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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002085-MR

LORENZO ABAYNEY BARNES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 12-CR-00486

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Lorenzo Abayney Barnes appeals the Fayette Circuit Court's judgment convicting him of second-degree assault under extreme emotional disturbance and of being a second-degree persistent felony offender (PFO-2nd). After a careful review of the record, we reverse the imposition of restitution set forth in the Fayette Circuit Court's judgment because it was imposed in violation

of Barnes's due process rights. We remand for further proceedings to determine the issue of restitution. The remainder of the Fayette Circuit Court's judgment is affirmed because the circuit court did not err in ordering Barnes's sentences in two separate actions to run consecutively for an aggregate sentence greater than twenty years.

I. FACTUAL AND PROCEDURAL BACKGROUND

Barnes was indicted in circuit court case number 11-CR-711 on the following charges: first-degree trafficking in a controlled substance; tampering with physical evidence; and PFO-2nd.¹ While on bond and awaiting trial on those charges, Barnes was arrested and indicted in the present case (circuit court case number 12-CR-486) on the following charges: second-degree assault; fourth-degree assault, domestic violence; and PFO-2nd. Two months after being indicted in the present case (circuit case number 12-CR-486), a jury trial was held on Barnes's charges in the initial case (circuit case number 11-CR-711), and he was convicted of first-degree trafficking in a controlled substance; tampering with physical evidence; and PFO-2nd. He was sentenced in circuit court case number 11-CR-711 to a total of twenty years of imprisonment.

In the present case, Barnes moved to clarify the maximum aggregated sentence he could receive for the two indictments, pursuant to the Fifth and

¹ We do not have the record from circuit court case number 11-CR-711 before us, but the parties do not dispute the order of events, *i.e.*, that while Barnes was on bond and awaiting trial in 11-CR-711, he was arrested and indicted on the charges in the present case (circuit court case number 12-CR-486). They also do not dispute that Barnes was convicted and sentenced in case number 11-CR-711 before he was convicted and sentenced in the present case (case number 12-CR-486).

Fourteenth Amendments of the United States Constitution and *Blackburn v. Commonwealth*, 394 S.W.3d 395 (Ky. 2011). In that motion, Barnes argued that “[i]n this case, as in *Blackburn*, . . . the aggregate of consecutive indeterminate sentences shall not exceed twenty (20) years.” The circuit court held a hearing on the matter and ultimately ordered “that any sentence the Defendant might receive in 12-CR-486 (up to 20 years) is required to run consecutively to 11-CR-711 and may exceed a total of 20 years.”

Barnes petitioned to enter a conditional guilty plea in 12-CR-486 (the present case), retaining the right to appeal the court’s ruling on his *Blackburn* motion. Specifically, he moved to enter a conditional guilty plea if the second-degree assault charge was amended to second-degree assault under extreme emotional disturbance and if the fourth-degree assault charge was dismissed. He further moved to enter his conditional guilty plea to the PFO-2nd charge.

During the plea colloquy, the Commonwealth moved to amend the second-degree assault charge to second-degree assault under extreme emotional disturbance, and it recommended the sentence for this charge to be one year of imprisonment, enhanced to seven years due to the PFO-2nd charge. The Commonwealth also moved to dismiss the fourth-degree assault charge, and it stated that restitution was “to be determined.” The circuit court accepted Barnes’s conditional guilty plea pursuant to the terms agreed upon by the parties.

During a subsequent hearing, a new presentence report was ordered. Additionally, defense counsel stated during this hearing that he had an issue with

the restitution, but he was hoping to get that issue cleared up before the next hearing so that a restitution hearing would be unnecessary.²

During the sentencing hearing, the Commonwealth informed the court that Barnes needed to pay restitution and the amount of restitution that he should be ordered to pay. Barnes was sentenced to one year of imprisonment for the second-degree assault under extreme emotional disturbance conviction, which was enhanced to seven years of imprisonment due to his conviction for PFO-2nd. The court also ordered this sentence to run consecutively to any prior felony sentence Barnes had to serve. The court dismissed the fourth-degree assault charge against Barnes. The circuit court further ordered Barnes to pay restitution in the amount of \$8,429.62 through the Fayette Circuit Clerk's Office.

Barnes now appeals, contending that: (a) the circuit court erred in ordering his sentences in case numbers 12-CR-486 and 11-CR-711 to run consecutively for an aggregate sentence greater than twenty years; and (b) the circuit court erred when it ordered Barnes to pay \$8,429.62 in restitution.

II. ANALYSIS

A. CONSECUTIVE SENTENCES

Barnes first argues that the circuit court erred in ordering his sentences in case numbers 12-CR-486 and 11-CR-711 to run consecutively for an aggregate sentence greater than twenty years. Barnes alleges that the circuit court “adopted the Commonwealth’s argument that, because Barnes committed new

² However, no agreement between the parties regarding restitution is in the record before us.

offenses while awaiting trial, his situation fell under KRS³ 533.060(3) and consecutive sentences were mandatory.” Barnes contends that the circuit court reached the wrong conclusion because when he entered his conditional guilty plea in the present case (*i.e.*, circuit court case number 12-CR-486), he was no longer awaiting trial in circuit court case number 11-CR-711.

