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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000496-MR

DARNELL LEON THOMAS, JR. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 15-CR-00410-001

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2018-CA-000726-MR

EDWARD E. HALE APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 15-CR-00410-002

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2018-CA-000727-MR

EDWARD E. HALE APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 15-CR-00626

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2018-CA-001304-MR

EDWARD EARL HALE, JR. APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NOS. 15-CR-00410-002 & 15-CR-00626-001

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: Lexington, Kentucky, was plagued by a series of robberies between late January and mid-April 2015. Fayette County Indictment No. 15-CR-

00410 charged fourteen counts of first-degree robbery.[1] Similarly, Fayette County Indictment No. 15-CR-00626 charged six counts of first-degree robbery—making the perpetrator—upon conviction—a violent offender under KRS 439.3401(1)(n) and requiring him to serve a minimum of 85% of any sentence imposed before becoming parole-eligible. Some counts alleged a single bandit; others alleged two or three men working together. Five different men were named in the indictments. Through plea negotiations, the Commonwealth amended several charges to second-degree robbery.[2]

Edward Earl Hale, Jr., pled guilty to fourteen offenses spread over both indictments—including four counts of first-degree robbery—for which he is serving a total of twenty-five years. Darnell Leon Thomas, Jr., pled guilty to fourteen offenses charged in Indictment No. 15-CR-00410—including four counts of first-degree robbery—for which he is also serving a total sentence of twenty-five years. Thomas Eugene Riley was indicted with Thomas on Count 1 of Indictment No. 15-CR-00410. Riley pled guilty to an amended charge of second-degree robbery. He is not a party to this appeal and the precise terms of his plea and criminal history are not part of the record certified to us on appeal. The

[1] Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

[2] KRS 515.030, a Class C felony.

Commonwealth argued to the trial court, however, Thomas, Hale, and Riley are all serving similar terms. Thomas and Hale are both serving twenty-five years; Riley[3] is serving twenty years. All must serve a minimum of 85%.

Since entering their guilty pleas, Thomas and Hale, whose appeals are being heard together, have filed multiple *pro se* post-conviction challenges in their quest to escape designation as violent offenders. They have raised similar issues, and both have run afoul of *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983), by failing to argue all known issues in a proper motion. On review of the record, briefs and law, we affirm.

HALE

Hale is serving sentences from two indictments assigned to different divisions but resolved on the same day by the same judge. When Hale pled guilty, his attorney stated on the record Hale did not oppose transfer of Indictment No. 15-CR-00626 from the Seventh Division to the Third Division for entry of the plea and sentencing in conjunction with Indictment No. 15-CR-00410. Two final judgments with sentences of imprisonment were entered the same day in their respective case files, neither mentioning the other.

[3] Riley was charged with a single offense in Fayette Circuit Court. However, he was indicted on other charges in Taylor County.

On April 20, 2017, Hale filed a motion pursuant to RCr[4] 11.02 and 11.04 seeking clarification of his maximum sentence.[5] He argued all terms in the two indictments were to be run concurrently but the Department of Corrections had run the terms consecutively for a total of twenty-five years rather than just fifteen years. The judgments themselves were silent. After reviewing notations made on the record at the time of sentencing, the trial court entered an amended opinion and order on April 28, 2017, stating a clerical error had been made and he had intended the sentences on the two indictments to be served consecutively for a total of twenty-five years. The motion to clarify was the focus of *Hale v. Commonwealth*, 2017-CA-000853-MR, 2018 WL 3492748, at *1 (Ky. App. July 20, 2018), wherein a panel of this Court affirmed the amended opinion and order.

While that appeal was pending in this Court, on March 20, 2018, Hale filed a *pro se* CR 60.02 motion stating, "movant was sentence [sic] to twenty five [sic] (25) years under case no. 15-CR-410 and 15-CR-626, by the Fayette Circuit Court on March 24, 2016." Without stating any grounds for relief, or the specific provision of CR 60.02 under which he was seeking relief, he filed accompanying

[4] Kentucky Rules of Criminal Procedure.

[5] We see no reference to Kentucky Rules of Civil Procedure (CR) 60.02 in this motion but the Commonwealth refers to it as Hale's first CR 60.02 motion.

motions seeking appointment of counsel to supplement the CR 60.02 motion and requested an evidentiary hearing.

