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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001833-MR

STANLEY L. PRIMM — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CR-000559

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Stanley Primm, *pro se*, has appealed from the Jefferson Circuit Court's denial of his motion for relief under CR[1] 60.02, following the denial of his motion to reconsider the grant of his motion for post-conviction relief

[1] Kentucky Rules of Civil Procedure.

pursuant to RCr[2] 11.42. After careful review of the briefs, the record and the law, we affirm in part, reverse in part, and remand.

On February 17, 2004, Primm was indicted in Indictment No. 04-CR-000559 for six counts of theft by unlawful taking over $300.00,[3] six counts of forgery in the second degree,[4] and being a persistent felony offender in the first degree (PFO I).[5] While awaiting trial on these charges, Primm committed additional offenses and was charged with those crimes under a separate indictment. Primm ultimately entered into a negotiated plea agreement with the Commonwealth which resolved all outstanding charges from both indictments.[6]

The plea agreement set forth that in exchange for his guilty pleas, the Commonwealth would recommend Primm receive a sentence of five years' imprisonment on each count of theft and forgery to be enhanced to ten years by virtue of his status as a PFO I, with the sentences all to run concurrently for a total sentence of ten years' imprisonment under Indictment No. 04-CR-000559. The agreement further noted that Primm's ten-year sentence would be served

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[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Revised Statutes (KRS) 502.020, a Class D felony.

[4] KRS 516.030, a Class D felony.

[5] KRS 532.080.

[6] Primm was indicted in Indictment No 06-CR-001021 for theft of identity, four counts of theft by deception over $300.00, eight counts of criminal possession of a forged instrument in the second degree, and PFO I. Although Primm ultimately entered into a negotiated "package" plea agreement encompassing the charges in 04-CR-000559 and 06-CR-001021, he has not appealed from the latter conviction and sentence in this appeal.

consecutively to his ten-year sentence under Indictment No. 06-CR-001021, for a total aggregate sentence of twenty years' imprisonment. The Commonwealth agreed to recommend Primm receive probation, and Primm was to pay restitution and perform community service as a part of his sentence. The plea agreement also contained a "hammer clause" which provided that Primm would be released on his own recognizance pending final sentencing but "if Defendant does not appear for sentencing, does not participate in the preparation of the PSI, or is arrested and/or picks up any new charges, the Defendant AGREES to SERVE THIRTY (30) years."

Primm was released from custody. Almost immediately following his release, Primm was charged with additional crimes and placed under arrest. On December 4, 2006, the trial court entered a judgment of conviction and sentence. In that order, the trial court stated Primm was to serve ten years' imprisonment to run consecutively to his sentence in Indictment No. 06-CR-001021 for a total sentence of twenty years, but because he had violated the terms of the "hammer clause" contained in the plea agreement, Primm was ordered to serve thirty years' imprisonment.

On November 26, 2007, Primm filed a motion for relief pursuant to RCr 11.42 alleging his counsel had been ineffective and that his sentence was illegal under KRS 532.110(1)(c).[7] On April 9, 2008, the trial court granted

[7] KRS 532.110 states in pertinent part:

> (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a

Primm's motion finding that the record was unclear "whether defense counsel advised the Defendant that the sentence was illegal and could be set aside later." Thus, because the trial court could not clarify whether defense counsel had misled Primm as to the legality of the longer sentence, it amended Primm's sentence to twenty years' incarceration. No formal re-sentencing occurred and no amended sentencing order was entered.

Primm filed a motion to reconsider alleging he was entitled to a full evidentiary hearing with the appointment of counsel. Alternatively, Primm moved that his twenty-year sentence be probated for a period of five years. The motion was denied on July 22, 2008.

On April 28, 2009, Primm filed a motion for relief pursuant to CR 60.02(e) and (f), alleging his sentence should be amended "[a]s if there had been no allegations that the Defendant violated the terms and conditions of his release pending sentencing." He alleged the charges for which he had been arrested while he was awaiting sentencing had been dismissed and were without merit. He also

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> 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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> . . .
>
> (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[.]

alleged the "hammer clause" contained in the agreement was illegal and/or improper on its face. He contended that these facts required the court not only to amend his sentence to the twenty years agreed to in the plea bargain, but also to grant him probation as he had earlier argued in his RCr 11.42 motion. He also argued the trial court had erred in re-sentencing him *in absentia*. On May 6, 2009, the trial court denied the CR 60.02 motion. This appeal followed.

Before this Court, Primm essentially advances three arguments in urging reversal. First, he contends the thirty-year sentence he received under the "hammer clause" was illegal, and the trial court erred in failing to find his counsel was ineffective for advising and allowing him to enter into such an agreement. Next, he argues the trial court erred in failing to grant him an evidentiary hearing on his RCr 11.42 motion. Finally, he contends the trial court erred in amending his sentence without formally re-sentencing him in open court.

