

RENDERED: NOVEMBER 6, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000097-MR

JOSEPH ELMO CHOATE

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JAY DELANEY, SPECIAL JUDGE
ACTION NO. 03-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: Joseph Elmo Choate appeals from an Order of the Mason Circuit Court overruling his *pro se* motion for resentencing pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(e). He argues that the aggregate length of his consecutive sentences - 35 years - exceeds the statutory limits set forth in Kentucky Revised Statute (KRS) 532.080 and KRS 532.110. Choate seeks an Opinion remanding the matter, with instructions to order concurrent rather than

consecutive sentences. We find no error, and AFFIRM the Judgment and Sentence on appeal.

On August 13, 2004, Choate entered a plea of guilty in Mason Circuit Court to one count each of First-Degree Assault (KRS 508.010), Tampering with Physical Evidence (KRS 524.100), and to First-Degree Persistent Felony Offender ("PFO"; KRS 532.080). The Commonwealth recommended a sentence of 15 years in prison on the Assault charge and five years for the Tampering charge, enhanced to 20 years by virtue of the PFO conviction. The Commonwealth further recommended that the sentences run consecutively for a total sentence of 35 years in prison. On September 10, 2004, the trial court sentenced Choate in accordance with the Commonwealth's recommendation.

On October 2, 2014, Choate filed a *pro se* motion for resentencing pursuant to CR 60.02(e) and Kentucky Rule of Criminal Procedure (RCr) 10.26. As a basis for his motion, Choate argued that the enhanced 35-year sentence ran afoul of KRS 532.080 and KRS 532.110, as these statutes allowed for a maximum sentence of 20 years in prison. The matter proceeded in Mason Circuit Court, whereupon the court rendered an Order on January 12, 2015, denying the relief sought. The court determined that First-Degree Assault, a Class B felony, was the highest class of crime to which Choate was sentenced, and that KRS 532.080(6)(a) allowed for a maximum sentence of life in prison. It noted, however, that KRS 532.110(1)(c) limits aggregate multiple sentences to 70 years. Citing *Castle v. Commonwealth*, 411 S.W.3d 754 (Ky. 2013), the Court determined that Choate's

35-year sentence fell squarely within the 70-year limit. It went on to find that Choate failed to demonstrate that the Judgment and Sentence were not equitable, and that he was not otherwise entitled to relief under CR 60.02(e). This appeal followed.

Choate now argues that the Mason Circuit Court erred in overruling his CR 60.02(e) motion for resentencing. He argues that the aggregate length of his consecutive sentences - 35 years - exceeds the statutory limits set forth in KRS 532.080 and KRS 532.110. He directs our attention to these provisions, as well as various court decisions including *Tabor v. Commonwealth*, 613 S.W.2d 133 (Ky. 1981), which he contends operate for the proposition that the sentence for the Assault conviction, which was not enhanced by the PFO, cannot run consecutively with the Tampering sentence, which was enhanced by the PFO. He seeks an Opinion reversing the 35-year sentence and remanding the matter for resentencing.

At the time of Choate's conviction and sentencing, KRS 532.080(6)(a) stated,

If the offense for which he presently stands convicted is a Class A or Class B felony, a persistent felony offender in the first degree 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.

Further, KRS 532.110(1) provides that,

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:
... (c) The 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 disposing of this matter below, the Mason Circuit Court concluded that,

First Degree Assault, a Class B Felony, was the highest class of crime to which the defendant was sentenced. Pursuant to KRS 532.080(6)(a), the highest sentence he may receive is life imprisonment. However, KRS 532.110(1)(c) limits the aggregate of multiple sentences that may be imposed to seventy (70) years. The defendant received a sentence of thirty-five (35) years which falls with the seventy (70) year limit and was therefore lawful. *Castle v. Commonwealth*, 411 S.W.3d 754 (Ky. 2013), cited by the Commonwealth in their response, clearly affirms the Court's reasoning in this matter.

We find no error in the circuit court's reasoning. In *Castle*, the Appellant argued that only a term of years can be considered to be an "extended term"; and because fifty years is the longest statutorily permitted "term of years" for a Class B felony offender under KRS 532.080(6)(a), no consecutive aggregate sentence can exceed fifty years. In rejecting this argument, the Kentucky Supreme Court held that "life imprisonment is a term of imprisonment." *Castle*, 411 S.W.3d at 759. The effect of this holding was that the "only statute operating as a limitation on such an extended sentence for a Class A or B felony offender is the seventy-year cap in KRS 532.110(1)(c)." *Id.* at 757.

The Mason Circuit Court applied *Castle* herein to conclude that KRS 532.110(1)(c) limits the aggregate of multiple sentences to 70-years imprisonment, and that Choate's 35-year sentence falls within this limit. This conclusion is supported by the record and the law, and we find no error. For the foregoing reasons, we AFFIRM the Order of the Mason Circuit Court which overruled Choate's Motion for resentencing pursuant to CR 60.02(e).

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Elmo Choate, *pro se*
Kentucky State Reformatory
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey R. Prather
Assistant Attorney General
Frankfort, Kentucky