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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001716-MR

EWELL COCHRAN — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 00-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: This is an appeal of the denial of a Kentucky Rule of Civil Procedure (CR) 60.02 motion in which Ewell Cochran (Appellant) argued that he should have been sentenced to a maximum of twenty (20) years in prison as opposed to the fifty (50) year sentence he received. The trial court denied the motion finding that the argument should have been brought on direct appeal of his conviction and that a CR 60.02 motion was not the proper avenue to pursue this

argument. The Commonwealth uses this same argument in its brief, but also argues that the 50-year sentence was proper. We find that Appellant's argument should have been brought on direct appeal. We also find that even if a CR 60.02 motion is the proper avenue for this argument, it is without merit as the 50-year imprisonment term was properly calculated. We therefore affirm the denial of the CR 60.02 motion.

Appellant was indicted for 15 counts of varying degrees of burglary. He was tried by a jury in July, 2001. He was convicted of three counts of first-degree burglary, one count of second-degree burglary, and ten counts of third-degree burglary, with each sentence to run consecutively. The jury recommended a total sentence of 96 years. The trial court, however, ultimately sentenced Appellant to 50 years.

Appellant's argument revolves around the interpretation of Kentucky Revised Statute (KRS) 532.110(1)(c) which states:

> (1) 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for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
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> ***
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> (c) 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. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years. . . .

Appellant argues that the court's use of KRS 532.080 as set forth in sub-section (c) above is unlawful in his case as KRS 532.080 deals with Persistent Felony Offenders and he was not adjudicated as such.

The Commonwealth argues that this argument should have been pursued during direct appeal. We agree.

> Appellant raises this claim pursuant to CR 60.02, which allows appeals based upon claims of error that "were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court." CR 60.02 is the codification of the common law writ of coram nobis, which allows a judgment to be corrected or vacated based "upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief." (Citations omitted).

Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998). The sentence imposed on Appellant was set forth "on the face of the record" and thus any challenge to the calculations could have been known to Appellant with the exercise of reasonable diligence. Thus, this issue was not properly brought via CR 60.02.

In any event, even if CR 60.02 was an appropriate avenue to seek relief from this sentence, Appellant's argument has no merit. The highest class of crime Appellant was convicted of was first-degree burglary, which is a Class B felony. According to KRS 532.110(1)(c), "[t]he 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." Under KRS 532.080(6)(a), a person convicted of a Class A or Class B felony shall be sentenced to a term of not less than 20 years and not more than 50 years. Since Appellant was convicted of a Class B felony, the maximum sentence he could have received was 50 years.

Appellant would have us look to KRS 532.060(2)(b) for the maximum number of years he was to receive. KRS 532.060(2)(b) states that the maximum term of imprisonment for a Class B felony is not less than 10 years and not more than 20 years. However, because Appellant was convicted on multiple counts, KRS 532.110(1)(c) becomes the relevant statute. Appellant claims that since KRS 532.080 is the Persistent Felony Offender statute, and that statute is being utilized to determine his maximum term of imprisonment, he is being declared a Persistent Felony Offender. This is not the case.

> Reference in KRS 532.110(1)(c) to KRS 532.080 is concerned with the maximum number of years imprisoned set out in the entire statute. The cross-reference between the statutes did not depend on the degree of a defendant's status as a persistent felony offender. Any other reading would produce an absurd result and be contradictory to the plainly expressed legislative intent.

Commonwealth v. Durham, 908 S.W.2d 119, 121 (Ky. 1995). Appellant was not indicted nor convicted as a Persistent Felony Offender. Just because that statute is being utilized to determine his prison sentence does not mean he was deemed or being treated as a Persistent Felony Offender. KRS 532.080 is simply a guide to

determine the possible term of imprisonment for someone who commits multiple crimes and is given multiple sentences.

For the above reasons, we affirm the denial of Appellant's CR 60.02 motion and find his 50-year term of imprisonment proper.

ALL CONCUR.

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