

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001966-MR

THOMAS LEE CRUM

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 87-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Thomas Lee Crum appeals *pro se* from a Nelson Circuit Court order denying his motion for resentencing pursuant to CR¹ 60.02. We affirm.

In August 1987, a jury found Crum guilty of the following charges: first-degree burglary, second-degree assault, theft over one hundred dollars, three

¹ Kentucky Rules of Civil Procedure.

counts of kidnapping, first-degree rape, and of being a first-degree persistent felony offender. The jury recommended sentences of 25 years, 20 years, 20 years, three terms of 50 years, and 100 years, respectively. While the jury verdict did not specify how the sentences would be run, the trial court ordered the sentences to run consecutively for a total term of 315 years. The final judgment was affirmed by the Supreme Court of Kentucky on February 16, 1989. *Crum v. Commonwealth*, (Ky. 1989) (87-SC-00831-MR).

Over twenty-one years later, Crum filed a motion for resentencing pursuant to CR 60.02 and RCr² 10.26, arguing the trial court had erred in imposing consecutive sentences, and that his sentence exceeded the maximum aggregate of consecutive sentences allowed by statute. He also filed a supplement arguing his trial counsel was ineffective for failing to tender instructions requiring the jury to recommend consecutive or concurrent sentences. The trial court denied the motion and this appeal followed.

Crum argues he was entitled to relief under CR 60.02 because the jury was not instructed on consecutive or concurrent sentencing, and because his total sentence of 315 years exceeded the statutory maximum. We review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To warrant relief, the trial court's decision must have been "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A movant must

² Kentucky Rules of Criminal Procedure.

demonstrate that “he is entitled to this special, extraordinary relief.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court’s decision absent a “flagrant miscarriage of justice.” *Id.* at 858.

The trial court denied Crum’s motion on the grounds that it was not filed within a reasonable time as required by CR 60.02(e) and (f), and that his arguments were barred as he could have raised them in his direct appeal or in a motion pursuant to RCr 11.42.

Crum argues his motion was timely because errors in sentencing can be raised at any time. In his motion to the trial court, Crum argued primarily that his counsel failed to tender instructions requiring the jury to make a recommendation regarding whether the sentences should be run consecutively or concurrently. This allegation of error does not, therefore, concern an error in sentencing, but rather an allegation of ineffective assistance of counsel that could have been brought pursuant to RCr 11.42. Similarly, any error in the jury instructions could have been raised on direct appeal.

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. . . . The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. . . . CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997) (internal citations omitted).

Insofar as Crum argues the calculation of his sentence was an error on the part of the trial court, the argument may be heard under CR 60.02 because “[s]entencing is jurisdictional. Subject matter jurisdiction may be raised at any time and cannot be consented to, agreed to, or waived by the parties.” *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1997). Crum contends that under KRS³ 532.110(1)(c) and KRS 532.080(6), the maximum sentence he should have received was fifty years for the first degree burglary conviction, and that the sentences for the other convictions should have been run concurrently with it for a total sentence of fifty years.

KRS 532.080(6)(a) currently provides that a first-degree persistent felony offender convicted of a Class A or Class B felony shall be sentenced to “an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than fifty (50) years, or life imprisonment, or life imprisonment without parole for twenty-five (25) years for a sex crime committed against a minor[.]” At the time Crum committed the crimes, however, KRS 532.080(6) (a) provided for “an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than life imprisonment[.]” Thus, no maximum sentence of fifty years was in effect at that time.

³ Kentucky Revised Statutes.

Although there is currently a seventy year cap on consecutive sentences, that measure took effect on July 15, 1998; it was not in place when Crum was sentenced. *Cummings v. Commonwealth*, 226 S.W.3d 62, 67, n. 3 (Ky. 2007). At that time, there was no upper limit on the term of years for a Class A felony, or on the length of aggregated sentences. As the Supreme Court of Kentucky stated,

KRS 532.110(1)(c), which deals with concurrent and consecutive terms of imprisonment, when read in tandem with KRS 532.080, Persistent Felony Sentencing, indicates that there is no upper limit on the term of years sentenced for a Class A felony. Consequently, there is no upper limit on the length of the aggregate of the consecutive indeterminate terms.

Violett v. Commonwealth, 907 S.W.2d 773, 777 (Ky. 1995).

Moreover, the trial court's decision to run the sentences consecutively without seeking a recommendation from the jury did not result in an illegal sentence. Even if the jury instructions had provided for such a recommendation, the trial court was not bound to follow it. "A jury recommendation regarding whether sentences shall be served concurrently or consecutively pursuant to KRS 532.055(2) is not mandatory or binding on a trial judge." *Nichols v. Commonwealth*, 839 S.W.2d 263, 265 (Ky. 1992).

The order denying Crum's CR 60.02 motion is therefore affirmed.

ALL CONCUR.

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