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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001843-MR

FREDERICK R. MILLER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 13-CR-01310

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

COMBS, JUDGE: Frederick R. Miller, Appellant, brings this direct appeal from his trial in the Fayette County Circuit Court in which he was convicted of escape in the second degree and of being a persistent felony offender in the first degree. After our review of the record and the applicable law, we affirm.

Relevant Facts

On October 14, 2013, Miller, while incarcerated on robbery charges, received a "day pass" to attend the funeral of a family friend. The pass permitted him to leave the detention center at 9:00 a.m. and required him to return no later than 2:00 p.m. on the same day. The detention center allowed inmates a one-hour grace period. After that period expired, the center would issue an "Attempt to Locate" (ATL) for that inmate.

When Miller left the detention center, he walked to his parents' house. Miller testified that he got into an argument with his father and left the house. He then asked a woman to give him a ride back to the detention center, but she declined to do so when she discovered that he was late returning.

When Miller failed to return to the detention center by 4:00 p.m., Sergeant Adam Moss issued an ATL for Miller. Officer Cliff Godbold responded to the ATL. After questioning people in the neighborhood, Officer Godbold discovered that Miller was wearing jeans and a maroon sweatshirt. Officer Joe Oliver spotted Miller on the railroad tracks pursuant to the previously provided description. Officers Godbold and Oliver began running after Miller by foot, and Officer Oliver testified that he called out "stop, police" several times. Miller eventually stopped at an abandoned building, where Sergeant Alan Culver was waiting in his police cruiser. Sergeant Culver ordered Miller to the ground, and Officer Godbold and Sergeant Moss handcuffed him.

Miller was charged with escape in the second degree, fleeing or evading police in the first degree, and being a persistent felony offender in the first degree. The jury convicted Miller of escape in the second degree and gave him a sentence of three years. This sentence was enhanced to a period of 14 years through the persistent felony offender statute. Miller separately pled guilty to fleeing or evading in the second degree and received a one-year sentence.

Analysis

On appeal, Miller's sole allegation of error is that his sentence of fourteen years, enhanced through the persistent felony offender statute, constitutes cruel and unusual punishment under § 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution.

As Miller acknowledges, this issue is unpreserved. Miller has requested palpable error review pursuant to RCr[1] 10.26. "[T]he task of the appellate court in review under CR[2] 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court." *Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008).

Escape in the second degree is a Class D felony (KRS[3] 520.030(2)), and a Class D felony carries a penalty of one-to-five-years' imprisonment. KRS 532.060(2)(d). KRS 532.080(6)(b) provides that if a persistent felony offender in

[1] Kentucky Rule of Criminal Procedure.

[2] Kentucky Rule of Civil Procedure.

[3] Kentucky Revised Statutes.

the first degree is convicted of a Class D felony, the defendant "shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years." Miller does not contest that he was sentenced within the applicable statutory provisions.

Cruel and unusual punishment is "punishment which shocks the general conscience and violates the principle of fundamental fairness." *Covington v. Commonwealth*, 849 S.W.2d 560, 563 (Ky. App. 1992) (citing *Cutrer v. Commonwealth,* 697 S.W.2d 156, 158 (Ky. App. 1985)). The United States Supreme Court has held that:

> [a]ny proportionality analysis of a claim of cruel punishment should consider three factors: '(1) The gravity of the offense and harshness of the penalty; (2) The sentences imposed on other criminals in the same jurisdiction; (3) The sentences imposed for commission of the same crime in other jurisdictions.'

Riley v. Commonwealth, 120 S.W.3d 622, 633 (Ky. 2003) (quoting *Solem v. Helm*, 463 U.S. 277, 290-92, 103 S.Ct. 3010-11, 3009, 77 L.Ed.2d 637 (1983)).

However, the Kentucky Supreme Court has noted that "proportionality review has never (or hardly ever) been used to strike down a mere prison sentence." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) (citing *Rummel v. Estelle*, 445 U.S. 263, 271, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). "[S]uccessful challenges, outside the context of capital punishments, to the proportionality of particular sentences are exceedingly rare." *Collett v. Commonwealth*, 686 S.W.2d 822, 824 (Ky. App. 1984). Indeed, "if the

punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence." *Turpin v. Commonwealth*, 350 S.W.3d 444, 448 (Ky. 2011) (quoting *Riley*, 120 S.W.3d at 633). It has also been held that the fact that "other defendants who have committed other crimes received different sentences does not mean [one criminal defendant's] sentence violates the Constitution." *St. Clair v. Commonwealth*, 451 S.W.3d 597, 658 (Ky. 2014). In determining whether a particular defendant's sentence falls outside this constitutional range,

> [a] court must begin by comparing the gravity of the offense and the severity of the sentence. . . . "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. . . . If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Turpin, 350 S.W.3d at 447-48 (quoting *Graham v. Florida*, 560 U.S. 48, 60, 130 S.Ct. 2011, 2022, 176 L.Ed.2d 825 (2010)).

Our Supreme Court has held twice that a conviction for a Class D felony enhanced to the statutory maximum through the persistent felony offender statute was not cruel and unusual punishment. In *Thornton v. Commonwealth*, 421 S.W.3d 372, 379-80 (Ky. 2013), the Supreme Court held that a twenty-year sentence for assault in the third degree, a Class D felony enhanced through the persistent felony offender statute, did not constitute cruel and unusual punishment.

Similarly, in *Riley*, 120 S.W.3d at 634, our Supreme Court held constitutional a twenty-year sentence for the possession of marijuana, normally a misdemeanor, elevated to a Class D felony by virtue of the defendant's possession of a handgun and by operation of the persistent felony offender statute. *See also Crouch v. Commonwealth*, 323 S.W.3d 668, 676 (Ky. 2010) (fifteen-year sentence for theft of identity is not disproportionate to the crime committed).

Unlike the appellants in *Riley* and *Thornton*, Miller did not receive the maximum possible enhancement under the persistent felony offender statute. Additionally, Miller had multiple prior felony convictions and was incarcerated for robbery, a violent felony, prior to his escape. "[A] State is justified in punishing a recidivist more severely than it punishes a first offender." *Riley*, 120 S.W.3d at 634 (quoting *Solem, supra,* at 296, 103 S.Ct. at 3013).

Thornton, *Riley* and *Crouch* illustrate the fact that Miller failed to demonstrate that he received a "harsh" penalty in the constitutional sense of the word or that his sentence was disproportionate to "sentences imposed on other criminals in the same jurisdiction" pursuant to *Solem*. *Supra,* at 290-92, 103 S.Ct. at 3009. Miller has also failed to show that his sentence was disproportionate to "sentences imposed for commission of the same crime in other jurisdictions…." *Id.* The *Riley* Court held that enhanced sentences for Class D felonies were not dissimilar to enhancement provisions in other states. 120 S.W.3d at 624.

Because Miller has failed to satisfy the *Solem* factors, his claim of a grossly disproportionate sentence falls short of a constitutional violation. Our

Supreme Court has established that there generally exists no constitutional violation when a Class D felony is enhanced within the applicable statutory ranges. And, as a matter of public policy, we do not wish to minimize escape charges. The state of Kentucky has a recognized public safety interest in prohibiting escape, *Stacy v. Commonwealth*, 396 S.W.3d 787, 802 (Ky. 2013), and this interest should be protected.

Because Miller's sentence fell within the statutory ranges, and because Miller has not satisfied the *Solem* factors, Miller has not shown that his sentence constituted cruel and unusual punishment.

Conclusion

We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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