

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001953-MR

DENNIS CUMMINGS

APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 09-CR-00117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Dennis Cummings appeals *pro se* from an order of the Hopkins Circuit Court denying his Motion to Amend Judgment seeking to amend his sentence on a conviction for third-degree rape to exclude the imposition of post-incarceration supervision. After our review, we affirm on other grounds.

On April 21, 2009, Cummings was indicted on second-degree rape (Kentucky Revised Statute (KRS) 510.050)—a Class C felony; assault in the

fourth-degree (KRS 508.030)—a Class A misdemeanor; and, being a second-degree persistent felony offender (KRS 532.080). The charges involved an incident occurring on March 9, 2009. On November 10, 2009, Cummings pleaded guilty pursuant to a plea agreement with the Commonwealth to the amended count of third-degree rape (KRS 510.060)—a Class D felony, and dismissal of the remaining offenses. On April 9, 2010, the circuit court entered its Judgment and Sentence consistent with the plea agreement sentencing Cummings to five years in prison for third-degree rape. The judgment did not indicate that Cummings was subject to post-incarceration supervision under KRS 532.043.

On June 26, 2012, Cummings filed a Motion to Amend Sentence challenging the imposition of post-incarceration supervision on various grounds. On September 26, 2012, the circuit court summarily denied the motion stating that Cummings had not been “sentenced to imprisonment conditionally discharged.” On November 7, 2012, Cummings filed a Notice of Appeal from the circuit court’s order denying his motion to amend. The appeal was held in abeyance pending resolution in the Kentucky Supreme Court of the case of *McDaniel v. Commonwealth*, 495 S.W.3d 115 (Ky. 2016), which dealt with the same issues raised by Cummings in his motion. After the Supreme Court rendered its opinion in *McDaniel* affirming in part on other grounds and vacating in part, this case was returned to this Court’s docket for further proceedings.

In the circuit court, Cummings challenged the post-incarceration supervision requirement on the following grounds claiming: (1) it represented a

sentence “enhancement” imposed on the basis of judicial fact-finding in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); (2) it was a judicially imposed harsher sentence than the sentence bargained for with the Commonwealth, contrary to *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky. 2002) (construing KRS 532.070, which allows trial court amelioration of jury-imposed sentences the court believes too harsh); and (3) it was a “second” sentence for the given crime, in violation of the Double Jeopardy Clause of the United States Constitution, which clause generally forbids that crimes be punished more than once. The circuit court denied the motion under the belief that Cummings was not subject to the requirements of KRS 532.043 because the court had not included it in the final judgment. The circuit court is mistaken because the requirements of KRS 532.043 are imposed on defendants convicted of certain crimes as detailed in the statute as a matter of law.

While a former version of KRS 532.043 provided that “any person convicted of, pleading guilty to, or entering an Alford plea to a felony [sex] offense . . . shall be sentenced to a period of conditional discharge[,]” the amended version that became effective in July 2006 (pursuant to which Cummings was sentenced) provided that the felon “shall be subject to a period of postincarceration supervision[.]”¹ (Emphases added.) Under the 2006 version of the statute, the five-

¹ The statute was amended in 2006 with the term of supervision being extended from three to five years, 2006 Ky. Acts ch. 182, § 42, and in 2011 with the terminology of the type of supervision being modified from “conditional discharge” to “post-incarceration supervision,” 2011 Ky. Acts ch. 2, § 91. See also *Melcher v. Commonwealth*, 471 S.W.3d 699, 701 (Ky. App. 2015).

year period of post-incarceration supervision was not imposed by the trial court as a part of Cummings's sentence. Instead, upon his conviction as a sex offender sentenced in April 2010 for the crime committed in March 2009, Cummings automatically became subject to the period of post-incarceration supervision as a matter of law. In *Jones v. Commonwealth*, 200 S.W.3d 495, 496-97 (Ky. App. 2006), this Court stated: “[U]pon her conviction as a sex offender . . . Jones automatically became subject to the period of conditional discharge *as a matter of law*. Therefore, the omission of any mention of the statute or of its requirements in the court's written judgment is not erroneous. Jones is bound by its provisions.” (Emphasis in original). Thus, the omission of any mention of the statute or of its requirements in the court's written judgment is not determinative, and Cummings was bound by the statute's provisions.

