

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001224-MR

DWAYNE ANTHONY BRUCE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 96-CR-000344

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Dwayne Anthony Bruce appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief. For the reasons stated below, we affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

On February 8, 1996, Bruce was indicted by a Jefferson County grand jury on charges that he committed sex crimes against his adopted daughter between April 1985 and November 1994. The indictment consisted of four counts of first-degree rape, nine counts of first-degree sodomy, and one count of first-degree criminal abuse. A jury trial was held on November 12-14, 1996, and Bruce was found guilty of three counts of first-degree rape, six counts of first-degree sodomy, and one count of first-degree criminal abuse. He was acquitted of one count of first-degree rape and three counts of first-degree sodomy. The charges for which he was convicted covered a time period from April 1985 to April 1991. He was acquitted of all charges involving the time period from April 1991 to November 1994.

For the rape and sodomy charges in Counts 1 and 2 of the indictment, the jury fixed Bruce's sentences at sixty years in prison on each count. These charges related to a period of time when the victim was less than twelve years of age. The jury fixed Bruce's sentences for all other rape and sodomy charges at twenty years on each count and fixed his sentence for first-degree criminal abuse at ten years. The trial court set the sentences pursuant to the jury's verdict and ordered all sentences to run consecutively as recommended by the jury. Thus, Bruce was sentenced to a total of 270 years in prison. Bruce's conviction and sentence was affirmed by an opinion of the Kentucky Supreme Court rendered on January 22, 1998. *See* Case No. 97-SC-0085-MR.

Subsequent to his direct appeal, Bruce has filed multiple petitions for post-conviction relief, including a second Kentucky Rules of Criminal Procedure (RCr) 11.42 motion filed on April 25, 2001. We need not, however, review the procedural history of those filings in detail. We do note, however, that Bruce filed his first RCr 11.42 motion on January 20, 1999. The trial court denied the motion and this Court affirmed in Case No. 2000-CA-00930-MR. By an Opinion and Order entered February 21, 2002, the Supreme Court granted discretionary review, reversed this Court's decision, and remanded for further consideration in light of recent Supreme Court decisions. Upon remand the trial court vacated one of the twenty-year sentences, thereby reducing Bruce's aggregate sentence from 270 years to 250 years.

On December 13, 2006, Bruce filed the present post-conviction motion, which is captioned "Motion to Correct Aggregate Consecutive Terms of Imprisonment and for Re-Sentencing Pursuant to KRS 532.110(1)(c)." The motion does not identify the procedural basis for the filing, e.g., RCr 11.42 or Kentucky Rules of Civil Procedure (CR) 60.02. The motion argues that the aggregate sentencing rules contained in KRS 532.110(1)(c), KRS 532.080(6)(a), and the retroactivity provisions of KRS 446.110 require that his aggregate sentence be reduced to 50 years. On December 27, 2006, the trial court entered an order denying the motion. This appeal followed.

The arguments presented in the present motion are indistinguishable from those raised in the RCr 11.42 motion filed by Bruce on April 25, 2001. That

motion raised precisely the same issues as brought in the present motion.

Following the trial court's denial of Bruce's 2001 motion, a Panel of this Court affirmed, and concisely addressed the matter at hand. *See Bruce v.*

Commonwealth, 2001-CA-001190-MR (Jan. 25 2002). Because the opinion in that case thoroughly addressed the issues of concern in the present appeal, and is otherwise the law of the case, we adopt its discussion of the issues as follows:

On appeal, Bruce now claims that KRS 532.080, as amended in 1998, should be applied retroactively to him. We disagree. First, we believe the trial court ruled correctly that Bruce's present motion is a successive RCr 11.42 motion and that the sentencing issue should have been addressed by Bruce in his prior appeals. RCr 11.42(3) states:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

In *Gross v. Commonwealth*, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court established the procedure for appellate review in criminal cases. The Court stated that the structure for appellate review is not haphazard or overlapping. *Id.* at 856. It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware. *Id.* More recently, in *McQueen v. Commonwealth*, Ky., 948 S.W.2d 415 (1997), the Court reaffirmed the procedural requirements set out in *Gross* when it said:

A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to

him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could “reasonably have been presented” by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); *Gross v. Commonwealth*, *supra*, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceedings.

Id. at 416.

In this case, Bruce could or should have been aware of the issue concerning his sentencing under KRS 532.080 shortly after the trial in 1996. He could have raised it in his direct appeal or within his ineffective assistance of counsel claim in his first RCr 11.42 motion. Consequently, he is barred from raising this issue by way of a second RCr 11.42 motion or in the future by way of a CR 60.02 motion.

Furthermore, we note that even if Bruce had properly raised this issue he would not have been successful. In *Lawson v. Commonwealth*, Ky., 53 S.W.3d 534 (2001), the Court held that one charged with a crime prior to the effective date of the legislative changes to KRS 532.080 and 532.110 (July 15, 1998), but sentenced after the effective date was not entitled to the benefits of the newly enacted legislation. In the case before us, Bruce committed the crimes and was sentenced prior to the effective date of the legislative changes to the statutes in question. We believe his argument that he is entitled to the benefits of the statutory modifications is without merit. In *Lawson*, the Court stated:

Lawson alleges that the trial court lacked jurisdiction to enter judgment sentencing him outside the statutory limits in place at the time of trial. We recently addressed a similar issue in *Commonwealth v. Phon*, [Ky., 17 S.W.3d 106 (2000)] and held that KRS 446.110 governs the retrospective application of legislative

amendments to punishment provisions of the Kentucky Penal Code. KRS 446.110 reads:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceedings. *If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.*

At common law, when the legislature modified or repealed a statute, the courts no longer had the authority to enter any judgment relying upon the prior law. KRS 446.110 modifies this common law rule so that, unless the General Assembly specifically designates otherwise, “offenses committed against the statute before its repeal, may thereafter be prosecuted, and the penalties incurred may be enforced.” Unquestionably, therefore, the trial court had jurisdiction to sentence Lawson under the pre-amendment provisions of KRS Chapter 532. (Emphasis in original; footnotes omitted).

Lawson, 53 S.W.3d at 550.

Bruce’s motion before the trial court was a successive RCr 11.42 motion and had no legal basis.

As previously noted, Bruce did not identify in his present motion the procedural authority under which it was brought. However, as shown by the above discussion, the present motion may not be properly brought under either RCr 11.42 or CR 60.02. Moreover, as further shown, in any event, Bruce's argument likewise fails upon the merits. Accordingly, the trial court properly denied his motion for relief.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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