

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000001-MR

LARRY RAY SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 93-CR-00668

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Larry Ray Smith, pro se, has appealed from an order entered by the Fayette Circuit Court on November 14, 2001, which denied his CR<sup>1</sup> 60.02 motion to vacate his sentence. Having found no abuse of discretion on the part of the trial court in denying Smith's CR 60.02 motion, we affirm.

On August 31, 1993, a Fayette County grand jury returned an indictment against Smith charging him with assault

---

<sup>1</sup> Kentucky Rules of Civil Procedure.

in the first degree,<sup>2</sup> and operating a motor vehicle under the influence (DUI).<sup>3</sup> On September 17, 1993, Smith pled guilty to an amended charge of assault under extreme emotional disturbance.<sup>4</sup> The Fayette Circuit Court entered its final judgment on November 9, 1993, at which time Smith was sentenced to three years' imprisonment, which was probated for a period of five years.

While on probation Smith was convicted on August 31, 1998, of two counts of incest,<sup>5</sup> and of being a persistent felony offender in the second degree (PFO II).<sup>6</sup> Consequently, Smith's probation was revoked for "failing to refrain from violating the law," and on September 22, 1998, he was sentenced to an indeterminate sentence of three years on the 1993 assault conviction. This three-year sentence was ordered to "run concurrently with any previous felony sentence the defendant must serve." Smith did not file a direct appeal.

On November 22, 2000, Smith filed a RCr<sup>7</sup> 11.42 motion to correct the final judgment and sentence entered on November

---

<sup>2</sup> Kentucky Revised Statutes (KRS) 508.010.

<sup>3</sup> KRS 189A.010.

<sup>4</sup> KRS 508.040.

<sup>5</sup> KRS 530.020.

<sup>6</sup> KRS 532.080(2). Smith was convicted on August 31, 1998, and on October 16, 1998. He was sentenced to ten years on each of the two convictions of incest, enhanced to 12 1/2 years by the PFO II convictions. The sentences were ordered to run consecutively.

<sup>7</sup> Kentucky Rules of Criminal Procedure.

9, 1993. In his RCr 11.42 motion Smith argued that the three-year sentence he received in 1993 should run concurrently with the 25-year sentence he received in 1998.<sup>8</sup> Smith claimed that when he was sentenced on the assault conviction the trial court ordered his sentence to run concurrently with any prior felony sentences. This argument was rejected, however, as Smith's 1998 incest convictions were subsequent to his 1993 sentence for assault. Thus, any sentence imposed on Smith in 1998 was not covered by the order sentencing him to three years to run concurrently with any previous felony sentence. The incest convictions were not previous to the assault conviction. Smith's RCr 11.42 motion was denied on March 12, 2001.<sup>9</sup>

On November 2, 2001, Smith filed a CR 60.02 motion to vacate his sentence. Smith argued that in 1993 the trial court failed to impose a sentence of imprisonment prior to sentencing him to probation. Smith further argued that without an underlying sentence of imprisonment, the trial court lost jurisdiction in his case and could not sentence him later, after the terms of his probation were violated. The trial court denied Smith's CR 60.02 motion on November 14, 2001. This appeal followed.

---

<sup>8</sup> Smith also has pending before this Court a consolidated appeal (2001-CA-002781-MR and 2001-CA-002783-MR) pertaining to his 1998 incest conviction.

<sup>9</sup> The record reflects that Smith filed a notice of appeal (2001-CA-000696) on April 2, 2001; however, after Smith sent a letter stating that he no longer wished to pursue his appeal, the appeal was dismissed on September 12, 2001.

It is well settled that CR 60.02 is not intended to provide criminal defendants with an additional opportunity to relitigate the same issues which could reasonably have been presented in RCr 11.42 proceedings.<sup>10</sup> Smith should have raised the issues that he has raised in his CR 60.02 motion pertaining to the 1993 assault conviction in his RCr 11.42 motion. Furthermore, Smith's brief fails to comply with several of the mandates set forth in CR 76.12. Nevertheless, in the interest of justice we have chosen to address Smith's arguments in this appeal.