Nevertheless, the rule in this jurisdiction is that the judgment of a lower court can be affirmed for any reason in the record. *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011); *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009) (an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result). “If an appellate court is aware of a reason to affirm the lower court's decision, it must do so, even if on different grounds.” *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 496 (Ky. 2014) (citing *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006)). Moreover, the construction and interpretation of a statute and any amendments to the statute is a matter of law subject to *de novo* review. See *Stage v.*

Commonwealth, 460 S.W.3d 921, 923 (Ky. App. 2014); *Commonwealth v. Kash*, 967 S.W.2d 37, 43-44 (Ky. App. 1997) (involving interpretation of post-incarceration statute).

Cummings alleges in his appellate brief that he served out the initial five-year incarceration period on December 10, 2013, after the circuit court entered its order denying his motion to amend in September 2012. He further asserts that at some point, his post-incarceration supervision was revoked by Probation and Parole and he was returned to prison. The Parole Board subsequently ordered him to serve out the full five-year post-incarceration term, and he is currently incarcerated on that term.

Cummings's first argument that imposition of post-incarceration supervision violates due process as expressed in *Apprendi* is without merit. The rule established in *Apprendi* requires that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004) (emphasis in original). With respect to KRS 532.043, there are no additional facts beyond those applicable to the underlying offense necessary to be determined to impose the post-incarceration supervision period. By pleading

guilty, Cummings waived the right to jury fact-finding and as part of the plea, he admitted the facts necessary to establish the offense of third-degree rape by acknowledging that he was over eighteen years of age at the time he had sexual relations with a fourteen-year-old female. *See, e.g., McDaniel*, 495 S.W.3d at 119 n.1 (noting that the defendants admitted the facts in their guilty plea that subjected them to the conditional discharge provision); *United States v. Yancy*, 725 F.3d 596, 601 (6th Cir. 2013) (“[W]hen a defendant knowingly admits the facts necessary for a sentence enhancement in the context of a plea, simultaneously waiving his Sixth Amendment right to a jury trial, no *Apprendi* problem arises.”). This admission was sufficient to subject him to a sentence consisting of both the term of years for third-degree rape and post-incarceration supervision with additional incarceration upon revocation of that supervision.

Cummings also argues that the imposition of post-incarceration supervision constituted a judicially imposed harsher sentence than the sentence bargained for with the Commonwealth, contrary to *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky. 2002) (overruling *Commonwealth v. Doughty*, 869 S.W.2d 53 (Ky. App. 1994) where the court had allowed KRS 532.070(2) to be utilized where sentencing was based on a guilty plea). However, the court in *Bailey* specifically stated:

The plain language of KRS 532.070(2) states that the statute can be used to modify a sentence “fixed by a jury” pursuant to KRS 532.060. “The literal language of the statute is both plain and unambiguous and must be given effect as written.” *Commonwealth v. Harrelson*, Ky., 14

S.W.3d 541, 547 (2000). *See also Lynch v. Commonwealth*, Ky., 902 S.W.2d 813 (1995). Therefore, KRS 532.070(2) can be applied by a trial judge where a sentence of imprisonment for a Class D felony is fixed by a jury, and only where it is fixed by a jury.

Bailey, 70 S.W.3d at 416. *See also McDaniel*, 495 S.W.3d at 119 n.2. To the extent that Cummings argues that inclusion of post-incarceration supervision represents a “harsher” sentence than he bargained for under the plea agreement, as noted above, the post-incarceration supervision provision is mandated by statute and is not imposed by the trial judge or subject to waiver or bargaining by the parties. During the guilty plea hearing, both Cummings and defense counsel told the court that he had been advised of the possible sentence that he could receive, which necessarily would have included post-incarceration supervision.²

Accordingly, Cummings has not shown that his sentence should be amended based on this argument.

