

RENDERED: AUGUST 24, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000116-MR

RICHARD ALLEN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 99-CR-002602

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON AND NICKELL, JUDGES.

ACREE, JUDGE: Richard Allen appeals, *pro se*, from the Jefferson Circuit Court's November 1, 2016 order denying his motion for resentencing. He claims his sentence is illegal because the Presentence Investigation Report (PSI) relied upon by the circuit court prior to sentencing contained factually inaccurate information that negatively influenced the court's sentencing decision. We affirm.

On March 30, 2001, a jury found Allen guilty of first-degree rape, first-degree sodomy, and first-degree sexual abuse for acts perpetrated on his minor biological daughter. The jury recommended a sentence of thirty-five years' imprisonment each for the rape and sodomy crimes, and five years for the sexual-abuse crime, to run consecutively for a total of seventy-five years' imprisonment.

The circuit court delayed sentencing to allow for the preparation of a PSI. Allen and his attorney¹ received his PSI report prior to sentencing. At his May 30, 2001 sentencing hearing, Allen and counsel identified alleged errors in the PSI. Counsel took issue with the lack of a jail-time credit calculation and, when asked by counsel if Allen had the opportunity to review the PSI, Allen replied that he had and took issue with the assessment regarding his future risk of repeat offending. The circuit court ultimately imposed the jury's recommended sentence.

Allen appealed his convictions and sentence to the Kentucky Supreme Court as a matter of right. The Kentucky Supreme Court affirmed. *Allen v. Commonwealth*, 2001-SC-0525-CR, 2003 WL 21259751, at *1 (Ky. May 22, 2003). The United States Supreme Court denied Allen's petition for writ of certiorari. *Allen v. Kentucky*, 540 U.S. 922, 124 S. Ct. 322, 157 L. Ed. 2d 222 (2003).

¹ Allen's original trial counsel was unable to attend the sentencing hearing; he arranged for alternate counsel to attend and represent Allen at the hearing.

In June 2004, Allen filed an RCr² 11.42 motion alleging ineffective assistance of trial counsel. The circuit court denied the motion, and this Court affirmed. *Allen v. Commonwealth*, No. 2008-CA-002343-MR, 2010 WL 3927730 (Ky. App. Oct. 8, 2010).

In March 2009, Allen invoked CR³ 60.02 to challenge his sentence as exceeding the statutory cap in the aggregate of consecutive indeterminate sentences, KRS⁴ 532.110(1)(c). The circuit court denied the motion, and Allen attempted to file a belated appeal, which this Court denied. *Allen v. Commonwealth*, No. 2011-CA-001405-MR (Ky. App. finality on June 20, 2014).

Allen then took his fight to the federal courts. He filed a petition seeking a writ of habeas corpus on March 26, 2014. The United States District Court dismissed his petition as time-barred. *Allen v. Taylor*, 3:14-CV-P276-H, 2014 WL 3362232, at *1 (W.D. Ky. July 8, 2014).

Back in circuit court, Allen filed a motion to clarify the final judgment and correct sentencing errors, pursuant to KRS 532.070(1). The circuit court denied the motion, and Allen did not appeal. (R. 720).

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Revised Statutes.

Finally, Allen filed a motion “for re-sentencing based on a corrected [PSI] report pursuant to KRS 532.050.” (R. 723). He claimed an instructor with the Sex Offender Treatment Program recently informed him that his PSI contained the false and derogatory statement that Allen penetrated his daughter’s vagina with a pistol barrel. Allen argued that fact was not proven during trial, and should not have been included in his PSI report.

The circuit court denied Allen’s motion by order entered November 1, 2016. It noted that the victim testified during trial that there was an incident during the three years of sexual abuse when Allen placed a pistol into her “private” and said he would shoot her if she told anyone. *See Allen*, 2003 WL 21259751, at *1 (“he placed a pistol into her ‘private’ and said he would shoot her if she ever told anyone”). The court further noted Allen and trial counsel reviewed the PSI prior to sentencing. A review of Allen’s sentencing hearing demonstrated conclusively that the circuit court followed the dictates of KRS 532.050 when imposing sentencing, and that no irregularities occurred entitling Allen to a new sentencing hearing. Allen appealed.

Generally speaking, a circuit court has wide discretion in sentencing, and sentencing decisions are only reviewed for an abuse of that discretion. *C.W.C.S. v. Commonwealth*, 282 S.W.3d 818, 824 (Ky. App. 2009). An abuse of discretion occurs when the circuit court’s decision was arbitrary,

unreasonable, unfair or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Allen first takes issue with his counsel's performance at the sentencing hearing. He claims counsel never met with him, never discussed with him the contents of the PSI report, and counsel "stood silent" and permitted the circuit court to impose an unlawful sentence. Citing RCr 11.42 and *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984), Allen asserts that trial counsel's inadequate performance mandates reversal of his sentence.

RCr 11.42 permits a defendant "who claims a right to be released on the ground that [his or her] sentence is subject to collateral attack may [move] . . . the court that imposed the sentence to vacate, set aside or correct it." RCr 11.42(1). The rule is routinely used to raise claims of ineffective assistance of counsel. An RCr 11.42 motion "shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." RCr 11.42(3). Kentucky courts have repeatedly ruled that successive RCr 11.42 motions are not permitted. *Sanders v. Commonwealth*, 339 S.W.3d 427, 438 (Ky. 2011).

In this case, Allen has already filed an RCr 11.42 motion challenging his trial counsel's performance. The ineffective-assistance claims now raised could, and should, have been raised in his original RCr 11.42 motion. "The courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier." *Hampton v. Commonwealth*, 454 S.W.2d 672, 673 (Ky. 1970). Allen is not entitled to another bite at this apple.

Allen also claims that the circuit court's failure to correct the error in his PSI report denied him due process of law. Kentucky law explicitly requires that, upon request, circuit courts must allow an offender fair opportunity to controvert alleged inaccuracies in the offender's PSI:

Before imposing sentence, the court shall advise the defendant or his or her counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them.

KRS 532.050(6). Allen received his PSI report prior to sentencing, reviewed it, and personally raised at least one concern with the report. His attorney raised a second concern. At no point did Allen take issue with the alleged "error" in the PSI related to a pistol and his daughter. And, as pointed out by the circuit court, his daughter specifically testified at trial that Allen inserted a pistol in her private.

We fail to see how including this evidence in the PSI was error, misleading, or factually incorrect.

Allen filed a CR 60.02 motion in 2009 claiming his sentence violated KRS 532.110(1)(c). He filed another in 2016 to clarify and correct his sentence pursuant to KRS 532.070(1). Both of those motions were denied, and Allen failed to adequately seek appellate review. This is Allen's third motion challenging his sentence. We are mindful that sentencing errors are jurisdictional and may be raised at any time. *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1997). But this does not entitle a defendant to successive motions involving alleged sentencing errors and, in turn, successive appeals. As with every other step in the post-conviction process – direct appeal, RCr 11.42, and CR 60.02 – a defendant must raise all issues that reasonably could have been presented in a single motion. *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010) (at each stage in the post-conviction process the defendant must raise “all issues then amenable to review, and generally issues that either were or could have been raised at one stage will not be entertained at any later stage”). Allen had ample opportunity to challenge his sentence. The time has come to put his sentence to rest.

We affirm the Jefferson Circuit Court's November 1, 2016 order denying Allen's motion to correct his PSI and receive a new sentence.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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