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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000087-MR
AND
NO. 2005-CA-001115-MR
AND
NO. 2005-CA-001146-MR

ALPHONZO R. MORTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 99-CR-00936

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING APPEAL NO. 2005-CA-000087-MR;
REVERSING AND REMANDING APPEAL NO. 2005-CA-001115-MR;
AND AFFIRMING APPEAL NO. 2005-CA-001146-MR

** ** ** ** **

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Alphonzo R. Morton, *pro se*, appeals from three orders of the Fayette Circuit Court. Appeal No. 2005-CA-000087-MR is taken from a December 9, 2004, order denying his motion for jail-time credit; Appeal No. 2005-CA-001115-MR is taken from

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

a May 3, 2005, order denying his motion to compel the Commonwealth to produce a transcript of grand jury proceedings; and Appeal No. 2005-CA-001146-MR is taken from a May 12, 2005, order denying his motion to correct sentence. We affirm Appeal No. 2005-CA-000087-MR, reverse and remand Appeal No. 2005-CA-001115-MR, and affirm Appeal No. 2005-CA-001146-MR.

On September 13, 1999, appellant was indicted by a Fayette County Grand Jury upon twenty-seven counts of sexual-related offenses involving a minor. The indicted offenses ranged from rape to sexual abuse and spanned some three months. The record indicates that upon being released from prison, appellant moved in with the victim's mother and proceeded to prey upon the twelve-year old child. Following a jury trial, appellant was convicted of twenty counts of use of a minor in a sexual performance (Class B felony), two counts of second-degree sodomy (Class C felony), and four counts of second-degree sexual abuse (misdemeanor). The trial court sentenced appellant to twelve months in jail and a $500.00 fine upon each of the four counts of sexual abuse, five years on each of the two counts of sodomy, and fifteen years on each of the twenty counts of using a minor in a sexual performance. The court ordered four of the fifteen-year sentences to be served consecutively for a total of sixty years' imprisonment.

On direct appeal, appellant's conviction was affirmed by the Kentucky Supreme Court in Appeal No. 2000-SC-0507-MR, and the subsequent denial by the circuit court of a Ky. R. Crim. P. (RCr) 11.42 motion was affirmed by this Court in Appeal No. 2003-CA-000914-MR.

Appellant then filed a motion for jail-time credit. By order entered December 9, 2004, the circuit court denied appellant's motion. Appellant also filed a motion pursuant to RCr 5.16(3) seeking a transcript of the grand jury testimony. By order entered May 3, 2005, the circuit court denied the motion. Appellant finally filed a motion to correct sentence that was denied by order entered May 12, 2005. These appeals follow.

Appeal No. 2005-CA-000087

Appellant contends the circuit court committed error by denying his motion for jail-time credit. Specifically, appellant contends he is entitled to two hundred and thirty days credit toward his final sentence for time he spent in home incarceration as part of his pretrial release.

In Buford v. Commonwealth, 58 S.W.3d 490, 491 (Ky.App. 2001), this Court addressed the precise issue presented by appellant:

> [W]hile some defendants may serve all or a portion of a county jail sentence in home incarceration and be credited with that time against the service of the jail term, jail-time credit is not allowed for time spent in home incarceration where it is ordered as a form of pretrial release.

In accordance with Buford, we hold that appellant is not entitled to jail-time credit for time he spent in home incarceration as part of his pretrial release. See id. As such, we believe the circuit court properly denied appellant's motion for jail-time credit.

Appeal No. 2005-CA-001115-MR

Appellant argues the circuit court erred by denying his motion seeking a transcript of the grand jury proceedings. Specifically, appellant asserts he is entitled to a copy of the transcript pursuant to RCr 5.16(3).

RCr 5.16(3) states, in relevant part, as follows:

> [A]ny person indicted by the grand jury shall have a right to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his or her indictment or any part thereof upon payment of its reasonable cost.

It is well-established that pursuant to RCr 5.16(3), a transcript of the grand jury testimony shall be made available to an indicted defendant. RCr 5.16(3); 8 Leslie W. Abramson, Kentucky Practice, § 10:29 (4th ed. 2003). Following the clear

mandate of RCr 5.16(3), we are of the opinion the circuit court erred by denying appellant's motion pursuant to RCr 5.16 for a transcript of the grand jury testimony. Thus, we are compelled to reverse and remand this matter for the circuit to enter an order directing the Commonwealth to make a transcript of the grand jury testimony available to appellant. Appellant shall pay the reasonable cost of such transcript.

Appeal No. 2005-CA-001146-MR

Appellant maintains the circuit court committed error by denying his motion for correction of sentence.[2] Appellant specifically contends the circuit court erred by ordering four of the fifteen-year sentences to run consecutively for a total sentence of sixty years' imprisonment. Appellant raises myriad arguments attacking the validity of his sentence. Appellant claims that his sentence violates double jeopardy and that the circuit court had no authority to sentence him in contravention of the jury's recommendation. These two arguments plainly are without merit. See Blockburger v. United States, 284 U.S. 299 (1932).

[2] We treat Alphonzo R. Morton's motion for correction of sentence as having been made pursuant to Ky. R. Civ. P. (CR) 60.02. See Jackson v. Commonwealth, 344 S.W.2d 381 (Ky. 1961). We further observe that "imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to RCr [Ky. R. Crim. P.] 11.42 or CR 60.02." Myers v. Commonwealth, 42 S.W.3d 594, 596 (Ky. 2001).

Appellant also argues that his sixty-year sentence is in excess of the maximum sentence allowed by KRS 532.110(1)(c). We disagree.

It is well-established that "an offense must be . . . punished according to the provisions of law existing at the time of the commission of such offense . . . ." Kotas v. Commonwealth, 565 S.W.2d 445, 448 (Ky. 1978). In the case *sub judice*, the indictment charged appellant with committing various offenses in January, February, and March of 1998. In January through March of 1998, the version of KRS 532.110(1)(c) in effect read:[3]

> 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.

The relevant version of KRS 532.080(6)(a), in effect during this time, read:[4]

> If the offense for which he presently stands convicted is a Class A or Class B 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 twenty (20) years nor more than life imprisonment[.]

[3] This version was enacted effective July 14, 1992.

[4] This version was enacted effective April 4, 1996.

In construing these versions of KRS 532.110(1)(c) and KRS 532.080(6)(a), we are guided by the Supreme Court's decision in Hampton v. Commonwealth, 666 S.W.2d 737 (Ky. 1984). Therein, Hampton was convicted of two counts of first-degree sodomy, seven counts of first-degree sexual abuse, and one count of second-degree sexual abuse. He was sentenced to a total of 105 years' imprisonment. Hampton maintained that the sentence of 105 years violated KRS 532.110(1)(c). Specifically, he argued that "a sentence of one hundred five (105) years exceeds in maximum length a term of life imprisonment." Id. at 740. In rejecting Hampton's argument, the Supreme Court concluded:

> 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. Obviously, as a practical matter, one hundred five (105) years exceeds appellant's life expectancy so that the state cannot exact such a penalty should it be so inclined. But the sentence must conform to the limitations of the statute, regardless of inherent practical limitations. The statute does not address the practical limitations and neither should we.

Id. at 740-741.

Stated differently, the Supreme Court held that KRS 532.110(1)(c) and KRS 532.080(6)(a) did not place an upper limit upon a "term of years" sentence. In so doing, the Court particularly rejected Hampton's contention that life imprisonment operated as an upper limit upon a term of years

sentence and specifically stated the statute "expresses no limitation on the number of years." Id. at 740.[5]

As appellant was sentenced to a "term of years" (60 years), we hold that KRS 532.110(1)(c) was not violated.[6]

For the foregoing reasons, the order of the Fayette Circuit Court in Appeal No. 2005-CA-000087-MR is affirmed, the order in Appeal No. 2005-CA-001115-MR is reversed and remanded for proceedings not inconsistent with this opinion, and Appeal NO. 2005-CA-001146-MR is affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

I concur in part and dissent in part. I concur with the majority's opinion with respect to 2005-CA-0087-MR and appellant's motion for jail-time credit.

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[5] KRS 532.080(6)(a) was amended effective July 15, 1998. This amended version specifically placed an upper limit of fifty (50) years upon a term of years sentence:

> If the offense for which he presently stands convicted is a Class A or Class B 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 twenty (20) years nor more than fifty (50) years, or life imprisonment[.]

[6] We observe there was no allegation by appellant that he elected to be sentenced under the mitigating versions of KRS 532.110(1)(c) and KRS 532.080(1)(b) in effect at his sentencing as permitted by KRS 446.110. We also express no opinion as to whether appellant's "term of years" (60 years) sentence would violate the versions of KRS 532.110(1)(c) and KRS 532.080(1)(b), which were in effect at the time of appellant's sentence and which are also the relevant current versions. As before stated, the current versions of these statutes would place an upper limit of fifty years upon a term of years sentence for Class A or Class B felonies.

As to 2005-CA-1115-MR, I respectfully dissent. RCr 5.16(3) grants any person who has been indicted the right to receive a copy of the grand jury testimony. The appellant acknowledges that his trial attorney had a copy of a videotape of the grand jury proceeding prior to and in preparation for trial.[7] Furthermore, appellant went to trial, exhausted his remedies of direct appeal and post-conviction relief, and has no other post-conviction proceedings pending. I would hold, at this late stage of the proceedings, the Commonwealth has no further obligation under RCr 5.16(3).

As to 2005-CA-001146-MR, I concur in result, but write separately to express my view that the motion to correct sentence is untimely. Presumably the motion is brought under CR 60.02, since appellant had exhausted both his direct appeal and RCr 11.42 relief. However, as has been often stated by our courts, "CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42."[8] If appellant had received an incorrect sentence, certainly that fact was readily discoverable by his counsel and

[7] See Chinn v. Commonwealth, 310 S.W.2d 65, 67 (Ky. 1957) (court noting the importance of the grand jury testimony in preparing for trial, and for impeaching any witnesses at trial who appeared before the grand jury).

[8] Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

him at the time of sentencing, and should have been a matter for direct appeal.

I would affirm the Fayette Circuit Court in all respects.

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