

RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000146-MR

JAMES MICHAEL WHITE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 79-CR-00242

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

HENRY, SENIOR JUDGE: James Michael White brings this appeal from orders of the Christian Circuit Court which denied his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.03. White is challenging an amended judgment

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 Kentucky Revised Statutes (KRS) 21.580.

which was entered in 1984, on two grounds: (1) that he was not given a presentencing hearing; and (2) that the judgment failed to specify that his amended sentence should be run concurrently with sentences from two earlier convictions.

In 1975, White entered a plea of guilty to third degree burglary and accessory before the fact to trafficking in a controlled substance. In accordance with his plea agreement, he was sentenced to five years for each crime, to be served concurrently.

Five years later, in 1980, White was convicted by a jury of trafficking in a controlled substance and being a persistent felony offender in the first degree under indictment number 79-CR-242. The jury recommended sentences of ten years on the trafficking count and eleven years on the PFO count. The trial court's judgment ordered the sentences to be merged for a total sentence of eleven years. The judgment was affirmed on appeal. *White v. Commonwealth*, 611 S.W.2d 529 (Ky. App. 1980).

White thereafter filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 in which he argued that the Commonwealth had failed to present any direct evidence to the jury that he was at least eighteen years of age or older at the time he committed the felonies underlying the PFO charge, and that his counsel had been ineffective for failing to move for a directed verdict on the PFO charge on that ground. According to White, the trial court agreed with

his claim of ineffective assistance of counsel and advised his attorney and the Commonwealth Attorney of the decision prior to issuing a written order granting the motion. Also according to White, his attorney met with the Commonwealth Attorney who allegedly offered to recommend that White receive a sentence of ten years on the principal offense, to run concurrently with the five-year term of imprisonment he was serving under the 1975 convictions, providing that White agreed not to request probation or to seek appellate review of the trial court's decision with respect to other claims presented in the RCr 11.42 motion.

According to White, the trial court approved the agreement and entered an amended judgment on September 1, 1984. It stated in pertinent part only that "So much of 79-CR-242 which finds James Michael White guilty of Trafficking in LSD and sentencing him to ten (10) years in the penitentiary shall stand." No mention was made in this order of the alleged underlying agreement to run the sentence concurrently with the earlier sentences, and White was never returned to the Christian Circuit Court for formal re-sentencing proceedings.

White contends that he learned for the first time in March 2008 when he saw a copy of his Department of Corrections "Resident Record Card" that the ten-year sentence imposed in 1984 amended judgment was not being run concurrently with the five-year concurrent sentences imposed under the 1975 convictions.² On October 27, 2008, White filed a motion pursuant to CR 60.03, claiming that the sentences should be run concurrently in accordance with the

² According to the "Resident Record Card," the sentences are being run consecutively under KRS 533.060(2) because the crime was committed while White was on parole.

alleged agreement. He also claims that he was entitled to a new sentencing hearing. The motion, and his subsequent motion to alter, amend or vacate, were denied. This appeal followed.

White's first argument is that the trial court erred when it refused to rule that he was entitled to a sentencing hearing on the amended 1984 judgment. He argues that the trial court erred in 1984 when it imposed the ten-year sentence without holding a sentencing hearing and without the benefit of an updated presentencing report.

Independent actions brought pursuant to CR 60.03 are subject to the same time restrictions as motions brought pursuant to CR 60.02. "Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule." CR 60.03. The only sections of CR 60.02 under which White could bring his action are (d), (e) and (f), because motions brought under sections (a), (b) and (c) must be brought not more than one year after the judgment. Motions made under (d), (e) or (f) must be made "within a reasonable time."

White has been aware for over twenty-four years that he was not provided with a new sentencing hearing prior to the entry of the amended judgment. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). Under

these circumstances, twenty-four years is simply not a reasonable time. The trial court did not abuse its discretion in denying the motion on this ground.

White's second argument is that the 1984 judgment should be amended to reflect concurrent sentences in accord with the purported agreement made among his defense counsel, the Commonwealth Attorney and the trial court, or, in the alternative, that the trial court should conduct an evidentiary hearing on this claim which he contends is not refuted by the record. The record contains a copy of the 1984 amended judgment which shows White's name and penitentiary address on the service list. The evidence in the record, therefore, indicates that White has been aware for twenty-four years that the 1984 amended judgment did not expressly impose concurrent sentencing. Motions under CR 60.02 are allowed "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." *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998) (citation and internal quotation marks omitted). Twenty-four years is not a reasonable time to wait before questioning why the amended judgment did not conform to the purported agreement.

The orders of the Christian Circuit Court denying White's CR 60.03 motion are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James Michael White, *pro se*
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky