# ***IMPORTANT NOTICE***

## ***NOT TO BE PUBLISHED OPINION***

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

DATE 2-12-04 Swift Graves, D.C.

2002-SC-0865-MR

JOHN PATRICK DOOLAN — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON
NOS. 94-CR-000473 AND 94-CR-001483

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant was convicted by a jury in the Jefferson Circuit Court of two counts of robbery in the first-degree. The jury sentenced him to two consecutive twenty-year terms. These sentences were further enhanced to fifty years each after the jury found Appellant to be a persistent felony offender (PFO) in the first-degree. On his prior appeal of that sentence, this Court affirmed Appellant's conviction but remanded the case to the Jefferson Circuit Court with directions that the court reduce Appellant's sentence to the statutory limit of seventy years imposed by KRS 532.110(c). The trial court issued an Amended Jury Trial Judgment of Conviction and reduced the second count of robbery in the first-degree to twenty years, thereby reducing Appellant's total sentence to seventy years. Appellant now alleges that his sentence is still illegal

because it is not clear from the amended judgment whether the trial court erroneously ordered that his PFO-enhanced sentence run consecutively to the underlying sentence of robbery in the first-degree. He appeals to this Court as a matter of right and asks that we remand with directions that the trial court impose "a clearly legal sentence." Ky. Const. § 110(2)(b). Finding no error in the reduction of sentence pursuant to our previous order, we affirm.

We first note that the Commonwealth states, and Appellant concedes, that this issue was not presented to the court below. However, we have repeatedly held that all defendants have a right to be sentenced in accordance with the law, and accordingly, that sentencing is "jurisdictional" in the sense that it cannot be waived by failure to object at the time judgment is entered. Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994); Wellman v. Commonwealth, Ky., 694 S.W.2d 696, 698 (1985). The Commonwealth states that Hughes, supra, was overruled by our decision in Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001), and that, therefore, Appellant has not preserved the issue for this Court's review. Myers, however, merely held that a defendant could waive the protections of KRS 532.110(c) pursuant to a plea agreement, and that decision did not overrule Hughes. Id. at 597. Accordingly, we will consider Appellant's allegation of sentencing error.

Appellant alleges that the trial court may have impermissibly run his enhanced sentence for being a PFO consecutive to his sentence on the underlying charge, and that this is proscribed by our decisions in Pace v. Commonwealth, Ky., 636 S.W.2d 887 (1982) (overruled on other grounds by Commonwealth v. Harrell, Ky., 3 S.W.3d 349 (1999)), and Covington v. Commonwealth, Ky., 481 S.W.2d 62 (1972). If this were what the trial court had in fact done, we agree that such a judgment would be error pursuant

to the above-cited authorities. However, the trial court merely reduced the second count of robbery in the first-degree to reflect that no PFO enhancement was applied to that charge. The first count of robbery in the first-degree remains enhanced by Appellant's status as a PFO, and that charge runs consecutive to the second count of robbery. Therefore, the PFO-enhanced count runs consecutive, not to the underlying first count of robbery, but to the separate, second count of robbery. The trial court properly complied with this Court's order to reduce Appellant's sentence in accordance with KRS 532.110(c). A trial court has wide discretion when imposing a sentence. Jones v. Commonwealth, Ky., 833 S.W.2d 839, 842 (1992). There was no error.

For the reasons stated above, we hereby affirm the Jefferson Circuit Court's judgment.

Lambert, C.J.; Cooper, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., concurs by separate opinion, with Graves, J., joining that separate opinion.

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## CONCURRING OPINION BY JUSTICE KELLER

In the interest of judicial economy, I concur in the result reached by the majority, but write separately because I disagree with the majority opinion's suggestion that "[t]he trial court properly complied with this Court's order to reduce Appellant's sentence in accordance with KRS 532.110(c)[,]"[1] and to express my view that the trial court reached an improper "solution" to the "problem" of how to impose a lawful, seventy (70) year aggregate sentence in this case.

The trial court's August 2000 judgment imposed fifty (50) year sentences for each of Appellant's two (2) First-Degree-PFO-enhanced, First-Degree Robbery convictions that were fixed by the jury's verdict, and, in accordance with the jury's recommendation, ordered the two sentences to run consecutively to one another for an aggregate sentence of one hundred (100) years, i.e., a sentence that unquestionably ran afoul of KRS 532.110(c), which provides "[i]n no event shall the aggregate of

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[1] Slip Op. at 3.