Barnes acknowledges that this issue was only partially preserved for appellate review. He asserts that the term “awaiting trial” in KRS 533.060(3) does not include a time period beyond sentencing and that although this part of his claim was not preserved, it is reviewable on appeal as a “sentencing issue” because the court’s holding was contrary to statute, and such sentencing issues are jurisdictional. Thus, Barnes contends that we can review this claim even though it was not entirely preserved for our review.

Barnes’s claim that the term “awaiting trial,” as used in KRS 533.060(3), does not include a time period beyond sentencing and that the circuit court violated the statute by inappropriately applying it to his case is a “sentencing issue” as described in *Jones v. Commonwealth*, 382 S.W.3d 22, 28 (Ky. 2011). Consequently, we will review it even though it is not preserved for our review.

Kentucky Revised Statute 533.060(3) provides:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently

³ Kentucky Revised Statute.

with confinement for the offense for which the person is awaiting trial.

In *Cosby v. Commonwealth*, 147 S.W.3d 56 (Ky. 2004), the issue was whether the phrase “awaiting trial” in KRS 533.060(3) could be “construed to mean ‘awaiting sentencing.’” *Cosby*, 147 S.W.3d at 58. While *Cosby* was free on bond while awaiting sentencing, he committed another crime. He contended that the phrase “awaiting trial” did not mean “awaiting sentencing” and, therefore, that the circuit court was not required to impose consecutive sentences.

In *Cosby*, the Kentucky Supreme Court explained the rules of statutory construction as follows:

General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy. No single word or sentence is determinative, but the statute as a whole must be considered. In addition, [w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Moreover, [i]n construing statutory provisions, it is presumed that the legislature did not intend an absurd result.

Cosby, 147 S.W.3d at 58-59 (internal quotation marks and citations omitted). The Court then found that there was “no doubt that, with regard to KRS 533.060(3), it was the General Assembly’s intent to punish persons who were convicted of committing a subsequent crime or crimes while awaiting trial more severely by eliminating the possibility of concurrent sentences.” *Id.* at 59 (internal quotation marks and citation omitted). The Supreme Court concluded that it could not agree

“with Cosby’s position that the phrase ‘awaiting trial’ cannot be construed to include ‘awaiting sentencing.’” *Id.*

Barnes’s allegation that the term “awaiting trial,” as used in KRS 533.060(3), does not include a time period beyond sentencing is misplaced. Barnes bases his entire argument on the two words, “awaiting trial,” but he neglects to read those words in the context in which they are written in KRS 533.060(3). In the statute, the words “awaiting trial” are used to distinguish between the crimes committed previously, for which the defendant is “awaiting trial,” and the crimes the defendant *committed while* “awaiting trial” on the prior offense. Barnes appears to misconstrue the statute, contending that because he had been sentenced for the prior crimes in circuit court case number 11-CR-711 before he was convicted and sentenced for the crimes in the present case, then KRS 533.060(3) does not apply to him. However, applying the plain meaning of the language in KRS 533.060(3) to the facts of Barnes’s case, we conclude that because Barnes committed the offenses in the present case while he was awaiting trial for the offenses in case number 11-CR-711 and then subsequently entered a guilty plea to the offenses in this case that were committed while he was awaiting trial in case number 11-CR-711, the sentence imposed for the offenses in the present case “shall not run concurrently” with his confinement for the offenses for which he was awaiting trial in case number 11-CR-711. Thus, the sentences in 11-CR-711 and the present case are required to run consecutively, pursuant to KRS 533.060(3).

Barnes also asserts that in the circuit court, defense counsel “argued that, pursuant to KRS 532.110 and *Blackburn*[, 394 S.W.3d at 395], Barnes’s aggregate sentence could not exceed [twenty] years because both cases only involved Class C or Class D felonies.” Barnes’s argument is again misplaced.

Kentucky Revised Statute 532.110(1)(c) provides as follows:

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a 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 . . . [t]he 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.

In *Noakes v. Commonwealth*, No. 2011-CA-000635-MR, 2012 WL 4335931, *1 (Ky. App. Sept. 21, 2012) (unpublished), *disc. rev. denied* (Ky. May 15, 2013),⁴ Noakes was sentenced to five years of imprisonment for a crime he committed while awaiting trial on murder charges, and his five-year sentence was ordered to run consecutively to the life sentence he received for the murder conviction. He argued that the aggregate sentence violated KRS 532.110(1)(c). This Court noted that “KRS 532.110(1)(c) and KRS 532.080 only apply ‘to sentences rendered in the same action for separate offenses.’” *Noakes*, No. 2011-CA-000635-MR, 2012 WL 4335931, at *3 (quoting *Clay v. Commonwealth*, No.

⁴ We cite this unpublished case pursuant to Kentucky Rule of Civil Procedure 76.28 (4)(c).