Smith argues that the trial court abused its discretion by denying his CR 60.02 motion to vacate his sentence because of his claim that the trial court failed to impose a sentence of imprisonment at the time of his 1993 assault conviction. More specifically, Smith claims the Fayette Circuit Court never fixed a sentence of imprisonment as mandated by KRS 532.030 and only imposed a sentence of probation, as provided for in KRS 532.040. Thus, Smith contends that when he violated the terms of his probation, there was no underlying sentence of imprisonment triggered by the revocation of probation. The argument follows that by failing to impose a sentence of imprisonment, the trial court lost jurisdiction to sentence

---

<sup>10</sup> McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

Smith in 1998.<sup>11</sup>

Accordingly, our analysis in this case turns upon the interrelationship between KRS 532.030 and KRS 532.040. The language contained in KRS 532.030 is mandatory. The statute explicitly provides that upon conviction a person "shall have his punishment fixed" at death, imprisonment or fine as may be appropriate depending on the offense committed. The language contained in KRS 532.040, however, is permissive. KRS 532.040 permits a court to "sentence such person to a period of probation or to a period of conditional discharge as provided by [KRS Chapter 533]." Moreover, KRS 532.040 further provides that "[a] sentence to probation or conditional discharge shall be deemed a tentative one to the extent that it may be altered or revoked in accordance with KRS Chapter 533 . . . ."

The Supreme Court of Kentucky explained the relationship between these two statutes in Commonwealth v. Tiryung.<sup>12</sup> In Tiryung, the Supreme Court concluded that the statutes should be read together as complementary to each other rather than as alternatives.<sup>13</sup> The Supreme Court went on to hold that the statutory scheme requires imposition of a sentence of

---

<sup>11</sup> A trial court generally loses jurisdiction of a case ten days after final judgment has been entered. See Commonwealth v. Gross, Ky., 936 S.W.2d 85, 87 (1996) and CR 59.05.

<sup>12</sup> Ky., 709 S.W.2d 454 (1986).

<sup>13</sup> Id. at 456.

imprisonment or a fine upon conviction, which must be rendered without unreasonable delay and before sentencing to probation.<sup>14</sup> Therefore, a judgment or order which contains only a "sentence of probation" is not sufficient to meet the requirements under KRS 532.030 and KRS 532.040.<sup>15</sup> The judgment must contain language fixing punishment at a specific term of imprisonment or fine, followed by language imposing such punishment or by language imposing a sentence of probation.<sup>16</sup> Simply put, "a defendant is first sentenced to an indeterminate term of imprisonment under KRS 532.030; then, the judge may set aside that tentative sentence and further sentence the defendant to probation or conditional discharge under KRS 532.040."<sup>17</sup>

The trial court did in fact fix Smith's sentence at an indeterminate sentence, the maximum of which was set at three years. The following language is taken directly from the final judgment entered by the trial court on November 9, 1993:

[I]t is hereby ORDERED AND ADJUDGED that the defendant's sentence shall be fixed at an indeterminate sentence, the maximum term of which shall be 3 years, but entry of the

---

<sup>14</sup> Id.

<sup>15</sup> "[P]robation standing alone does not function as a sentence because it provides no authorized penalty . . . ." Id. at 455.

<sup>16</sup> There is no requirement that the language fixing and imposing punishment be contained in one judgment. As long as both the fixing of punishment and imposing of it, or of probation, or of conditional discharge, are present, the sentencing requirements of KRS 532.030 and KRS 532.0404 are met.

<sup>17</sup> Hamilton v. Commonwealth, Ky.App., 754 S.W.2d 870, 871 (1988).

judgment imposing sentence is hereby withheld, and the defendant is placed on probation for a period of 5 years . . . .

Thus, the record clearly refutes Smith's argument. As indicated above, the trial court did in fact sentence Smith to an indeterminate term of imprisonment under KRS 532.030. Thereafter, the trial court withheld imposition of the sentence and placed Smith on probation pursuant to KRS 532.040. Smith was sentenced properly and according to the sentencing scheme. The record in this case is simply devoid of any indication that the trial court in sentencing Smith failed to comply with the statutory framework in this Commonwealth.<sup>18</sup> Accordingly, Smith has failed to demonstrate why he is entitled to the extraordinary relief he is seeking.<sup>19</sup>

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

---

<sup>18</sup> Smith also raises an ineffective assistance of counsel allegation on appeal, claiming his counsel was ineffective for failing to challenge the sentencing hearing. This argument is completely without merit, however, as Smith's trial counsel had no sound basis upon which to challenge the sentencing hearing.

<sup>19</sup> See McQueen, 948 S.W.2d at 416 (holding that a CR 60.02 movant must demonstrate why he is entitled to special, extraordinary relief).

BRIEF FOR APPELLANT:

Larry Ray Smith, Pro Se  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Rickie L. Pearson  
Assistant Attorney General  
Frankfort, Kentucky