Primm first contends the provisions of the "hammer clause" were illegal as the clause called for a sentence which was outside the maximum allowed by statute. He argues that "hammer clauses" are wholly without statutory support and are thus always void, regardless of whether the sentence called for therein violates any statutory maximums. He contends his counsel was ineffective for advising him to enter into a void sentencing agreement. Primm also argues the trial court should have specifically found the "hammer clause" to be illegal, his counsel was ineffective, and granted his motion to withdraw his guilty plea and proceed to trial. We disagree.

In the recent case of *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), our Supreme Court engaged in a detailed discussion regarding the use of "hammer clauses." McClanahan was indicted for multiple offenses, all of which were Class C and D felonies. He ultimately entered into plea agreements covering all of the charges in which he agreed to a total sentence of ten years' imprisonment. However, the plea agreements contained "hammer clauses" whereby McClanahan would serve a forty year sentence if he violated the terms of his pre-sentence release or failed to appear for sentencing. He did not appear for his final sentencing and a warrant was issued for his arrest.

McClanahan was found and arrested. When he appeared for sentencing, the trial court imposed an enhanced punishment of thirty-five years' imprisonment pursuant to the "hammer clause." The trial court noted that this represented the maximum aggregate sentence of the individual crimes for which McClanahan stood convicted and that to impose the forty-year sentence would be outside the statutory range of punishments.

The Supreme Court reversed McClanahan's sentence, finding that pursuant to the mandates of KRS 532.110(1)(c), the maximum aggregate sentence which McClanahan could receive was twenty years. It found application of the terms of the "hammer clause"—even as reduced by the trial court—resulted in an illegal sentence length and the trial court erred in failing to reject the agreement. However, the opinion went on to state:

> [w]e neither endorse nor condemn the general use of the "hammer clause" in a plea agreement. Except for *Jones* [*v. Commonwealth*], 995 S.W.2d 363 [(Ky. 1999)], we have had no opportunity to examine the concept. The sentencing extremes, ten years versus forty years, posited in this case may not be representative of a typical "hammer clause." The making of a plea agreement is a matter between the accused and the Commonwealth. Our disapproval of the specific plea agreement involved here arises from the fact that its acceptance by the court resulted in the imposition of an illegal sentence. A "hammer clause" which remains within the legislatively authorized sentencing ranges remains an appropriate plea bargaining tool subject to the trial court's review and exercise of its independent discretion as described in the following section of this opinion.

Id. at 700-01. Based on this opinion, we reject Primm's contention that all "hammer clauses" are inherently illegal.

Further, we are convinced that the "hammer clause" contained in Primm's plea agreement was proper. He stood charged under two separate indictments, each of which contained a charge of being a PFO I. Pursuant to KRS 532.080, the maximum sentence allowable under each indictment was twenty years. The later indictment charged offenses which were committed while Primm was awaiting trial on the earlier charges. Pursuant to KRS 533.066(3) the sentences were required to be run consecutively to one another. Thus, by operation of law, the maximum aggregate sentence which could have been imposed was forty years, and the thirty-year sentence called for in the "hammer clause" was within the statutorily maximum allowable sentencing range. We therefore conclude the trial court did not err in failing to find the provisions of the plea

agreements were void. Likewise, we are unable to conclude there was any ineffectiveness in Primm's counsel advising or allowing him to enter into the plea agreements as nothing therein was improper.

Clearly, Primm was in violation of the terms of the "hammer clause" when he was arrested on new charges shortly after his release. The trial court would have been well within its discretion to enhance his sentence based on this provision of the agreement. He received a windfall when the trial court imposed only a twenty-year sentence rather than the thirty years he could have received based on his violation of the "hammer clause." Primm's sentence of twenty years was exactly what he bargained for and he cannot now be heard to complain. His contention that he should have been allowed to revoke his guilty plea is without merit and warrants no further discussion. In a similar vein, his allegation that he should have been granted probation is negated by his violation of the terms of the agreement. There was no error.

Next, Primm argues the trial court erred in failing to convene an evidentiary hearing on his RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion; there must be an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth,* 854 S.W.2d 742 (Ky. 1993). "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)). Our review indicates

all of Primm's allegations are clearly refuted on the face of the record, and thus the trial court did not err in refusing to hold an evidentiary hearing.

Finally, Primm argues the trial court erred in amending his sentence without holding a formal sentencing hearing in open court. The Commonwealth concedes the trial court erred and we agree. Pursuant to RCr 8.28, absent an express waiver, a defendant *shall* be present at all critical stages of the trial including "the imposition of the sentence." The wording of this rule is mandatory rather than permissive. Our review of the record indicates the trial court amended Primm's sentence via written order without any formal re-sentencing in open court. To this he was entitled and we must ensure that the rules are followed lest we risk their erosion. Therefore, we must remand this matter for the limited purpose of holding a formal re-sentencing hearing in open court.[8]

For the foregoing reasons, the Jefferson Circuit Court's denial of Primm's CR 60.02 motion is affirmed. The matter is remanded for the limited purpose of convening a sentencing hearing.

ALL CONCUR.

[8] Although we do not believe Primm's punishment will be changed by having a sentencing hearing, we note that the trial court would be within its discretion to impose a greater sentence based upon our holding that the "hammer clause" contained in the plea agreement was not improper.

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