A *pro se* memorandum of law in support of the motion alleges the Commonwealth overcharged the case to gain leverage; the sentences imposed violate KRS 505.020(1)(c) because the robberies were not interrupted by an arrest warrant, indictment or arraignment; counsel failed to argue Hale committed the robberies to support his drug habit; counsel did not request concurrent sentences; and, Hale received no benefit from pleading guilty. A copy of the final judgment follows the memorandum in the record. After the memorandum is an "Affidavit in Support of RCr 11.42." However, we have located no corresponding RCr 11.42 motion. While Hale alleges counsel made errors in the CR 60.02 motion, he cites neither RCr 11.42 nor the standard for ineffective assistance of counsel.[6] Nor does he provide a factual statement supporting the motion as required by RCr 11.42(2).

Recognizing the CR 60.02 motion merely repeated the earlier request for clarification, the trial court denied relief on April 25, 2018,[7] noting a grant of such relief is entirely discretionary and appropriate only on a showing of extraordinary circumstances—qualities Hale's arguments lacked. By

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[7] This order is the basis of *Hale v. Commonwealth*, Case Nos. 2018-CA-000726 (Fayette Co. Indictment No. 15-CR-00410) and 2018-CA-000727 (Fayette Co. Indictment No. 15-CR-00626).

acknowledging the trial court could run the sentences concurrently, the trial court found Hale had impliedly acknowledged the court could run them consecutively as it chose to do.

Citing *United States v. Ferrell*, 231 F. App'x 432, 435 (6th Cir. 2007), and *United States v. Jenkins*, 770 F.3d 507, 509 (6th Cir. 2014), the trial court rejected Hale's suggestion a string of fourteen robberies—supposedly committed to fuel a drug habit—at different locations around Lexington, with different victims, different co-defendants, and spanning four months constituted one continuous course of conduct. The trial court also denied appointment of counsel and an evidentiary hearing and found no grounds for relief under CR 60.02.

On August 1, 2018, Hale filed another CR 60.02 motion—this time based on grounds (e) and (f)[8]— asking "to amend/modify sentence due to change to KRS 439.3401." The motion claimed Hale could not be designated a violent offender because the judgments did not state whether any victim suffered serious physical injury or death. The trial court denied the motion on August 14, 2018, finding Hale had misinterpreted a statutory change which took effect July 14,

[8] Under CR 60.02 "(e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief."

2018. This motion is the basis of *Hale v. Commonwealth*, Case No. 2018-CA-001304, the third appeal in this trilogy.

Campbell v. Ballard, 559 S.W.3d 869 (Ky. App. 2018), resolves this question. Relying on *Pate v. Department of Corrections*, 466 S.W.3d 480, 488-89 (Ky. 2015), Hale, like Campbell before him, argued he could not qualify as a violent offender because no one died or was seriously injured during his crimes.

> Some Class B felons cannot be classified as violent offenders unless the crime involved the death or serious injury to the victim, and the trial court so designates. However, where the Class B felony is robbery, the felon is automatically considered a violent offender. The violent offender statute is clear that any person who has been convicted of or pled guilty to the commission of robbery in the first degree qualifies as a violent offender. No designation by the trial court is required. *See Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008); *see also Pollard v. Commonwealth*, 2017-CA-000608-MR, 2018 WL 2277170, at *2 (Ky. App. May 18, 2018) ("Pollard became a violent offender upon pleading guilty to robbery in the first degree, and the trial court correctly found its failure to designate whether a victim suffered death or serious physical injury did not provide grounds to modify his sentence.").
>
> [Hale] became a violent offender when he pled guilty to robbery in the first degree. When the crime involved is first-degree robbery, the violent offender statute applies even without a designation by the trial court regarding whether the victim suffered death or serious injury. The relief [Hale] sought from the circuit court, a determination that he does not qualify as a violent offender, is not authorized.

Campbell, 559 S.W.3d at 871.

The Commonwealth urges us to deny Hale's request for relief because successive appeals are not permitted and once decided, the "law of the case" rule precludes an issue from being raised a second time. *Williamson v. Commonwealth*, 767 S.W.2d 323 (Ky. 1989); *Commonwealth v. Schaefer*, 639 S.W.2d 776 (Ky. 1982); *Gossett v. Commonwealth*, 441 S.W.2d 117 (Ky. 1969); and *Coots v. Commonwealth*, 299 Ky. 619, 186 S.W.2d 638 (1945). There is clear merit to the Commonwealth's position and we affirm the trial court.