consecutive indeterminate terms exceed seventy (70) years."[2] After this Court reversed the unlawful aggregate sentence and remanded the case to the trial court "with instructions that the Appellant's sentence be reduced to the statutory limit, seventy years[,]"[3] the trial court attempted to accomplish that result – apparently by reducing the PFO-enhanced sentence for the second of Appellant's two (2) First-Degree Robbery convictions from fifty (50) to twenty (20) years, i.e., the minimum First-Degree-PFO-enhanced sentence for a Class B Felony,[4] but continuing to order the sentences for the two (2) convictions to run consecutively to one another for a total aggregate sentence of seventy (70) years. KRS 532.070(1) is the only statutory authority for such a reduction of a sentence fixed by a jury:

> When a sentence of imprisonment for a felony is fixed by a jury pursuant to KRS 532.060 and the trial court, having regard to the nature and circumstance of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that the maximum term fixed by the jury is unduly harsh, the court may modify that sentence and fix a maximum term within the limits provided in KRS 532.060 for the offense for which the defendant presently stands convicted.[5]

KRS 532.070, however, provides no authority for the sentence reduction that occurred in this case, i.e., where the trial court reduced Appellant's sentence under Count II to twenty (20) years not to avoid an "unduly harsh" jury verdict, but in an attempt to avoid

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[2] KRS 532.110(c).

[3] Doolan v. Commonwealth, 2000-SC-0816-MR (Memorandum Opinion Affirming in Part, Reversing and Remanding in Part Rendered March 21, 2002) (Slip Op. at 6).

[4] See KRS 532.080(6)(a) ("If the offense for which he presently stands convicted is a . . . Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than fifty (50) years[.]").

[5] KRS 532.070(1).

an unlawful aggregate sentence. In its August 2000 final judgment, the trial court implicitly rejected the notion that the fifty (50) year, PFO-enhanced sentence that the jury fixed for Appellant's second First-Degree Robbery conviction was "unduly harsh" when it not only imposed that fifty (50) year sentence, but also ran that sentence consecutively to the other fifty (50) year sentence. I would further observe that the amended judgment entered upon remand merely changed two (2) numbers – the length of the sentence for Count II and the length of the aggregate sentence – and did not contain any factual finding by the trial court that the jury's verdict as to Count II was "unduly harsh." Because KRS 532.070(1) is not implicated when a jury's sentencing recommendation is simply flawed rather than "unduly harsh,"[6] the trial court had no authority upon remand to "whittle away" thirty (30) years of the sentence fixed by the jury so that the aggregate sentence was lawful.

So, a fair question is, "what should the trial court have done?" For starters, at the time of trial, it should have instructed the jury as to the KRS 532.010(c) statutory cap, e.g., with a verdict form that provided:

> We, the jury, recommend that the sentences fixed for the Defendant under Counts 1 and 2 above shall be served concurrently (at the same time) or consecutively (one to begin after the completion of the other) in whole or in part, as follows:
>
> _____
>
> For a total sentence of _____ years, not to exceed, however, a total sentence of seventy (70) years.[7]

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[6] Cf. Neace v. Commonwealth, Ky., 978 S.W.2d 319, 321 (1998) ("Nothing in these provisions prohibits a trial court from disregarding a flawed sentencing recommendation. RCr 9.84 and KRS 532.070 do not control the issue.").

[7] See Lawson v. Commonwealth, Ky., 85 S.W.3d 571, 580 n.22 (2002); 1 WILLIAM S. COOPER, KENTUCKY INSTRUCTIONS TO JURIES § 12.18 at 131 (4th ed. 1999, 2003 cum. supp.); Id. at § 12.18A, cmt. at 132 ("It is reasonable for judges and

Having failed to instruct the jury in this manner, the trial court then should have imposed the fifty (50) year sentences that the jury had fixed for each of the two (2) First-Degree Robbery Convictions, but ordered thirty (30) years of the second conviction to run concurrently with (and twenty (20) years of it to run consecutively to) the other fifty (50) year sentence for a total aggregate sentence of seventy (70) years.[8] Having failed to impose a lawful sentence in this manner in its August 2000 final judgment, the trial court should have done so when this Court remanded the case for entry of a seventy (70) year sentence. (In fairness to the trial court, I would observe that Lawson was not rendered until September 26, 2002, which was almost three (3) weeks after the amended judgment was entered.)

I concur in the result reached by the majority opinion because, in the grand scheme of things, seventy (70) years is still seventy (70) years, and judicial economy militates against another remand for the sole purpose of imposing yet another seventy (70) year sentence.

Graves, J., joins this concurring opinion.

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practitioners to infer that [Lawson] represents the settled view of the majority of the Court.").

[8] See KRS 531.110(1) ("When multiple sentences of imprisonment are imposed on a defendant for more than one crime . . . the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence[.]" (emphasis added)); Lawson, 85 S.W.3d at 580 n.23.