

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000446-MR

WILLIAM H. KENNEDY

APPELLANT

v. APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 98-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's CR 60.02 motion alleging that the trial court erred in computing his sentence. Upon review of the record, we reject appellant's contention that the court so erred. Hence, we affirm.

As a result of a drunk driving accident wherein one person was killed and four others were injured, appellant, William Kennedy, was indicted on April 27, 1998, on the

following charges: murder by manifesting extreme indifference to human life by wantonly operating a motor vehicle under the influence (count 1); four counts of assault in the first degree (counts 2-5); persistent felony offender in the second degree ("PFO 2") (count 6); and operating a motor vehicle with a suspended license (count 7). On December 17, 1998, Kennedy entered a guilty plea pursuant to a plea agreement. The plea agreement stated that in exchange for a plea of guilty to manslaughter in the second degree (count 1), four counts of first-degree assault (counts 2-5), and PFO 2 (count 6), the Commonwealth would recommend that the charge of driving on a suspended license (count 7) be dismissed, that Kennedy be sentenced to ten (10) years' imprisonment on the second-degree manslaughter charge (count 1), enhanced to twenty (20) years under the PFO 2 charge (count 6), and that he be sentenced to ten (10) years for each assault charge (counts 2-5) to run concurrently with count 1. In the order on the guilty plea, entered on December 17, 1998, the lower court correctly recited the charges to which Kennedy was pleading pursuant to the plea agreement, but mistakenly stated that the Commonwealth's recommended sentence for Kennedy was as follows:

COUNT 1. TEN (10) YEARS ENHANCED TO TWENTY (20) YEARS; COUNT 2. TEN (10) YEARS; COUNT 3. TEN (10) YEARS; COUNT 4. TEN (10) YEARS; COUNT 5. TEN (10) YEARS; COUNT 6. TEN (10) YEARS; COUNT 7. DISMISSED; COUNTS 2, 3, 4, 5

AND 6 TO RUN CONCURRENT WITH COUNT 1 FOR A
TOTAL EFFECTIVE SENTENCE OF TWENTY (20)
YEARS TO THE DEPARTMENT OF CORRECTIONS.
(emphasis added.)

In the court's final judgment and sentence on the plea of guilty entered on February 2, 1999, the court correctly recited the charges to which Kennedy had pled guilty and correctly stated the Commonwealth's recommendation as to sentencing. At the end of this order, the court stated that the defendant "shall be confined for a maximum term of twenty years to the Department of Corrections."

On January 11, 2002, Kennedy filed a motion pursuant to CR 60.02 to correct his sentence, alleging that "one sentence could not enhance another" and that the court had intended to sentence him to a total of only ten (10) years' imprisonment under the December 17, 1998, order because it had included count 6, the PFO 2, as one of the sentences which would run concurrently with count 1. It should be noted that Kennedy did not file a direct appeal nor an RCr 11.42 motion in the case. On February 5, 2002, the lower court denied the CR 60.02 motion, reiterating that Kennedy agreed to a ten-year sentence on the second-degree manslaughter charge, enhanced to twenty years by his plea to PFO 2. This pro se appeal by Kennedy followed.

Kennedy first argues that the court is bound by the Commonwealth's offer on the plea of guilty wherein the

Commonwealth agreed to recommend that the sentence on count 6 (PFO 2) run concurrently with the ten-year sentence on count 1 such that the total sentence would be ten years. In viewing the plea agreement, we see that the Commonwealth agreed to no such thing. The Commonwealth agreed to recommend that the ten-year sentence on count 1 be enhanced to twenty years pursuant to the PFO 2 (count 6) and that the sentences on counts 2-5 only would run concurrently with the sentence on count 1. Hence, this argument is devoid of merit.

Kennedy next argues that the trial court intended to sentence him to a total of only ten years by virtue of running the sentence on count 6 (PFO 2) concurrently with the ten-year sentence on count 1 in its order of December 17, 1998. We disagree.

In the order of December 17, 1998, the court explicitly states that the ten-year sentence on count 1 would be enhanced to 20 years, although the court then goes on to mistakenly state that the sentence on count 6 (the PFO 2) is ten years, which it included with those sentences to run concurrently with the sentence on count 1. At the end of that order, the court concludes that the total effective sentence would be twenty years. Clearly, the court intended that the sentence on count 1 would be enhanced by the PFO 2 (count 6)

since the PFO is the only means of enhancement contained in the order. KRS 532.080.

Being found to be a persistent felony offender is a status not an independent criminal offense. Malicoat v. Commonwealth, Ky., 637 S.W.2d 640 (1982); Hardin v. Commonwealth, Ky., 573 S.W.2d 657 (1978). A clerical error, which the trial court has the statutory authority to correct, is an error which is not the deliberate result of judicial reasoning. Cardwell v. Commonwealth, Ky., 12 S.W.3d 672 (2000). The court's inclusion of count 6 with the sentences to run concurrently with count 1 was clearly a clerical error since a PFO conviction does not result in a separate sentence thereon, but rather provides only for enhancement of an independent felony sentence, and there was no judicial reason given for including count 6 with counts 2-5. See KRS 532.080. The court's final judgment essentially corrected this clerical error by specifically stating its intent to enhance the ten-year sentence on count 1 to twenty years pursuant to the PFO 2 conviction and by not including count 6 in the offenses to run concurrently with the sentence on count 1. Accordingly, the trial court properly denied Kennedy's motion to correct the sentence.

For the reasons stated above, the judgment of the McCreary Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William H. Kennedy, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Natalie L. Lewellen
Assistant Attorney General
Frankfort, Kentucky