However, Hale's *pro se* filings demonstrate a clear misunderstanding of court rules. As explained in *Gross*, 648 S.W.2d at 857, attacking a criminal conviction begins with a direct appeal, "stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken." By pleading guilty, Hale waived his right to a direct appeal.

His next option, "while in custody under sentence or on probation, parole or conditional discharge," was filing a RCr 11.42 motion stating:

> any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Gross, 648 S.W.2d at 857. Hale filed an affidavit in support of a RCr 11.42 motion, but never filed the actual RCr 11.42 motion. Therefore, that avenue is foreclosed to him. Additionally, claims of ineffective assistance of counsel cannot be raised via CR 60.02. *Id.* Thus, he has lost his opportunity to claim attorney error. On pleading guilty to first-degree robbery, he became a violent offender and must serve a minimum of 85% of the twenty-five years imposed. We affirm the rulings of the Fayette Circuit Court as to Hale.

THOMAS

We turn now to Thomas who pled guilty to all fourteen counts alleged in Indictment No. 15-CR-00410—four counts of first-degree robbery and ten (amended) counts of second-degree robbery. He currently challenges denial of a CR 60.02 motion asking the circuit court to

> either [amend] all his charges to Robbery 2nd degree twenty-five (25) year's [sic] or to amend Count 1 Robbery 1st degree 15 years 85% to Robbery 2nd degree 15 years and to run them concurrent with the 10 years Robbery 1st.

He appears to seek relief under CR 60.02(f). The rationale for his request is he:

> received the most time between him and his co-defendants, Thomas Riley and Edward Hale, even though he had no prior criminal record as the co-defendant's had.
>
> . . .

> There is no justification for the Movant, who had no prior record, to receive approximately 10 more years for count 1 than the co-defendant Thomas Riley, in this case who had a prior record. With that being said, there is solid video evidence showing the Movant never garnished [sic] a weapon in Count 1 with Thomas Riley and the Movant was given Robbery 1st degree 15 years at 85%, while co-defendant Riley's Robbery 1st degree was amended. This is unfair and 25 years at 85% for a person who has no prior criminal record is malicious with only 3 counts garnishing [sic] a weapon with no injuries.

Thomas alone on four occasions, once with Riley, and nine times with Hale, robbed fourteen businesses between January 23, 2015, and February 27, 2015. According to witness statements, one of the three was armed and force was either used or threatened during each robbery. All three gave statements and pled guilty separately. Thomas was the first to plead and be sentenced. Like Hale, he seeks to escape the grasp of KRS 439.3401(1)(n), but having to serve 85% of any sentence imposed was mentioned repeatedly during his guilty plea colloquy, and again at sentencing. He never objected or sought clarification. He voluntarily, intelligently and knowingly pled guilty.

Nearly one year after sentencing he filed a RCr 11.42 motion alleging counsel had provided ineffective assistance of counsel by failing to investigate the case, not preparing for trial, and badgering him into pleading guilty when he would have demanded trial. The motion contained only generalized accusations without any factual support for his claims as required by RCr 11.42(2). The motion to

vacate requested appointment of counsel to supplement his argument and an evidentiary hearing. Filing of the motion precipitated a flurry of other motions we outline briefly.

First, the Department of Public Advocacy (DPA) was ordered to represent Thomas. Its review of the case revealed a person of reasonable means would not pursue the matter. The trial court granted DPA's motion to withdraw.

Second, Thomas filed a CR 59.05 motion asking DPA be ordered to remain on the case or private counsel be appointed. The trial court denied the motion because having already determined the case lacked merit DPA could not be ordered to remain on the case.

Third, Thomas moved to withdraw his RCr 11.42 motion claiming an inmate legal aide had prepared the motion and as DPA had correctly determined, it was deficient. The trial court granted the motion and the RCr 11.42 motion was voluntarily withdrawn.

