

RENDERED: JANUARY 18, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001885-MR

ROY LUKE SUTHERLAND, JR.

APPELLANT

v. APPEAL FROM JEFFERSON COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 79-CR-001351

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, TAYLOR, AND L. THOMPSON, JUDGES.

Roy Luke Sutherland, Jr., brings this *pro se* appeal from an October 23, 2017, Order of the Jefferson Circuit Court summarily denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion to correct his sentence of imprisonment. We vacate and remand.

In November 1981, appellant entered a plea of guilty to the offenses of murder and first-degree rape. By Final Judgment entered November 30, 1981,

the circuit court sentenced appellant to a life sentence for the murder and forty years for the rape. The sentences were ordered to run consecutively for forty years plus life imprisonment.

Throughout the years, appellant has filed numerous post-conviction motions, including CR 60.02 motions. Most recently, on October 16, 2017, appellant filed a CR 60.02 motion arguing that his sentence of imprisonment was illegal as violative of Kentucky Revised Statutes (KRS) 532.080 and KRS 532.110. Appellant maintained that the forty-year sentence was and is not permitted to run consecutively with the life sentence. KRS 532.110; KRS 532.080; *Goben v. Commonwealth*, 503 S.W.3d 890 (Ky. 2016); *Shannon v. Commonwealth*, 562 S.W.2d 301 (Ky. 1978) *overruled on other grounds by Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985). By order entered October 23, 2017, the circuit court summarily denied appellant's CR 60.02 motion.

After entry of the circuit court's October 23, 2017, order, the Kentucky Supreme Court rendered *Phon v. Commonwealth*, 545 S.W.3d 284 (Ky. 2018). Relevant to our appeal, the *Phon* Court held that a sentence of imprisonment in contravention of statutory authority is illegal and void. *Id.* at 304. The *Phon* Court further concluded that such an illegal sentence must be corrected

at any time by the circuit court, notwithstanding prior collateral motions attacking the sentence.¹ *Id.* at 306-07.

As the circuit court did not consider whether appellant's sentence was violative of KRS 532.080 and KRS 532.110, we vacate the October 23, 2017, order summarily denying appellant's CR 60.02 motion.² Upon remand, the circuit court shall reconsider its denial of appellant's CR 60.02 motion in light of *Phon*, 545 S.W.3d 284. In so doing, the circuit court shall comply with CR 52.01 and render separate findings of fact and conclusions of law.

For the foregoing reasons, the Order of the Jefferson Circuit Court is vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

¹ As a point of emphasis, the sentence of imprisonment must also be in contravention of statutory authority at the time it was imposed upon a defendant. *Phon v. Commonwealth*, 545 S.W.3d 284, 304 (Ky. 2018).

² In its brief, the Commonwealth of Kentucky concedes that the October 23, 2017, order must be vacated in light of *Phon*, 545 S.W.3d 284.

BRIEF FOR APPELLANT:

Roy Luke Sutherland, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky