

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000738-MR

ROBERT POLK

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 02-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * *

BEFORE: BARBER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Robert Polk appeals that portion of a judgment and sentence of the Fulton Circuit Court which ordered a one-year sentence to be run consecutively to a twenty-year sentence, for a total of twenty-one years' imprisonment. Because the twenty-one-year sentence exceeded the maximum sentence of twenty years authorized by KRS 532.110 and KRS 532.080, we reverse in part and remand for resentencing.

On March 28, 2002, a Fulton County grand jury returned an indictment (no. 02-CR-00023) charging appellant with the following offenses: two counts of third-degree burglary (Counts I and IX); three counts of receiving stolen property - value over \$300 (Counts II, III, and IV); one count of operating a vehicle while under the influence of intoxicants (Count VI); one count of first-degree fleeing or evading a police officer (Count VII); one count of operating a motor vehicle with a suspended or revoked operator's license (Count VIII); one count of first-degree criminal mischief (Count X);¹ and being a first-degree persistent felony offender (Count V).

On August 13, 2002, appellant was tried on some of the charges in the indictment (Counts III, IV, V, VI, and VII). Count VI was dismissed. Appellant was found not guilty on Count III. Appellant was convicted of Count IV (receiving stolen property - value over \$300, Class D felony), Count VII (first-degree fleeing or evading, Class D felony), and Count V (PFO I). Appellant was sentenced to five years each for Counts IV and VII, to run consecutively, enhanced to twenty years for the PFO I. Appellant's convictions were affirmed on direct appeal by the Kentucky Supreme Court.

¹ KRS 512.020. We note that first-degree criminal mischief was incorrectly referred to in the indictment and elsewhere in the record as a Class A misdemeanor. This charge was ultimately amended to second-degree criminal mischief, which is a Class A misdemeanor. KRS 512.030.

On May 21, 2004, appellant filed a motion to dismiss the remaining counts in the indictment for failure to prosecute. The Commonwealth's response to the motion to dismiss requested that the court set a date for trial on the remaining counts. In January, 2005, the Commonwealth and appellant reached a plea agreement as to the remaining charges. In accordance with the plea agreement, on February 10, 2005, appellant pled guilty to Count II (receiving stolen property - value over \$300, Class D felony), Count IX (third-degree burglary, Class D felony), and Count X (amended to second-degree criminal mischief, Class A misdemeanor),² with the Commonwealth recommending a sentence of one year each on Counts II and IX, and 12 months on Count X. The trial court accepted the plea, and sentenced appellant to one year each on Counts II and IX, and 12 months on Count X. The trial court ordered the two one-year terms to run concurrently, for a total of one year. The trial court further ordered that the one-year sentence run consecutively to the twenty-year sentence previously imposed, for a total of twenty-one years' imprisonment. Appellant and defense counsel objected, arguing that the court was not permitted to run the one-year sentence consecutively to the twenty-year sentence previously imposed, because all of the charges were under the

² Count I (third-degree burglary) was merged with Count II. Count VIII was dismissed as merged with Count VII (fleeing or evading), for which appellant had been found guilty at trial.

same indictment and the maximum permissible sentence for appellant's convictions was twenty years. On February 10, 2005, a "Judgment and Sentence on Plea of Guilty" was entered, in which the one-year sentence was ordered to run consecutively to the twenty-year sentence previously imposed (for a total of twenty-one years' imprisonment).³ This appeal followed.

On appeal, appellant contends that the trial court erred when it sentenced him to serve the one-year sentence consecutively to the previously imposed twenty-year sentence, for a total of twenty-one years. Appellant contends that the twenty-one-year sentence exceeds the maximum of twenty years authorized by KRS 532.110 and KRS 532.080.⁴ We agree. KRS 532.110 provides, in pertinent part:

- (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime . . . the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

. . . .

- (c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would

³ The judgment and sentence entered February 10, 2005, incorrectly states that the twenty-year sentence was imposed on January 26, 2003. The record indicates that the sentence was imposed on November 14, 2002.

⁴ The Commonwealth does not dispute appellant's legal argument, and simply requests this court to adjudicate the merits of the case as required by the applicable statutory and case law.

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

KRS 532.080 provides, in pertinent part:

- (6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

. . . .

- (b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

As the highest class of crime for which any of the sentences was imposed under the indictment was a Class D felony, the maximum sentence authorized by KRS 532.110 and KRS 532.080 was twenty years.⁵ See, Young v. Commonwealth, 968 S.W.2d 670 (Ky. 1998), overruled on other grounds by, Matthews v. Commonwealth, 163 S.W.3d 11 (Ky. 2005); Dawson v. Commonwealth, 756 S.W.2d 935 (Ky. 1988); Hendley v. Commonwealth, 573 S.W.2d 662 (Ky. 1978); Tabor v. Commonwealth, 613 S.W.2d 133 (Ky. 1981). Accordingly, the trial court erred in running the one-year sentence

⁵ It was not argued that any exception to KRS 532.110(1)(c) applied.

consecutively to the twenty-year sentence for a total sentence of twenty-one years.

For the aforementioned reasons, we affirm in part, reverse in part and remand to the Fulton Circuit Court for resentencing consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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