Fourth, while the motion to withdraw the RCr 11.42 motion was pending, Thomas received conflicting information from another inmate prompting him to ask to dismiss the motion to withdraw and allow him to supplement the RCr 11.42 motion instead. Thomas now believed once withdrawn, an RCr 11.42 motion could not be refiled. The motion to withdraw having already been granted, the trial court denied the request to dismiss the motion to withdraw.

Fifth, Thomas moved to refile his voluntarily withdrawn RCr 11.42 motion. The Commonwealth responded, urging denial of the motion under *Gross*, 648 S.W.2d at 857, and *Cox v. Commonwealth*, 2009-CA-000237-MR, 2010 WL 3717237, at *3 (Ky. App. Sept. 24, 2010),[9] an unpublished case holding voluntary withdrawal of an RCr 11.42 motion forecloses refiling of the motion asserting "any issues related to ineffective assistance of trial counsel[.]" The *Cox* analysis did not end with the prisoner's withdrawal of the motion, it asked whether the prisoner had "knowingly and voluntarily agreed to withdraw his motion." *Id.* Plowing new ground, the panel held the appropriate test was whether withdrawal of the motion was "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* (citing *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970))). Based on *Edmonds v. Commonwealth*, 189 S.W.3d 558, 569 (Ky. 2006), the panel concluded, "voluntariness of a plea is fact sensitive and the trial court will only be reversed if its decision was clearly erroneous." *Cox*, 2010 WL 3717237, at *3.

We have no quarrel with *Cox*. Applying its sound logic to the case at hand, we conclude the trial court did not commit clear error and Thomas

[9] Pursuant to CR 76.28(4)(c), we cite this case not as binding precedent but because no published opinion adequately addresses the issue.

voluntarily chose to rely on erroneous information provided by inmates. There is no indication Thomas was forced to seek or believe their bad advice—that was his choice and he must live with the consequences. Citing *Gross* and RCr 11.42(3),[10] the trial court properly forbade refiling of the voluntarily withdrawn RCr 11.42 motion. Because of Thomas' choice, counsel's alleged ineffectiveness was not addressed, and all related claims are now foreclosed. While this may seem harsh, Thomas' claims of ineffectiveness are easily refuted by the existing record.

Finally, on February 12, 2018, Thomas filed a CR 60.02 motion claiming his sentence should be less than or equal to that given to his co-defendants[11]—especially Riley whom he claims had more charges, a criminal record, and was armed during the Waffle House robbery (Count 1)—the first of three Waffle House robberies in which Thomas participated—twice preying on the same female victim. Thomas received fifteen years on Count 1. Like Hale, Thomas also alleges the prosecutor overcharged the case to take advantage of him;

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[10] RCr 11.42(3) dictates:

> The 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.

[11] Curiously, Thomas cites *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995), a case which undercuts his argument. Quoting *Williams v. Illinois*, 399 U.S. 235, 243, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586 (1970), *Bokun* says, "there is no requirement that two persons convicted of the same offense receive identical sentences." Thus, it matters not what sentence Riley received. Thomas was sentenced based on his role in the crimes.

the crime spree was one continuous course of conduct under KRS 505.020(1); and, he did not receive the bargain originally promised.

The trial court denied the CR 60.02 motion because it

> rais[ed] issues that could and should have been raised earlier. By voluntarily withdrawing his RCr 11.42 Motion, [Thomas] has waived any further claim for post-conviction relief.
>
> Further, CR 60.02 is an avenue of "extraordinary relief." [Thomas] does not set out under what provision he is seeking relief. He argues he received more time then [sic] his Co-Defendants. It should be remembered he pled Guilty to these charges and the recommendations of the Commonwealth. He knew going in what the recommendation was going to be and that is what he received. That is not "extraordinary relief", that is sour grapes.

Thomas alleged not only counsel's ineffective assistance of counsel but receipt of a harsher sentence than his co-defendants in the RCr 11.42 motion he voluntarily withdrew. CR 60.02 is not a "second bite at the apple." *Alvey v. Commonwealth*, 648 S.W.2d 858, 860 (Ky. 1983). Because the claims were known and included in the voluntarily withdrawn request for RCr 11.42 relief, he could not recycle them under CR 60.02. *Gross*, 648 S.W.2d at 856.

