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Joseph A. McIntyre brings this *pro se* appeal from a February 7, 2002 Opinion and Order of the Franklin Circuit Court. We affirm.

In December 1999, appellant pled guilty to the offenses of trafficking in a controlled substance first degree, trafficking in marijuana less than eight ounces, and persistent felony offender second degree. Appellant was sentenced to a total of ten years' imprisonment. In November 2001, appellant filed an Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. Without an evidentiary hearing and without appointment of

counsel, the circuit court denied the motion, thus precipitating this appeal.

Appellant alleges that the circuit court committed reversible error by summarily denying his RCr 11.42 motion. Appellant initially contends "the grand jury under Count 3 of its indictment charged appellant [with] committing a class B felony under KRS 532.080, an offense that does not exist by law." He maintains that persistent felony offender represents an unconstitutional "status." We think it well recognized that the persistent felony offender statute (Kentucky Revised Statutes 532.080) creates a constitutional status, which subjects such offender to an enhanced penalty. See Hardin v. Commonwealth, Ky., 573 S.W.2d 657 (1978). We thus view appellant's contention to be without merit.

Appellant also alleges that the circuit court committed reversible error by amending its judgment of conviction. The circuit court amended the judgment as follows:

[U]pon review of the record of this case the Court has discovered a clerical error. The Defendant's Judgment states he was sentenced for Trafficking in a Controlled Substance, 1st degree for five (5) years and Ten (10) years for Persistent Felony Offender, 2nd degree. The sentences are to run concurrently with the a [sic] five year sentence in 98-CR-00139, for a total of ten (10) years. The Judgment should state that the Defendant is sentenced to five (5) years on Trafficking in a Controlled Substance, 1st degree, Class C Felony, enhanced to ten (10) years by Persistent Felony Offender, 2nd degree, Class B felony. This sentence is to run concurrently with five (5) year sentence in 98-CR-00139, for a total of ten (10) years. The Defendant has not been prejudiced by this clerical mistake. The Defendant's

the [sic] time of incarceration remains ten (10) years.

Appellant objects to the above amendment of the judgment. He suggests that the circuit court was without jurisdiction to so amend the judgment. We view the circuit court's revision of the judgment as a mere correction of a clerical mistake, which may be done by the court *sua sponte* at any time. Ky. R. Civ. P. 60.01. We also observe that the correction of the judgment in no way prejudiced appellant; appellant's sentence of imprisonment remained the same.

In sum, we are of the opinion that appellant's allegations were refuted upon the face of the record. Thus, the circuit court did not commit error by denying appellant's RCr 11.42 motion without evidentiary hearing and without appointment of counsel. See Trice v. Commonwealth, Ky. App., 632 S.W.2d 458 (1982).

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph A. McIntyre, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky
Frankfort, Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky