

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000443-MR

KENNY J. TUTTLE

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 98-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE. Kenneth Tuttle (Tuttle) appeals the trial court's order denying relief under Rules of Criminal Procedure (CR) 60.02. Tuttle filed the CR 60.02 motion to vacate his 60-year sentence for convictions on two counts of first-degree robbery and two counts of being a second-degree persistent felony offender. Finding no error, we affirm.

Tuttle's convictions stemmed from two incidents of purse snatching in Richmond, Kentucky during March of 1998.

After the latter incident, a number of onlookers chased Tuttle, caught him and held him until the police arrived. The police recovered the second victim's purse on the ground beside Tuttle. Ultimately, in September of 1998, a jury found Tuttle guilty of two counts of first-degree robbery and two counts of being a second-degree persistent felony offender.

Tuttle filed a direct appeal on the following issues: (1) the propriety of the admission of an out-of-court identification; (2) whether Tuttle was entitled to a directed verdict on one of the robbery charges; and (3) whether Tuttle was unduly prejudiced by the joint trial for both robberies. In an unpublished opinion rendered April 20, 2000, the Kentucky Supreme Court affirmed Tuttle's conviction on all grounds asserted.

On September 28, 2001, Tuttle filed a motion under CR 60.02 to vacate his 60-year sentence. In support, Tuttle alleged his sentence exceeded the maximum aggregate sentence allowed by Kentucky Revised Statutes (KRS) 532.060, KRS 532.080 and KRS 532.110. In so arguing, Tuttle cites the language of the statutes as amended effective July 15, 1998. Tuttle further argued that his maximum aggregate sentence should have been 30 years.

The trial court denied Tuttle's CR 60.02 motion. In so doing, the trial court relied on Lawson v. Commonwealth, Ky.,

53 S.W.3d 534 (2001), which it noted was directly on point with the arguments raised by Tuttle. Lawson held that, under KRS 446.110, courts are required "to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is 'certainly' or 'definitely' mitigating." Id. at 550 (quoting Coleman v. Commonwealth, 160 Ky. 87, 169 S.W. 595, 597 (1914)). In Tuttle's case, since the crimes with which the jury convicted Tuttle occurred in March of 1998, the trial court properly instructed the jury and subsequently sentenced Tuttle in accordance with the pre-amendment law.

Upon the trial court's denial of Tuttle's CR 60.02 motion, Tuttle filed a motion under CR 59.05 to vacate the trial court's order. The trial court denied Tuttle's CR 59.05 motion as well.

In this appeal, Tuttle raises the same argument he raised before the trial court -- his 60-year sentence exceeded the maximum allowable aggregate sentence under KRS 532.060, 532.080 and 532.110 -- however, Tuttle's argument fares no better before this Court. Notwithstanding the facts that this issue should have been brought on direct appeal and was not preserved for our review, on the merits, we conclude that the trial court properly sentenced Tuttle according to the

guidelines in place at the time of the commission of the robberies. See Lawson, 53 S.W.3d at 549-50.

Under KRS 532.080(5), as in effect in March of 1998, "[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." A jury convicted Tuttle of two counts of first-degree robbery and two counts of being a second-degree persistent felony offender. First-degree robbery is a Class B felony, therefore, Tuttle was sentenced pursuant to the authorized maximum terms of imprisonment for a Class A felony, the next highest degree. Under KRS 532.060(2)(a), as in effect in March of 1998, the maximum term was "not less than twenty (20) years nor more than life imprisonment." As Tuttle was sentenced to two (2) 30-year terms to run consecutively for a total of 60-years imprisonment, the aggregate of Tuttle's sentence did not exceed the maximum length, which was life imprisonment. See KRS 532.110(1)(c), as amended effective July 14, 1992 ("The aggregate of consecutive indeterminate terms shall not exceed in 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."); Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 740 (1984) ("No term of

years, regardless of length, conflicts technically with the terms of a sentencing statute which expresses no limitation on the number of years.")

For the foregoing reasons, the order of the Madison Circuit Court denying Tuttle relief under CR 60.02 is affirmed.

ALL CONCUR.

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