Had Thomas stood trial, a jury could have convicted him of multiple counts of first-degree robbery and sentenced him to seventy years of which he would still have to serve 85% before becoming parole-eligible. Thomas does not grasp a first-degree robbery conviction—whether the result of a guilty plea or a

jury trial—triggers KRS 439.3401(1)(n) and requires service of at least 85% of the sentence imposed.

Thomas describes his sentence as "malicious" and suggests the judge was biased because he had previously presided over a domestic matter in which the mothers of Thomas' two children described him as "violent." No reference was made to this case during the criminal matter and we see no evidence of bias.

We remind Thomas he confessed to all fourteen counts; he described his involvement in several counts; he admitted being armed during three robberies; and victim statements established a participant in each robbery was armed. Thomas argues no one was injured during Count 1—the first Waffle House robbery he committed with Riley—for which Thomas received the longest sentence—fifteen years.

Thomas completely ignores events occurring during Count 14 at the Tobacco Zone where a twenty-year-old female clerk was able to wrest Thomas' gun from him. During the ensuing scuffle, Thomas was shot with his own gun. The clerk suffered a concussion and blurred vision. Her hand was scratched, became infected and she contracted cellulitis. Her knees and ankles were bruised "from being dragged with the gun[.]" According to her victim impact statement she now suffers

> [a]nxiety, paranoia, stress, fear; I frequently have mental recaps of the incident, and I don't let my mom work

> alone at the store anymore; some customers have come up to me in the store and said they know the robber personally and I panicked thinking they may take revenge for what I did; I feel scared thinking these guys may follow us home one night and hurt my family. I force my mom to lock the store door early because I fear they might send a friend or family member to take revenge.

At sentencing, both defense counsel and Thomas spoke about this robbery.[12] Counsel described it as a turning point and Thomas realizes it could have ended far differently with him facing the death penalty. At the time, Thomas painted himself as being contrite and remorseful. It now appears the victim's pain and fear—and his own gunshot wound—have been forgotten.

Our review of the proceedings revealed an extraordinarily patient judge who explained court process and options to Thomas and listened intently. Ultimately, the judge told Thomas he was "truly, truly sorry that you put yourself in this spot." We have no reason to disagree.

Thomas urges the running of all terms concurrently because the fourteen robberies were "one continuous course of conduct." As explained earlier in this opinion we reject that position. Under the facts presented, KRS 505.020(1) did not prohibit conviction on multiple counts. Each of the robberies was separate

[12] In his reply brief, Thomas claims the Tobacco Zone robbery was an "attempted robbery" during which he took no money. Thomas' rendition of facts is contradicted by a victim impact statement saying approximately $100.00 was taken from the store.

and independent with different victims; none was included in another; inconsistent findings of fact were not required to convict; and KRS 515.020 was not designed to prohibit a continuing course of conduct, rather it was intended to punish individual crimes with different victims. *See Hennemeyer v. Commonwealth*, 580 S.W.2d 211, 215 (Ky. 1979) (legislative intent determined by statutory language). Thomas' crimes involved multiple victims at multiple locations on multiple days. It did not constitute a single continuous course of conduct. *See McNeil v. Commonwealth*, 468 S.W.3d 858, 871 (Ky. 2015).

We perceive no overcharging by the Commonwealth. A weapon and use or threat of force was involved in all fourteen thefts. All offenses were properly charged as first-degree robberies. The Commonwealth's willingness to amend ten counts to second-degree robbery and recommend five-year terms on the amended counts—all to run concurrently—was truly a "gift" as described by the trial court.

Finally, we discern no support for Thomas' contention he had been promised a maximum sentence of fifteen years. The Commonwealth's written offer, placed in the record during a prehearing conference on September 3, 2015, never changed. The same offer was recited in open court during the guilty plea hearing where Thomas agreed on the record it was his understanding of the offer. While defense counsel asked the court to impose fifteen years—to be served at

85% as a violent offender—the trial court chose to exercise its discretion and impose twenty-five years of which he would serve a minimum of 85%. Thomas stated on the record he understood the trial court would impose a sentence between fifteen and forty-five years. The court imposed neither the minimum nor the maximum, but rather chose a middle ground. Thomas' current complaint must fall on deaf ears.

On the record before us, we discern no abuse of discretion by the trial court. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). We affirm the Fayette Circuit Court's denial of Thomas' request for CR 60.02 relief.

ALL CONCUR.

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