

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000574-MR

JEFFERY L. CARPENTER

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE DAN KELLY, SPECIAL JUDGE
ACTION NO. 00-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Jeffery Carpenter was convicted in 2003 of sexual abuse in the first degree and persistent felony offender (PFO) in the first degree, and he was sentenced to fifteen years of imprisonment. He now appeals the denial of his eighth post-conviction motion; namely, a motion filed under the auspices of

Kentucky Rule of Civil Procedure (CR) 60.02(e). Because Carpenter's latest motion is duplicative of his prior, unsuccessful motions, we affirm.

The relevant history of this matter was largely set forth in *Carpenter v. Commonwealth*, No. 2014-CA-000178-MR, 2015 WL 136037, at *1 (Ky. App. Jan. 9, 2015):

Carpenter was originally indicted on August 10, 2000, for 31 counts of sexual abuse in the first degree; he was later indicted for persistent felony offender (PFO) in the first degree and his indictments were consolidated. Following a jury trial on two counts of sexual abuse and the PFO charge, he was convicted of one count of sexual abuse in the first degree and PFO in the first degree. Carpenter's convictions were affirmed by this Court on June 10, 2005; discretionary review was denied by the Kentucky Supreme Court.

Carpenter filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging ineffective assistance of counsel. On January 22, 2004, the trial court denied this motion; the court later denied the motion to alter, amend, or vacate its judgment. On March 2, 2007, this Court vacated and remanded the trial court's decision because it did not have the record before it and so sent the case back for reconsideration.

On remand, Carpenter filed a *pro se* motion to supplement his RCr 11.42 motion. Counsel was appointed and an evidentiary hearing was held. Thereafter, the trial court denied Carpenter's RCr 11.42 motion, which was affirmed by this Court on appeal.

On March 3, 2010, Carpenter filed a motion for resentencing; the trial court granted the motion and he was resentenced on August 10, 2010. Carpenter did not appeal that order. On August 8, 2011, Carpenter filed an

amended RCr 11.42 motion arguing ineffective assistance of counsel. On August 25, 2011, Carpenter filed a second motion for resentencing. Following a hearing on these two motions, the trial court overruled both motions. This was affirmed by this Court on February 22, 2013.

On August 2, 2013, Carpenter filed his third motion for resentencing. The trial court held another hearing; thereafter, the court overruled the motion. This decision was not properly appealed. On January 6, 2014, Carpenter filed his fourth motion for resentencing. The trial court concluded that this motion was a rehash of his third motion for resentencing and overruled the motion on January 21, 2014.

This Court reviewed the Butler Circuit Court's order denying Carpenter's fourth motion for resentencing (and thus his sixth post-conviction motion overall) and ultimately affirmed, explaining:

On appeal, Carpenter argues: (1) the trial court erred to his substantial prejudice by not correcting a sentencing error that could not be waived because sentencing errors are jurisdictional; and (2) Carpenter was entitled to dismissal of the PFO conviction due to the lack of a penalty being imposed on the underlying offense. The Commonwealth argues that the trial court did not err (1) in denying this repetitive motion; (2) that Carpenter should have appealed prior motions for resentencing if he was unsatisfied with the outcome; and (3) his argument concerning the PFO conviction is without merit. We agree with each of the Commonwealth's arguments.

Simply stated, the court below did not err in denying Carpenter's fourth motion for resentencing. Indeed, Carpenter has already been resentenced once; if he believed his resentencing to be in error, he should have appealed therefrom. Thus, the court did not err in

denying this repetitive motion. Moreover, we agree with the Commonwealth that Carpenter's argument is without merit, as evidenced by *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010):

In *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991), we held that where, as here, there is no possibility that the PFO sentence is unlawful, any error in not requiring the jury to fix an underlying sentence was a mere procedural defect not subject to review in the absence of a contemporaneous objection. Although in *Montgomery* we did not expressly review the allegedly faulty sentencing procedure for palpable error, we clearly indicated that absent some possibility of an illegal sentence, any mere procedural error did not result in a manifest injustice. We expressly so hold today, and conclude that the jury's not having fixed an underlying sentence does not entitle *Montgomery* to palpable error relief. *Commonwealth v. Jones, supra*,^[1] (noting that palpable error relief is not available unless the error resulted in a manifest injustice).

Id. at 49[.]

Carpenter, 2015 WL 136037, at *1-2.

Carpenter later filed two more post-conviction motions under the purview of CR 60.02. Specifically, on December 29, 2014 – during the pendency of his above-referenced appeal – he raised the same arguments he previously raised

¹ *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009).

in his January 21, 2014 motion; he re-raised his earlier argument that he was provided ineffective assistance of counsel; and he also contested the validity of his conviction based upon the sufficiency of the Commonwealth's evidence. The circuit court denied his motion, and Carpenter filed no appeal.

On February 20, 2018, Carpenter then filed his eighth post-conviction motion, which forms the basis of this appeal. There, Carpenter once again argued: (1) the trial court erred to his substantial prejudice by not correcting a sentencing error that could not be waived because sentencing errors are jurisdictional; and (2) he was entitled to dismissal of the PFO conviction due to the lack of a penalty being imposed on the underlying offense.

For the same reasons set forth above, the circuit court denied his motion. Carpenter now appeals. We affirm. The circuit court did not err in denying Carpenter's CR 60.02 motion. As before, the circuit court's reasons for doing so were legally sound; and apart from that, such motions cannot rest upon grounds that could have been asserted in a direct appeal or RCr 11.42 proceedings, much less grounds that have already been asserted and rejected in prior CR 60.02 proceedings. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

As an aside, Carpenter also devotes much of his appellate brief to an issue he never raised before the circuit court, properly or otherwise: He notes that he has received several different sentences of imprisonment for several different,

unrelated criminal convictions; and he contends there has been a miscalculation regarding when, in relation to those other sentences, his fifteen-year sentence at issue in this matter should have begun. Because that issue is not properly before this Court, we cannot address it. “A new theory of error cannot be raised for the first time on appeal.” *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999).

ALL CONCUR.

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