

RENDERED: JULY 25, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002781-MR
AND
NO. 2001-CA-002783-MR

LARRY RAY SMITH

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-CR-00374

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.¹

JOHNSON, JUDGE: Larry Ray Smith, pro se, has appealed from an order of the Fayette Circuit Court entered on October 3, 2001, which denied his RCr² 11.42 motion to vacate his 25-year prison

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

sentence for incest.³ Smith also has appealed from an order of the same court entered on November 8, 2001, which denied his CR⁴ 60.02 motion for concurrent sentencing on his two 12-1/2 year sentences. Having concluded that the trial court did not err by denying Smith relief, we affirm.

On April 7, 1998, a Fayette County grand jury returned an indictment against Smith charging him with two counts of incest, a Class C felony, and as being a persistent felony offender in the second degree (PFO II).⁵ The underlying felony conviction that supported the PFO II charge was a 1993 conviction for assault under extreme emotional disturbance.⁶ Smith was on probation for the assault conviction at the time of the alleged incest offenses.

The incest charges involved two separate incidents between Smith and his stepson, D. B., who was under the age of sixteen when the offenses occurred. Smith was tried by a jury of the Fayette Circuit Court on August 31, 1998, and he was convicted of all the charges contained in the indictment. The jury recommended that Smith be sentenced to terms of imprisonment of ten years on each of the two convictions of

³ Kentucky Revised Statutes (KRS) 530.020.

⁴ Kentucky Rules of Civil Procedure.

⁵ KRS 532.080(2).

⁶ KRS 508.040.

incest, and that each sentence be enhanced to 12-1/2 years by the PFO II conviction, with the sentences to be served consecutively for a total of 25 years.

At the sentencing hearing held on October 16, 1998, the trial court sentenced Smith to 12-1/2 years on each of the two incest convictions, with the sentences to run consecutively for a total of 25 years.⁷ However, when the trial court entered the final judgment and sentence of imprisonment on October 20, 1998, it failed to state whether the sentences were to run concurrently or consecutively. Smith appealed his incest convictions to the Supreme Court of Kentucky, arguing that they were not supported by sufficient evidence.⁸ The procedural melee that followed is summarized below.

On June 2, 1999, while his direct appeal was still pending, Smith filed a "motion to modify." Smith moved the trial court "to modify the Final Judgment, Sentence of Imprisonment entered on October 20, 1998, and to order that the prior sentence run concurrent for a total of 20 years pursuant

⁷ Smith had just begun serving a three-year sentence for his 1993 assault conviction, bringing his total combined sentence to 28 years. Smith was initially sentenced to five years' probation on the assault charge, however, upon conviction of incest in 1998, Smith's probation was revoked and he was sentenced to an indeterminate sentence of three years on the assault conviction. Smith's 25-year sentence for incest was ordered to run consecutively with his three-year sentence for assault. In addition, Smith has a separate appeal, which is pending before this Court, pertaining to how the sentences on the assault conviction and the incest convictions were to be served (2002-CA-000001-MR).

⁸ Smith also raised allegations of prosecutorial misconduct in his direct appeal, however, Smith did not raise any issues pertaining to his sentence.

to KRS 532.110." This scant motion only referred to KRS 532.110 generally; however, at the hearing on June 11, 1999, counsel for Smith argued that the Supreme Court's holding in Young v. Commonwealth,⁹ limited his maximum sentence to 20 years. The Commonwealth did not file a response to the motion, but at the hearing it relied on Devore v. Commonwealth.¹⁰ In Devore, our Supreme Court held that pursuant to KRS 533.060(2) the maximum aggregate sentence limits of KRS 532.110(1)(c) did not apply to a defendant who had committed the current offenses while he was on probation or parole. Since Smith was on probation for the assault conviction when he committed the incest offenses, the trial court rejected Smith's argument. The CR 60.02 motion was denied in an order entered on June 16, 1999, and Smith did not appeal from that order.