Cummings’s contention that the post-incarceration statute violates his right against double jeopardy is equally unavailing. The Double Jeopardy Clauses of Section 13 of the Kentucky Constitution and the Fifth Amendment to the United States Constitution protect against a second prosecution for the same offense after

² To the extent that Cummings contends that subjecting him to the revocation procedures based on the modification of KRS 532.043 in 2011 constitutes a “harsher” sentence and is illegal in violation of the prohibition against “fair warning” and *ex post facto* statutes, this Court has held, “given that the 2011 amendments to KRS 532.043 were merely procedural in nature, the fact that [the appellant] committed his offenses prior to their enactment is irrelevant.” *Melcher v. Commonwealth*, 471 S.W.3d 699, 702 (Ky. App. 2015). *See also Rider v. Commonwealth*, 460 S.W.3d 909, 912 (Ky. App. 2014) (holding that the 2011 amendments to KRS 532.043(5) merely established a new procedure for adjudicating the revocation of conditional discharge and did not create a new crime, enhance an existing crime, or enhance the penalty for an existing crime, so they were not an *ex post facto* law).

acquittal, a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969)); *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996). Generally, the protections accorded by our state constitution “parallel those guaranteed by the Fifth Amendment.” *Burge* 947 S.W.2d at 809. The United States Supreme Court has explained that the double jeopardy protection against cumulative punishments

is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature . . . the question under the Double Jeopardy Clause whether punishments are “multiple” is essentially one of legislative intent.

Quisenberry v. Commonwealth, 336 S.W.3d 19, 39 (Ky. 2011) (quoting *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984) (internal citations omitted)). *See also Wilfong v. Commonwealth*, 175 S.W.3d 84, 92 (Ky. App. 2004) (“The legislature is vested with the power to prescribe punishment for crimes and the judiciary’s role is to impose sentences within the statutory limits prescribed by the legislature.”). “[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors.” *Brown*, 432 U.S. at 165, 97 S. Ct. at 2225. Where “a legislature specifically authorizes cumulative punishment under two statutes . . . a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury

may impose cumulative punishment under such statutes in a single trial.” *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S. Ct. 673, 679, 74 L. Ed. 2d 535 (1983).

With respect to post-incarceration supervision, KRS 532.043 provides in relevant part:

(1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, 529.100 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310, or 531.320 shall be subject to a period of postincarceration supervision following release from:

(a) Incarceration upon expiration of sentence; or

(b) Completion of parole.

(Emphasis added). This statute clearly expresses legislative intent for cumulative punishment involving the term-of-years for a sexual offense under KRS Chapter 510 and the subsequent post-incarceration supervision period as part of a single prosecution. As noted earlier, post-incarceration supervision is a statutorily imposed component of the overall sentence for certain sexual offenses. In *McDaniel*, the Kentucky Supreme Court noted this aspect of the statute in relation to double jeopardy when it stated:

Conditional discharge, of course, although an addition to the term-of-years sentence either bargained for (as in these cases) or imposed by the jury, is not a “second” punishment imposed in the course of a “second” jeopardy, as disallowed by the Double Jeopardy Clause, but is merely a portion of a single sentence imposed in the course of the original jeopardy.

495 S.W.3d at 119 n.3. Therefore, imposition of post-incarceration supervision does not violate double jeopardy or entitle Cummings to amendment of his sentence.

Cummings has raised several other issues in his appellate brief that he did not raise in the circuit court. As a result, these arguments are not properly preserved for appellate review. It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court. *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016); *Skaggs v. Commonwealth*, 488 S.W.3d 10, 18 (Ky. App. 2016) (citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976)). “[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Accordingly, we will not consider or address those other issues not presented to the circuit court.

For the foregoing reasons, the order of the Hopkins Circuit Court is affirmed on other grounds.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis Cummings, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky