

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky

FINAL

2003-SC-1063-MR

DATE 7-7-05 EJA Growth D.C.

TIMOTHY CHAMBERS

APPELLANT

V.

APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
2000-CR-0001 & 2000-CR-0055

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Timothy Chambers, was convicted by a jury in Greenup Circuit Court of eight counts of criminal attempt to commit an unlawful transaction with a minor, three counts of second degree sodomy, four counts of use of a minor in a sexual performance, and one count of promoting a sexual performance by a minor. The jury recommended that the sentences be served consecutively for a total of two hundred years. Pursuant to the requirements of KRS 532.110(1)(c), the trial judge reduced the sentence to seventy years, the maximum allowed under the statute.

An appeal of the conviction was originally considered in Chambers v. Commonwealth, 2001-SC-0088-MR (August 21, 2003). This Court determined that the trial court erred in denying Appellant's motion for a directed verdict on the four counts of use of a minor in a sexual performance. Slip op. at 6. Accordingly, all four counts of use of a minor in a sexual performance were reversed and the case was remanded to the circuit court for re-sentencing in conformity with the opinion.

On November 20, 2003, Appellant appeared before the Greenup Circuit Court for re-sentencing. Defense counsel filed a motion requesting that Appellant be re-sentenced by a jury; the motion was denied. At the same hearing, defense counsel also requested that the re-sentencing hearing be postponed so that a new pre-sentence investigation (PSI) report could be prepared. This request was denied on the basis of defense counsel's admission that an updated PSI would not contain any new or different information.

Appellant now appeals to this Court as a matter of right. Ky. Const. § 110 (2)(b). He argues that: (1) the trial court denied him due process of law by refusing to allow him to be re-sentenced by a jury; and (2) his due process rights were again violated when the trial court failed to obtain an updated PSI before his re-sentencing hearing. Finding no merit in either of these claims, we affirm Appellant's sentence.

Appellant first argues that the trial court erred in denying his motion for jury re-sentencing. At the re-sentencing hearing, the trial court removed the four overturned counts of use of a minor in a sexual performance, which had resulted in a combined seventy-year sentence, and simply subtracted those seventy years from the jury recommended two-hundred year sentence. Appellant argues that he was prejudiced by this method because the original sentencing jury had fixed the punishments on the other counts believing that he had also been found guilty of four counts of use of a minor in a sexual performance. According to Appellant, the sentencing jury might have considered the totality and number of the charges against him when fixing the possible penalties on all the charges, which would have produced an unfair result. He submits that jury re-sentencing is required whenever a sentence determination might have been influenced by a vacated conviction.

In addition to prejudicing him, Appellant also argues that statute and case law mandated jury re-sentencing. We consider this argument first. Appellant maintains that the trial court's refusal to allow him to be re-sentenced by a jury violated KRS 532.055(2), which states that the court shall conduct a sentencing hearing before the jury and the jury will determine the punishment to be imposed. He also argues that the refusal violated KRS 29A.270(1), which provides that a defendant "shall have the right to a jury trial in all criminal prosecutions," and RCr 9.84, which states that "[w]hen the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty . . . ." Appellant also cites Wilson v. Commonwealth, 765 S.W.2d 22 (Ky. 1989), and Franklin v. Commonwealth, 490 S.W.2d 148 (Ky. 1973), in support of his argument that jury re-sentencing was required.

We find the statutes and cases to which Appellant cites inapplicable. KRS 532.055, KRS 29A.270, and RCr 9.84 grant a criminal defendant the right to a jury trial and to be sentenced by the jury. However, these statutes have not been violated in this matter. Appellant was found guilty by a jury and was sentenced by the jury at the time of his trial, in accordance with applicable statutes. The record reveals that the sentencing jury recommended sentences for each of the twenty charges of which Appellant was found guilty. All of these charges and sentences were reviewed in Appellant's prior appeal. While the four counts of use of a minor in a sexual performance were reversed, no error was found with respect to the remaining convictions. Simply put, the remaining sixteen convictions and sentences have been affirmed by this Court and there is simply no basis to re-sentence Appellant on those charges.

Furthermore, neither Wilson nor Franklin provides authority to grant Appellant jury re-sentencing on all charges. In both cases, the reviewing court affirmed the convictions, but remanded the cases for re-sentencing due to errors in the sentencing phase. Upon appealing the re-sentencing, it was determined that both defendants should have been re-sentenced by a jury. The cases, however, are not analogous to the present matter because in neither case was the conviction reversed; rather, both cases were initially reversed to correct errors in the sentencing phase. In Wilson, the matter was remanded for re-sentencing because the initial sentencing jury had failed to find the existence of a statutory aggravating factor as required by KRS 532.025(3). In Franklin, it was determined that the instructions delivered to the initial sentencing jury were ambiguous and therefore invalid. In effect, then, both Franklin and Wilson were entitled to jury re-sentencing because they had never received valid penalties fixed by a jury. Here, however, Appellant is not being re-sentenced on an affirmed conviction, nor is any error in the initial sentencing phase being alleged. A jury sentenced Appellant, those sentences were reviewed and affirmed by this Court, and therefore no basis exists to re-sentence Appellant on those convictions.

Moreover, we are not persuaded that Appellant was substantially prejudiced when the sentencing jury fixed punishment believing that he was guilty of the four counts of use of a minor in a sexual performance. The thrust of Appellant's argument is that the jury might have sentenced him less severely had it known he was not guilty of the four additional counts. Appellant, however, is unable to direct our attention to any material demonstration of prejudice. This argument amounts to little more than speculation or conjecture. It seems more likely that the jury fixed punishment based on

the overwhelming evidence of Appellant's guilt. Reversal is not warranted in this instance.

Appellant next contends that the trial court's failure to grant his request for an updated PSI constitutes reversible error. At the re-sentencing hearing, defense counsel requested a postponement in order to prepare an updated PSI. The trial judge denied this request because defense counsel admitted that the new PSI would not contain any new or different information. Additionally, the trial judge noted that Appellant had been incarcerated and under the jurisdiction of the Department of Corrections since the time of the existing PSI.

Appellant argues that even though the new PSI might not contain any new or different information, failure to grant his request still resulted in a violation of KRS 532.050, which requires a PSI report to be prepared before sentencing on a felony conviction. He points to the fact that the existing PSI was prepared almost three years before the re-sentencing hearing to suggest that it may now be inadequate to comply with the statutory requirements. According to Appellant, the length of time that had transpired between the existing PSI and the re-sentencing hearing created a reasonable likelihood that the existing PSI would be incorrect or incomplete. Appellant cites to Doolan v. Commonwealth, 566 S.W.2d 413 (Ky. 1978), to support this contention.

We find no error in the trial court's decision to deny Appellant's motion. In Doolan, this Court determined that the trial court erred in denying the appellant's request to update his PSI upon re-sentencing. The present matter is factually distinguishable. In Doolan, the appellant challenged the accuracy of specific information contained in the existing PSI, but the trial court refused to allow time for the

appellant to controvert the information in the report. Here, on the other hand, defense counsel admitted that no new information would be contained in the report. More importantly, Appellant did not object or challenge the accuracy of any of the information in the report. Simply stated, it is impossible to see how Appellant suffered prejudice by the trial judge denying his request for an updated PSI when Appellant's counsel conceded that an updated PSI would produce no changes or new information.

The judgment of the Greenup Circuit Court is, therefore, affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone, Scott, and Wintersheimer, JJ.,  
sitting. All concur.

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