

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001335-MR

JAMES C. SAVAGE

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 07-CR-00174

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: James Savage appeals from the Muhlenberg Circuit Court's July 16, 2013 order denying his motion to vacate the court's judgment and final sentence on grounds that it imposed an illegal sentence. We affirm.

Savage pleaded guilty to first-degree robbery, a Class B felony, Kentucky Revised Statute (KRS) 515.020; possession of a handgun by a convicted

felon; and being a first-degree persistent felony offender (PFO I). The Commonwealth voluntarily dismissed “Count 2,” theft by unlawful taking, \$300 or more, for lack of sufficient evidence. By judgment entered in 2008, and subsequently amended on February 3, 2009,¹ the circuit court sentenced Savage to “confinement in the penitentiary for twenty (20) years on Count 1, enhanced by five (5) years on the persistent felony offender in the first-degree status, for a total of twenty-five years on **Count 1** [first-degree robbery], and for five (5) years on **Count 3** [possession of a firearm by a convicted felon, KRS 527.040], all to be served concurrently.” (R. at 131) (emphasis added).

In the meantime, Savage filed a motion to vacate his conviction under Kentucky Rules of Criminal Procedure (RCr) 11.42 alleging ineffective assistance of counsel. The circuit court denied Savage’s motion, and this Court affirmed the circuit court’s decision. *Savage v. Commonwealth*, 2009-CA-000353-MR, 2010 WL 1926382, at *1 (Ky. App. May 14, 2010).

Without citation to any procedural rule, Savage again moved to vacate the amended judgment and final sentence, claiming the five-year sentence for the PFO I charge was illegal and ran afoul of KRS 532.080. The circuit court denied Savage’s motion. This appeal followed.

¹ The circuit court explained in its amended order that it made a clerical error when identifying the count numbers in its original Judgment and Final Sentence, and was thus amending the final judgment to reflect the proper count numbers. Kentucky Rules of Civil Procedure (CR) 60.01.

On appeal, Savage faults the circuit court for imposing an illegal five-year sentence for the “offense” of being a PFO I in violation of KRS 532.080.

That statute states, in pertinent part:

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section.

. . . .

(6) A person who is found to be a [PFO I] shall be sentenced to imprisonment as follows: (a) If the offense for which he presently stands convicted is a Class A or Class B felony . . . [the defendant] 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[.]

KRS 532.080(1), (6). We agree with Savage’s assessment that “[c]onviction as a persistent felony offender (PFO) is not a charge of an independent criminal offense but rather a particular criminal status” for sentencing purposes. *Owens v.*

Commonwealth, 329 S.W.3d 307, 318 (Ky. 2011). Thus, KRS 532.080 does not give the circuit court leeway to impose a separate, independent sentence for a PFO I status. Instead, “[i]f a jury finds a defendant is [or a defendant pleads guilty to being] a PFO, the defendant’s sentence for the underlying offense is **enhanced**.”

Commonwealth v. Derringer, 386 S.W.3d 123, 126 (Ky. 2012) (emphasis added);

Kroth v. Commonwealth, 737 S.W.2d 680, 681 (Ky. 1987) (“Once the status of

persistent felony offender has been established, the defendant can receive enhanced punishment on each and every subsequent felony.”).

A review of the circuit court’s amended judgment and sentence reveals it fully complied with KRS 532.080. Contrary to Savage’s argument, he did not receive a standalone sentence for the PFO I count. Instead, the circuit court, as authorized by KRS 532.080, enhanced the twenty-year sentence for first-degree robbery by five years due to Savage’s status as a PFO I, thereby imposing a total sentence of twenty-five years’ imprisonment for the first-degree robbery conviction. The circuit court certainly did not, as suggested by Savage, run a five-year sentence for PFO I consecutively to the twenty-year sentence for first-degree robbery. Savage misinterprets the circuit court’s amended judgment and sentence.

The sentence imposed upon Savage does not run afoul of KRS 532.080. We affirm the Muhlenberg Circuit Court’s July 16, 2013 order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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