

RENDERED: JUNE 26, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001350-MR

MICHAEL G. THOMAS

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE JAMES T. JAMESON, JUDGE
ACTION NO. 16-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND MCNEILL,
JUDGES.

CLAYTON, CHIEF JUDGE: Michael G. Thomas appeals *pro se* from the Calloway Circuit Court's denial of Thomas's motion to alter, amend, or vacate his sentence pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. Upon our review of the record and applicable law, we affirm.

BACKGROUND

Following a routine traffic stop, police discovered weapons, methamphetamine, heroin, marijuana, and drug paraphernalia on Thomas's person and in his vehicle. With the assistance of counsel, Thomas ultimately accepted a plea deal under which he pled guilty to first-degree trafficking in a controlled substance, a Class C felony, possession of a handgun as a convicted felon, a Class C felony, and possession of a controlled substance, a Class D felony.

On November 17, 2016, the trial court entered a judgment and sentence on plea of guilty pursuant to which the trial court sentenced Thomas to twenty years' imprisonment. Specifically, Thomas was sentenced to ten years for first-degree trafficking in a controlled substance, ten years for being a convicted felon in possession of a handgun, and five years for possession of a controlled substance. The ten-year sentences were to be served consecutively, while the five-year sentence was to be served concurrently.

On June 25, 2019, Thomas filed a motion under CR 60.02 asking the trial court to correct his sentence and arguing that Kentucky Revised Statute (KRS) 532.110(1)(c)—which grants the trial court discretion in imposing concurrent and consecutive terms of imprisonment—was unconstitutionally vague and violated the separation of powers doctrine. Thomas further argued that his sentence exceeded the maximum sentence allowed under KRS 532.110. Thomas included the

attorney general on the certificate of service for his CR 60.02 motion, which was titled “CR 60.02 Motion to Correct Sentence Due to Parts of KRS 532.110 Being Unconstitutional and Unconstitutional [sic] Vague in the Way They Are Interpreted to Sentence the Movant.” The Attorney General maintained in its brief that Thomas did not provide notice to the Attorney General that Thomas was challenging the constitutionality of a statute as required by KRS 418.075(1).

The trial court denied Thomas’s CR 60.02 motion on the basis that it was not made within the applicable time required under CR 60.02(a), (b), or (c) and that Thomas’s sentence was constitutional and otherwise proper under KRS 532.110. Thomas filed a timely appeal of the trial court’s decision.

ANALYSIS

a. Standard of Review

CR 60.02 motions are applicable to criminal cases pursuant to Kentucky Rule of Criminal Procedure (RCr) 13.04 and may be used by criminal defendants to present additional issues not specifically available through direct appeals or RCr 11.42 motions. *Gross v. Com.*, 648 S.W.2d 853, 856 (Ky. 1983). We review a trial court’s denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Com.*, 337 S.W.3d 639, 640 (Ky. App. 2010), *overruled on other grounds by Chestnut v. Com.*, 250 S.W.3d 288 (Ky. 2008). The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or

unsupported by sound legal principles.” *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Absent a “flagrant miscarriage of justice,” we will affirm the trial court. *Gross*, 658 S.W.2d at 858.

b. Discussion

On appeal, Thomas again argues that his sentence was incorrect because KRS 532.110 is unconstitutionally vague and violates the separation of powers doctrine. As previously discussed, CR 60.02 motions are limited to provide “special, extraordinary relief” not available in other proceedings.

McQueen v. Com., 948 S.W.2d 415, 416 (Ky. 1997). Particularly, CR 60.02 states the following, in relevant part:

On motion a court may, upon such terms as are just, relieve a party . . . from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (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. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.

Pursuant to the foregoing language, we agree with the trial court that any grounds claimed by Thomas under CR 60.02(a)-(c) are not applicable in this case, as Thomas's motion was not filed within the one-year period described by the rule.

Further, we find no entitlement to relief under CR 60.02(d)-(f). The plain language of KRS 532.110(1)(c) places an upper limit on the maximum term of imprisonment that can be imposed through consecutive indeterminate terms and establishes a maximum for accumulated indeterminate terms that is equivalent to the maximum term that can be imposed on a persistent felony offender under KRS 532.080. Under KRS 532.080(6)(b), if the greatest of a defendant's offenses is a Class C felony, his or her consecutive sentences, when accumulated, can equal an indeterminate term of no more than twenty years.

Thomas's constitutional arguments concerning the vagueness of KRS 532.110 appear to be due to Thomas's failure to differentiate between a class of crime and a persistent felony offender status. To effectuate the plain language of KRS 532.110(1)(c), the appropriate measure to be referenced in KRS 532.080 is that portion which sets forth the longest extended term for a given class of crime. A defendant's lack of status as a persistent felony offender is irrelevant to the purpose for which KRS 532.110(1)(c) refers to KRS 532.080.

Here, the trial court did not go beyond the penalty range on any of the three counts—*i.e.*, five to ten years for a Class C felony—and it was within the trial court’s discretion to run each of the counts consecutively, so long as the aggregate did not exceed twenty years. *See* KRS 532.110(1)(c). As previously discussed, we may only reverse the trial court’s decision denying Thomas’s CR 60.02 motion if such decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles[,]” and we fail to so find. *English*, 993 S.W.2d at 945. Further, we see no constitutional implications to the foregoing, either facially or as applied to Thomas.

Additionally, Thomas argues on appeal that the trial court was biased against him. Thomas’s failure to make such argument at the circuit court level, however, precludes our review on appeal. Indeed, “a party may not raise an issue for the first time on appeal.” *Sunrise Children’s Services, Inc. v. Kentucky Unemployment Insurance Commission*, 515 S.W.3d 186, 192 (Ky. App. 2016) (citation omitted).

CONCLUSION

For the foregoing reasons, we affirm the Calloway Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael G. Thomas
pro se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General

Robert Baldrige
Assistant Attorney General
Frankfort, Kentucky