

RENDERED: AUGUST 28, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001214-MR

ROBERT ALLEN CARTER, JR.

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 06-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

LAMBERT, JUDGE: On March 6, 2007, Robert Allen Carter, Jr., was tried before a Whitley County jury and convicted of fifteen (15) counts of theft by failure to make a required disposition of property over \$300. The jury determined that Carter, a founding member of the Cumberland River Valley Habitat for Humanity,

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.

systematically and unlawfully converted over \$17,000 from this nonprofit organization to himself or to his friends and family.

After receiving these guilty verdicts, Carter, Carter's counsel, and the Commonwealth negotiated a deal whereby Carter would plead guilty to being a persistent felony offender in the second degree. The parties further agreed that Carter's total sentence for these various crimes would be fifteen years' imprisonment. In light of this agreement, the jury was dismissed and did not recommend a sentence for Carter's crimes.

On May 11, 2007, the trial court entered a final judgment and sentence against Carter in accordance with the parties' agreement. Upon review of the circumstances and the sentencing report, the trial court determined that imprisonment was appropriate in lieu of alternative sentencing options that were available in Carter's case. The trial court also ordered Carter to pay restitution to his victim, Cumberland River Valley Habitat for Humanity, in the amount of \$17,518.05.

On July 27, 2007, Carter filed a *pro se* motion for belated appeal with this Court. On October 12, 2007, this Court entered an order remanding the matter back to the Whitley Circuit Court for an evidentiary hearing to determine whether Carter implicitly or explicitly waived his right to appeal his convictions and sentence. After some delay, an evidentiary hearing was conducted and findings were made by the Whitley Circuit Court in compliance with this Court's directive. Upon review of the Whitley Circuit Court's determinations, this Court denied

Carter's motion for belated appeal on May 14, 2009. Thereafter, Carter filed a motion for discretionary review to the Kentucky Supreme Court.

Prior to the resolution of his *pro se* motion for belated appeal, Carter filed a *pro se* CR² 60.02 motion to set aside or modify his sentence on March 31, 2008. In this motion, Carter contended that his sentence was in violation of KRS 532.080 and unconstitutionally excessive. He further argued that the introduction of a circuit court judge's testimony at his trial violated his right to a fair trial. A response by the Commonwealth was filed on April 14, 2008, and Carter filed a "rebuttal" to the Commonwealth's response on April 17, 2008. Thereafter, on April 21, 2008, the Whitley Circuit Court denied Carter's *pro se* CR 60.02 motion to set aside or modify his sentence. An appeal to this Court from the denial of this post-conviction CR 60.02 motion now follows.

In his appeal to this Court, Carter, via counsel, sets forth two main arguments as to why his conviction and sentence should be vacated pursuant to CR 60.02: (1) unfair, prejudicial, and irrelevant evidence was admitted at his original trial in violation of the U.S. Constitution; and (2) his sentence is in violation of KRS 532.080. Carter claims the ineffective assistance of his trial counsel caused the latter error to occur at his sentencing.

This Court has held that actions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Richardson v. Brunner*, 327 S.W.2d 572,

² Kentucky Rules of Civil Procedure.

574 (Ky. 1959). In *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007), this

Court explained the nature of CR 60.02 proceedings as follows:

CR 60.02 ‘is designed to provide relief where the reasons for the relief are of an extraordinary nature.’ A very substantial showing is required to merit relief under its provisions. Moreover, one of the chief factors guiding the granting of CR 60.02 relief is the moving party's ability to present his claim prior to the entry of the order sought to be set aside.

Id. at 541-42 (internal citations omitted).

Upon careful review of the record, we conclude there are no extraordinary grounds justifying CR 60.02 relief in this case. Carter had more than ample ability and opportunity to present both of the substantive arguments presented to this Court on direct appeal. This Court has already denied Carter’s motion to file a belated appeal, concluding that Carter knowingly waived his right to pursue a direct appeal. Accordingly, we decline to address issues in this collateral proceeding which could have properly been raised in that forum had Carter exercised his right to directly appeal his convictions and sentence. *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963) (“It has long been the policy of this court that errors occurring during the trial should be corrected on direct appeal, and the grounds set forth under the various subsections of CR 60.02 deal with extraordinary situations which do not as a rule appear during the progress of a trial.”); *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908, 910 (Ky. 1967) (“CR 60.02 is not a supplemental appeal procedure.”).

Because he was *pro se* when he filed his CR 60.02 motion, Carter's counsel urges this Court to treat his motion as one for RCr³ 11.42 relief. *See Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967) (appellate courts apply relaxed procedural standards upon prisoners proceeding *pro se*). RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Carter's claim for ineffective assistance of counsel is certainly a reason which is not accessible by direct appeal. *See Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998). However, as previously discussed, his substantive claims were accessible by direct appeal and thus, even under RCr 11.42, these claims are not reviewable in this matter as they were abandoned upon the waiver of Carter's right to a direct appeal.

As Carter has not previously filed a RCr 11.42 motion nor has his time run to file such a motion, *see* RCr 11.42(10), we shall utilize our discretion to address his ineffective assistance of counsel claim, thereby treating his motion labeled as a CR 60.02 claim as one for RCr 11.42 relief. In order to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate the following: 1) counsel's performance was deficient; and 2) this deficiency resulted in actual prejudice affecting the outcome of the case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

³ Kentucky Rules of Criminal Procedure.

Carter claims his trial counsel's performance was deficient in stipulating to a fifteen-year sentence when in fact KRS 532.110(1)(c) permitted a maximum aggregate sentence of only ten years in this case. We disagree, and thus find no deficient performance by Carter's trial counsel at his sentencing.

Carter was convicted of fifteen Class D felonies and of being a persistent felony offender in the second degree. Pursuant to KRS 532.060(2)(d), the sentence for a Class D felony is not less than one but no more than five years imprisonment. Because he was also convicted of being a persistent felony offender in the second degree, Carter acknowledges that KRS 532.080(5) subjects him to sentencing for these Class D felonies at the "next highest degree than the offense for which convicted." Thus, for each Class D felony for which Carter was convicted, instead of being subject to between one and five years imprisonment, he is subject to the maximum term for Class C felonies, which is between five and ten years imprisonment for each offense. *See* KRS 532.060(2)(c).

Theoretically, Carter's maximum aggregate sentence would have been one hundred fifty years' imprisonment (fifteen convictions multiplied by the maximum ten year sentence for each of Carter's crimes). However, KRS 532.110(1)(c) limits aggregate sentences as follows: "[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. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years[.]"

Carter claims the longest extended term authorized by KRS 532.080 in this case is ten years imprisonment. He derives this from reading KRS 532.080(5) which states that a second-degree persistent felony offender “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.” However, KRS 532.080(5) applies to enhance the maximum sentence for each offense committed by a second-degree persistent felony offender. There is no indication from either the case law or the plain language of the applicable statutes that this section is also intended to limit the total aggregate sentence for defendants who are convicted and sentenced for multiple crimes.

In fact, Carter’s interpretation of KRS 532.110(1)(c) was rejected many years ago in *Milner v. Commonwealth*, 655 S.W.2d 31 (Ky. App. 1983). In *Milner*, the defendant was a first-time offender who was convicted of 105 counts of theft by unlawful taking over \$100.00, a Class D felony. *Id.* at 32. The defendant argued that since he was not a persistent felony offender in any degree, he should only be subject to the maximum sentence for the lowest status of persistent felony offenders set forth in KRS 532.080, which was persistent felony offender in the second degree. *Id.*

The *Milner* Court rejected this argument, holding that the maximum aggregate sentencing limitation set forth in KRS 532.110(1)(c) was not meant to vary based on one’s degree of offender status, or lack thereof as the case may be. *Id.* Rather, the language was meant to read as its plain language directs, “[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.” KRS 532.110(1)(c)(emphasis added).

The longest extended term authorized for Class D felonies set forth in KRS 532.080 is not less than ten but no more than twenty years’ imprisonment. *See* KRS 532.080(6). Thus, a correct reading of KRS 532.110(1)(c) indicates that Carter’s maximum aggregate sentence for his multiple convictions was limited to twenty, not ten, years’ imprisonment.

Carter argues on appeal that the maximum terms set forth in KRS 532.080(6) can not be applicable in his case since KRS 532.080(6) specifically references first-degree felony offenders, which he is not. While it is true that KRS 532.080(6) is utilized to sentence first-degree felony offenders, that is not its purpose or intent in this case. Rather, as directed by KRS 532.110(1)(c), this section may also be relied upon for the purpose of establishing an upper limitation on aggregate sentences in general. As suggested in *Milner, supra*, if we were to read KRS 532.110(1)(c) as Carter contends, this statute would be rendered useless for non-persistent felony offenders who commit and are sentenced for multiple crimes, which is surely not what the legislature intended.

Since the longest term authorized by KRS 531.110(1)(c) for Carter’s fifteen Class D felony convictions was twenty years, there was no deficient performance on the part of Carter’s counsel in agreeing to a fifteen-year sentence

for these multiple crimes. Accordingly, Carter's ineffective assistance of counsel claim is without merit.

Having set forth no grounds for relief under either CR 60.02 or RCr 11.42, we hereby affirm the Whitley Circuit Court's April 21, 2008, order denying Carter's *pro se* CR 60.02 motion to set aside or modify his sentence.

ALL CONCUR.

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