The Supreme Court subsequently affirmed Smith's conviction on August 26, 1999, and on November 10, 1999, Smith filed a pro se RCr 11.42 motion to vacate his sentence. Smith advanced several arguments in his RCr 11.42 motion, all of which pertained to the alleged ineffective assistance of his trial counsel. The most notable argument raised by Smith in his RCr

⁹ Ky., 968 S.W.2d 670, 675 (1998). KRS 532.110(1)(c) limits the maximum aggregate sentence to the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed, which for a Class C felony under KRS 532.080(6)(b) is 20 years.

¹⁰ Ky., 662 S.W.2d 829, 831 (1984) cert denied, 469 U.S. 836, 105 S.Ct. 132, 83 L.Ed.2d 72 (1984).

11.42 motion was that his trial counsel was ineffective for failing to challenge Smith's 25-year prison sentence. More specifically, Smith claimed that his trial counsel "failed to object and/or preserve the unconstitutionality of his 25 year sentence under KRS 532.110(1)(c), and KRS 532.080(6)(b)." Smith also requested an evidentiary hearing on the merits of his motion. Smith's request for an evidentiary hearing was granted and the hearing was set for October 1, 2001.

In the interim, on June 13, 2001, Smith filed a pro se CR 60.02 motion to vacate his 25-year prison sentence. In his second CR 60.02 motion, which was filed pro se on June 13, 2001, Smith claimed that his 12-1/2 year sentences for incest should run concurrently since the trial court's sentencing judgment failed to specify the manner in which the sentences were to run. Smith argued that KRS 532.110(2) was controlling as the statute specifically states that "[i]f the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve." Smith further argued that his 25-year prison sentence exceeded the maximum aggregate amount possible under KRS 532.110(1)(c).¹¹

¹¹ This is essentially the same argument raised by Smith in his initial motion to modify sentence, which was filed on June 2, 1999. Smith simply added his three-year sentence for assault and argued that is combined 28-year sentence exceeded the maximum amount permitted by statute. In addition, Smith also

Upon conclusion of the evidentiary hearing, which was conducted on October 1, 2001, the trial court entered an order denying Smith's RCr 11.42 motion in its entirety, which in turn resolved all but one of the issues raised in Smith's CR 60.02 motion.¹² The only issue left unresolved by the trial court's denial of Smith's RCr 11.42 motion was whether the final judgment and sentence could be amended to comply with the trial court's oral pronouncement of the sentence at the hearing on October 16, 1999.¹³ The trial court granted both parties leave to brief the issue and on November 8, 2001, it denied Smith's CR 60.02 motion. The trial court found Cardwell v. Commonwealth,¹⁴ to be dispositive of the issue and determined that its failure to specify the manner in which Smith's sentences were to run by way of a written judgment was merely a clerical mistake, and therefore, within the purview of RCr 10.10.¹⁵ Smith subsequently

raised allegations of ineffective assistance of counsel in his second CR 60.02 motion.

¹² The evidentiary hearing was supposed to be confined to Smith's allegation that his trial counsel did not appropriately investigate the credibility of a witness who testified against him at trial, however, the trial court chose to address several of the arguments contained in Smith's pending CR 60.02 motion as well. In addition, Smith was represented by counsel at the evidentiary hearing, however, upon conclusion of the hearing Smith dismissed his counsel and notified the trial court of his desire to proceed pro se.

¹³ The trial court did not address Smith's argument that his combined sentences of 28 years exceeded the maximum aggregate amount possible under KRS 532.110(1)(c).

¹⁴ Ky., 12 S.W.3d 672 (2000).

¹⁵ RCr 10.10 permits the court to correct clerical mistakes at any time.

appealed the denial of his RCr 11.42 motion and the denial of his CR 60.02 motion to this Court. The appeals have been consolidated for our review.

