

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001368-MR

LARRY PENCE

APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 10-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JONES, AND MAZE, JUDGES.

COMBS, JUDGE: Larry Pence appeals the order of the Ohio Circuit Court which denied the motion for relief that he filed pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 60.02(f). After our review of his case, we affirm.

On May 25, 2011, Pence pleaded guilty to driving under the influence (DUI), fourth offense; driving a motor vehicle with a suspended license, third

offense; and being a persistent felony offender in the first degree. He received a sentence of ten-years' incarceration.

On April 5, 2013, Pence invoked RCr 60.02(f) and filed a motion to correct his sentence. The trial court denied the motion on May 13, 2013. This appeal followed.

RCr 60.02 is a vehicle for extraordinary post-conviction relief. "It is for relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Pence brings his appeal under RCr 60.02(f), which provides relief based on "any . . . reason of an extraordinary nature. . . ."

Pence first argues that the evidence was insufficient to support a conviction for first-degree persistent felony offender (PFO). He claims that his criminal record did not support the indictment. A person is guilty of being a PFO in the first degree if he has previously been convicted of two or more felonies. Kentucky Revised Statute[s] (KRS) 532.080(3).

In Pence's indictment, the Commonwealth cited three previous felonies in Pence's record – a robbery conviction in 1988, a criminal conviction and second-degree PFO in 1997, and a conviction for DUI fourth offense in 2007. Pence contends that the 1988 and 1997 convictions are "merged" for the purposes of calculating PFO eligibility. Although Pence cites *Gray v. Commonwealth*, 979 S.W.2d 454 (Ky. 1998) to support his merger argument, *Gray* has been overruled and is no longer good law. *Morrow v. Commonwealth*, 77 S.W.3d 558 (Ky. 2002).

Therefore, these two convictions alone are sufficient to support Pence's status of first-degree PFO.

Additionally, Pence contends that it was a violation of double jeopardy to rely on his 2007 DUI conviction to support both the offense of DUI fourth offense and the PFO. This argument has no merit. The crime for which he was convicted in both instances was driving under the influence, fourth *or subsequent* offense - a felony. Pence does not present any authority for his claim that *multiple* commissions of the same crime are exempt from PFO calculations. Double jeopardy serves as a protection only from multiple *prosecutions* of the same crime – not for serial prosecutions of multiple crimes. The PFO enhancement was appropriate.

Next, Pence claims that the court erred in imposing a fine and court costs. However, he did not raise this issue in his motion to the trial court. We are unable to review an issue that is presented for the first time on appeal without the trial court's having had an opportunity first to correct the alleged error. *Grundy v. Commonwealth*, 25, S.W.3d 76, 84 (Ky. 2000).

Finally, Pence argues that he was not provided his entire record for his appeal. The basis for his contention is that the record does not include a motion to withdraw his plea. He alleges that his motion to withdraw plea was entered on July 6, 2012, which was one week prior to his sentencing. We reviewed the recording of Pence's sentencing hearing, and he did not raise the issue of a motion

to withdraw his plea. No additional evidence in the record can be found to support the allegation that the motion was filed.

Accordingly, we conclude that the trial court did not err in denying Pence's motion. We affirm the Ohio Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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