2009-SC-000012-MR, 2010 WL 2471862, *1 (Ky. June 17, 2010) (unpublished)).

This Court stated that Noakes “was convicted and sentenced in separate trials and for separate offenses, though one offense was committed while awaiting trial for the other.” *Id.* The Court then held that “the circuit court properly applied KRS 533.060(3) as requiring consecutive sentences.” *Id.*

Pursuant to the reasoning in *Noakes*, because Barnes’s sentences that were run consecutively to each other and that exceed twenty years were rendered in separate actions (*i.e.*, in circuit court case numbers 11-CR-711 and 12-CR-486), KRS 532.110(1)(c) and KRS 532.080 do not apply to the present case. We also hold the circuit court properly found that KRS 533.060(3) requires consecutive sentences in this case, as explained in *Noakes*.

Further, contrary to Barnes’s argument, *Blackburn* is distinguishable from his case. In Blackburn’s case, the two sentences that were ordered to be served consecutively both stemmed from offenses Blackburn committed while on parole, and the Kentucky Supreme Court discussed the interplay between KRS 533.060(2) and KRS 532.110(1)(c). The Kentucky Supreme Court held that, pursuant to KRS 533.060(2) (which is a different section of KRS 533.060 than the one applicable in the present case), when a felon parolee commits other felony offenses while out on parole, the consecutive sentences he is ordered to serve for the multiple subsequent offenses cannot exceed the maximum aggregate duration permitted by KRS 532.110(1)(c). *Blackburn*, 394 S.W.3d at 401. However, as noted above, *Blackburn* concerned KRS 533.060(2), and Barnes’s case involves

KRS 533.060(3), so *Blackburn* is distinguishable on that basis. Additionally, in Barnes's case, the sentences ordered to be served consecutively were the ones for the offense he initially committed and for the offense he committed while out on bond awaiting trial on the first offense, which differs from the situation in *Blackburn*, where the two consecutive sentences both stemmed from offenses Blackburn committed while on parole. Therefore, Barnes's arguments concerning *Blackburn* and KRS 532.110(1)(c) lack merit, and the circuit court did not err in ordering Barnes's sentences in 11-CR-711 and 12-CR-486 to run consecutively for an aggregate sentence greater than twenty years.⁵

B. RESTITUTION

Barnes next alleges that the circuit court erred when it ordered Barnes to pay \$8,429.62 in restitution. He asserts that “[n]either the petition to enter a conditional guilty plea nor the judgment on the conditional guilty plea listed restitution as a term of the guilty plea. . . . Neither the person receiving restitution nor the reasons for the restitution were ever identified.” Barnes also states that no restitution hearing was ever held in the circuit court. He acknowledges that this

⁵ We note that Barnes also cites *Blackburn v. Commonwealth*, Nos. 2012–CA–000640–MR, 2012–CA–000641–MR, 2012–CA–000642–MR, 2013 WL 2450498, *1 (Ky. App. Feb. 15, 2013), which he refers to as “*Blackburn II*,” in his brief. Barnes cites *Blackburn II* and he states that in that case, this Court “affirmed the trial court’s order requiring the sentences to run consecutively for more than 20 years.” Barnes asks this panel to reconsider this Court’s ruling in *Blackburn II*. However, “[i]t is our policy that a decision by a panel of this court may only be reversed by the entire court sitting *en banc*.” *Monyhan v. Kentucky Unemployment Ins. Com’n*, 709 S.W.2d 837, 837 (Ky. App. 1986). Therefore, we decline to reconsider the Court’s ruling in *Blackburn II*. Regardless, however, we agree with the *Blackburn II* decision.

issue is not preserved for our review, but he asks us to review it under RCr⁶ 10.26 for palpable error.

Kentucky Rule of Criminal Procedure 10.26 provides as follows: “A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

[T]he requirement of “manifest injustice” as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .

[The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks and citation omitted).

In *Jones*, 382 S.W.3d at 32, the Kentucky Supreme Court held the following regarding restitution:

[W]e conclude that when the issue of restitution under KRS 532.032 has not been resolved by an agreement between the Commonwealth and the defendant, constitutional due process requires an adversarial hearing that includes the following protections:

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution

⁶ Kentucky Rule of Criminal Procedure.

claimed and of the nature of the expenses for which restitution is claimed; and

- a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and

- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and

- the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

Upon reviewing the written record, we found no agreement between the parties concerning the issue of restitution. Therefore, an adversarial hearing regarding restitution and in accord with the requirements set forth in *Jones* was necessary, yet it does not appear that such a hearing was held. Consequently, the minimal due process requirements concerning restitution were not met, resulting in a manifest injustice, meaning that the circuit court committed palpable error in awarding restitution without first conducting a hearing on the issue of restitution.

Accordingly, we reverse the imposition of restitution set forth in the Fayette Circuit Court's judgment and remand for further proceedings to determine the issue of restitution. The remainder of the Fayette Circuit Court's judgment is affirmed.

TAYLOR, JUDGE, CONCURS.

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