

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000344-MR

DAVID PATRICK ANDERSON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 14-CR-00846

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: David Patrick Anderson, *pro se*, appeals from a November 9, 2016, order of the Warren Circuit Court denying his motion for modification of sentence and motion for resentencing. We affirm.

Anderson entered into a plea agreement in April 2015, agreeing to plead guilty to two counts of criminal possession of a forged instrument in the

second degree. The Commonwealth agreed to dismiss a persistent felony offender charge. On April 13, 2015, Anderson filed a request that he be sentenced without a presentence investigation report (PSI) first being prepared.¹ Under the plea agreement, the Commonwealth recommended Anderson serve four years on one count and three years on the second, with the sentences to run consecutively. Anderson signed a document acknowledging the Commonwealth would recommend consecutive terms totaling seven years. The trial court orally discussed the plea agreement's terms with Anderson prior to sentencing him, including the recommended seven-year total sentence, and Anderson acknowledged he understood the terms.² Anderson unequivocally responded affirmatively when asked if he wanted to be immediately sentenced. The trial court then immediately sentenced Anderson in open court to four years on count one and three years on count two, to be served consecutively. The written judgment entered by the court on April 15, 2015, also reflected that Anderson was sentenced to four years on count one and three years on count two, with a notation "C/S TO TOTAL 7 YRS[.]"

In October and November 2016, roughly eighteen months after he was sentenced, Anderson filed a motion for modification of sentence and a motion for

¹ Both David Patrick Anderson and his attorney signed this request.

² Video record on appeal, April 13, 2015 at 4:40:57 et seq.

resentencing. Those motions raised only two arguments: 1) the trial court had the discretion under Kentucky Revised Statutes (KRS) 532.110 to order the sentences be served concurrently, and concurrent sentences were mandated because the judgment did not specify the sentences were to be served consecutively;³ and 2) the trial court erred by sentencing him without first having a PSI prepared. By order entered November 9, 2016, the trial court summarily denied the motions from which this appeal follows.

In his *pro se* brief, Anderson urges this Court to grant his motions filed below. However, he fails to cite to any controlling authority to support that specious request. Anderson agreed to both the seven-year total sentence and to being sentenced prior to the preparation of a PSI. Plea agreements are binding contracts, *Hensley v. Commonwealth*, 217 S.W.3d 885, 887 (Ky. App. 2007), and in this instance, there is no valid basis presented for Anderson to repudiate the valid, binding agreement into which he voluntarily entered.

Moreover, the motions were untimely since trial courts generally lose the ability to amend judgments ten days after they are entered, *see, e.g., Winstead v. Commonwealth*, 327 S.W.3d 479, 485-86 (Ky. 2010). In this case, Anderson

³ In context of the entire record, it is obvious that the notation “C/S TO TOTAL 7 YRS” in the final judgment calls for consecutive sentences totaling seven-years’ imprisonment. We thus disagree with Anderson that Kentucky Revised Statutes 532.110(2), which requires sentences to be served concurrently if the trial court does not specify a manner of service, is applicable to this case.

waited roughly eighteen months to seek relief. In Anderson’s motions below, he relies solely upon KRS 532.110. However, subsection one of that statute clearly states that multiple sentences “shall run concurrently or consecutively *as the court shall determine at the time of sentence*[.]” KRS 532.110(1) (emphasis added). As noted, the court designated the sentences to run consecutively in the judgment. In short, Anderson did not present a proper claim for post-conviction relief in either of his motions.

Finally, Anderson argues for the first time on appeal that his attorney was ineffective because he did not review discovery, obtain a four-year total sentence and request a competency evaluation. We cannot review any ineffective assistance of counsel (Kentucky Rules of Criminal Procedure 11.42) claims that were not presented to the trial court below. *See Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. App. 1989).

For the foregoing reasons, the order of the Warren Circuit Court denying Anderson’s motions is affirmed.

ALL CONCUR.

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