Smith appears to raise three claims of error in his two appeals.¹⁶ Smith claims the trial court erred (1) by denying his RCr 11.42 motion to vacate his 25-year sentence; (2) by denying his CR 60.02 motion for concurrent sentencing; and (3) by sentencing him to a combined sentence of 28 years, which he claims exceeds the maximum aggregate amount permitted under KRS 5323.110(1)(c). We will address these arguments in turn.¹⁷

In his first claim of error, Smith argues that his trial counsel was ineffective for failing to investigate the credibility of Mark Fairchild, a key prosecution witness. Smith's argument appears to be predicated upon alleged discrepancies contained in Fairchild's testimony. Smith claims that Fairchild testified at trial that he looked through a crack in the door of Smith's home and witnessed Smith having anal sex

¹⁶ The arguments raised by Smith on appeal are difficult to understand as he fails to state his claims with any precision or clarity. Moreover, Smith's briefs fail to comply with several of the mandates set forth in CR 76.12. Nevertheless, in the interest of justice we have made every effort to address the arguments set forth in Smith's consolidated appeals.

¹⁷ Smith also appears to argue on appeal that the trial court erred in permitting the Commonwealth to amend his indictment to list the charged offenses as Class B felonies as opposed to Class C felonies. This argument merits little attention, however, as the initial error was merely a clerical mistake, and thus, within the purview of RCr 6.16. The incest charges were Class C felonies which were then enhanced to Class B felonies by the PFO II charge. The original indictment, however, did not reflect the PFO II enhancement. Consequently, the Commonwealth sought to amend the indictment.

with his stepson, D. B. According to Smith, "[Fairchild] stated that movant had his stepson bent over the bed and was having sex with him." Smith, however, argues that Fairchild previously stated that he witnessed Smith having sex with D. B. while lying in bed. Thus, Smith maintains "[t]hat is two different stories." Smith claims that the apparent discrepancies in Fairchild's testimony were not addressed at trial. Smith further argues that his trial counsel failed to adequately investigate the crack in the door through which Fairchild allegedly witnessed the crime. The trial court conducted an evidentiary hearing on this issue and concluded that the evidence offered by Smith was unreliable and speculative at best.

Any claims predicated upon the alleged ineffective assistance of counsel must be analyzed under the standard set forth in Strickland v. Washington:¹⁸

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a

¹⁸ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986).

fair trial, a trial whose result is reliable.¹⁹

The Supreme Court in McQueen further elaborated on this standard as follows:

The twin standard for such review is the proper measure of attorney performance or simple reasonableness under prevailing professional norms and whether the alleged errors of the attorney resulted in prejudice to the accused. The defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different.²⁰

As noted above, Smith claims that his trial counsel was ineffective for failing to challenge the credibility of Fairchild, a key prosecution witness. Smith also claims his trial counsel was ineffective for failing to adequately investigate the crack in the door through which Fairchild allegedly witnessed the crime. Smith, however, fails to address in his brief exactly how he was prejudiced by his trial counsel's alleged errors. Smith attempts to gloss over the fact that the Commonwealth introduced an audiotape of him confessing to the crimes. Thus, even assuming arguendo that Smith's counsel was ineffective for failing to investigate the crack in the door or the credibility of Fairchild, in light of the evidence that was presented that Smith had admitted to

¹⁹ Strickland, supra at 687.

²⁰ McQueen, 721 S.W.2d at 697.

committing the crimes, there was no prejudice. That is to say, Smith has failed to demonstrate that there is a reasonable possibility that, but for counsel's alleged errors, the result of the trial would have been different.²¹ Accordingly, Smith's first claim of error is completely without merit.

In support of his second claim of error, Smith argues that his due process rights were violated when the trial court amended its final judgment and sentence of imprisonment to provide for consecutive sentences on his two incest convictions. Smith argues that the written judgment entered on October 20, 1998, should take precedent over the initial oral sentencing, which took place on October 16, 1998. Moreover, since the amended final judgment and sentence of imprisonment was not entered until November 21, 2001, Smith claims the trial court lost jurisdiction to amend the October 20, 1998, judgment as more than ten days had passed since the final judgment had been entered.²²

Smith's contentions lack merit, however, as the Supreme Court recently resolved this issue in Cardwell, supra. In Cardwell, the defendant was convicted of manslaughter in the second degree and assault in the fourth degree and sentenced to

²¹ Id.

²² See Commonwealth v. Gross, Ky., 936 S.W.2d 85, 87 (1996); and CR 59.05.

a total of ten years' imprisonment.²³ The trial court ordered the defendant's ten-year sentence to be served consecutively with a five-year sentence he was previously serving, bringing his total sentence to 15 years. The sentencing took place in open court and in the presence of the defendant.²⁴ The trial court's written judgment, however, failed to mention whether the sentences were to run concurrently or consecutively. Thus, the Department of Corrections determined that the defendant's ten-year sentence was to run concurrently with the five-year sentence he was serving.²⁵ Consequently, the trial court entered an amended judgment and sentence, which provided for consecutive sentences. However, the amended judgment was entered over eight months after the original judgment and the sentence had become final.²⁶

The Supreme Court resolved the issue by concluding that the amendment to the sentencing judgment was permissible as a correction of a clerical error under RCr 10.10.²⁷ The Court determined that the omission contained in the trial court's

²³ Cardwell, 12 S.W.3d at 673.

²⁴ Id.

²⁵ Id. at 674. The Department of Corrections was simply following the mandate set forth in KRS 532.110(2).

²⁶ Id. at 673.

²⁷ Id. at 675.

written judgment was merely a mistake made in reducing the oral judgment to writing. The Court reasoned as follows:

The distinction between clerical error and judicial error does not turn on whether the correction of the error results in a substantive change in the judgment. Rather, the distinction turns on whether the error "was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel, or by the judge."²⁸

In addition, the Court went on to hold that the defendant's due process rights were not violated because he was present in court when the sentence was pronounced and the record was devoid of any evidence indicating vindictiveness or retaliation.²⁹

Furthermore, the Court determined that double jeopardy principles were not implicated as the defendant had no legitimate expectation of finality.³⁰ We agree with the trial court that Cardwell is clearly dispositive of the issue before us. Thus, there is no reason to address the plethora of cases cited by Smith in furtherance of this argument.

²⁸ Id. at 674.

²⁹ "[W]e believe that the absence of the possibility of vindictiveness or retaliatory motive by the trial court, eliminates any due process concerns in the case at bar." Id. at 677.

³⁰ "We believe that under the facts of this case, [Cardwell] clearly did not have a legitimate expectation of finality. Thus, we hold that the increase in Cardwell's sentence via the amended judgment did not violate double jeopardy principles." Id. at 675.

Smith's final claim of error is predicated upon the language contained in KRS 532.110(1)(c), which provides as follows:

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

. . .

The aggregate of consecutive indeterminate terms shall not exceed the maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

KRS 532.080(5) enumerates the sentencing procedure for persistent felony offenders, such as Smith, and provides that under such circumstances:

A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted.

KRS 532.060 provides for varying ranges of imprisonment that may be imposed depending on the class of felony for which the defendant has been convicted. Smith was convicted of two separate counts of incest, which is a Class C

felony. Smith's incest convictions were then enhanced to Class B felonies as a result of his PFO II convictions. Under KRS 532.060(2), the maximum penalty for a Class B felony is 20 years. Smith, however, was sentenced to a total of 25 years, bringing his combined sentence to 28 years.³¹ Thus, Smith cites KRS 532.110(1)(c) and argues that the trial court abused its discretion by ordering his combined 25-year sentence for incest to run consecutively with his three-year sentence for assault. Smith further asserts that the trial court erred by sentencing him to a total of 25 years on the incest convictions as the maximum amount authorized by KRS 532.060(2) for a Class B felony is 20 years.³²

As to Smith's first contention, the Supreme Court resolved this issue in Riley v. Parke,³³ and Brewer v. Commonwealth,³⁴ where the Court held that KRS 533.060(2) required

³¹ As previously discussed, Smith's 25-year sentence for incest was ordered to run consecutively with his three year sentence for assault.

³² The Commonwealth chose not to brief this issue, arguing that Smith's claim was abandoned by him in a separate appeal. Smith did raise this issue in his pro se RCr 11.42 motion, which was filed on November 10, 1999, and he also raised the issue in both of his CR 60.02 motions, which were filed on June 2, 1999, and June 13, 2001. For reasons unknown to this Court, however, the issue was not raised at Smith's RCr 11.42 hearing, which also addressed his second CR 60.02 motion. To make matters worse, Smith never appealed the order denying his initial CR 60.02 motion. Thus, Smith has created a great deal of confusion by attempting to argue this issue in his CR 60.02 appellate brief, which is an appeal from the denial of his second CR 60.02 motion. Nonetheless, in the interest of justice we will address this issue.

³³ Ky., 740 S.W.2d 934, 935 (1987).

³⁴ Ky., 922 S.W.2d 380, 381 (1996).

the sentences to run consecutively. KRS 533.060(2) provides as follows:

When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation . . . and is convicted or enters a plea of guilty to a felony committed while on probation . . . the period of confinement for that felony shall not run concurrently with any other sentence.

Thus, KRS 533.060(2) controls over any conflicting provisions contained in KRS 532.110(1)(c). Accordingly, the trial court did not abuse its discretion by ordering Smith's 25-year sentence for incest to run consecutively with his three-year sentence for assault.

Smith's final issue has also already been resolved adversely to him by our Supreme Court. As previously discussed, Smith was convicted of two separate Class C felonies, which were then enhanced to Class B felonies pursuant to KRS 532.080(5). Smith was then sentenced to 12-1/2 years on each conviction and the trial court ordered the sentences to be served consecutively for a total of 25 years. The maximum penalty authorized by KRS 532.080(5) for conviction of a Class C felony, however, is 20 years.³⁵ Thus, Smith claims his sentence violates KRS 532.110(1)(c), which limits the aggregate of consecutive indeterminate terms to "the longest extended term which would be

³⁵ See KRS 532.060(2).

authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed."

Smith cites Young v. Commonwealth,³⁶ in support of his argument and claims the case is dispositive. However, as correctly noted by the trial court, Young is distinguishable from the case sub judice. Furthermore, Devore, supra, is dispositive since it involved precisely the same issue we are faced with in the case sub judice.

The defendant in Young was convicted of three Class C felonies, which were then enhanced to Class B felonies pursuant to KRS 532.080(6)(b).³⁷ The trial court sentenced the defendant to 20 years for each offense and ordered the sentences to be served consecutively, for a total of 60 years.³⁸ The Supreme Court reversed the trial court's judgment and held that "[t]he longest term authorized by KRS 532.080 for conviction of a Class C felony is twenty years."³⁹ However, in Devore the Supreme Court held that the provisions of KRS 532.060(2) pertaining to defendants who were on probation or parole at the time they committed the current offense were subject to being sentenced to

³⁶ Ky., 968 S.W.2d 670 (1998). See also Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001).

³⁷ The defendant in Young was a persistent felony offender in the first degree.

³⁸ Young, supra at 671.

³⁹ Id. at 675.

consecutive sentences which exceeded the 20-year limit of KRS 532.110(1)(c). Devore has been followed in Corbett v. Commonwealth,⁴⁰ and Campbell v. Commonwealth.⁴¹

For the foregoing reasons, the orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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⁴⁰ Ky., 717 S.W.2d 831, 833 (1986).

⁴¹ Ky., 732 S.W.2d 878, 880 (1987).