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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2007-SC-000047-MR

DATE 2-14-08 ELLAGRAVHTP.C.

ERVIN THOMAS JENKINS, JR.

APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
NO. 95-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Ervin¹ Thomas Jenkins, Jr., appeals as a matter of right² from a judgment re-sentencing him to a fifty-year prison term. Although Jenkins raises several issues in his pro se brief to this court,³ we affirm the trial court's judgment because the issues raised are either without merit or are unpreserved for our review.

I. FACTS.

The thirteen-year progression of this case began in 1995 when Jenkins was indicted on ten counts of first-degree rape and five counts of first-degree sodomy of his

¹ The appellant is referred to as "Irvin" Thomas Jenkins, Jr., in several documents. However, the correct spelling of his first name appears to be "Ervin," as indicated by Jenkins's signature on the pro se appellate brief.

² Ky. Const. § 110(2)(b).

³ Although the Department of Public Advocacy was initially appointed to serve as appellate counsel for Jenkins, it withdrew upon his request; and he filed a pro se brief.

minor stepdaughter occurring during the years of 1992 through 1994. The first trial on these charges ended in a mistrial, and Jenkins sought a writ to prohibit the trial court from retrying him on the same charges. The Court of Appeals denied the writ.

In 2001, Jenkins was within weeks of the scheduled retrial when, in the midst of a bond hearing, he informed the trial court that he wished to enter an open plea of guilty to all charges and waive jury sentencing. After a brief recess, the trial court accepted Jenkins's guilty plea after conducting a colloquy and determining that his plea was made freely, voluntarily, and intelligently. The trial court took note of Jenkins's request for sentencing by the court, rather than a jury, and stated that the request would be granted only if the Commonwealth agreed. Shortly thereafter, the trial court entered a written order accepting Jenkins's guilty plea and setting a hearing for "the court" to hold a sentencing hearing "by agreement of the parties."

Jenkins soon obtained new counsel and moved to withdraw his guilty plea. Following a hearing, the trial court denied the motion to withdraw the plea. Several days later, the trial court proceeded to sentence Jenkins, imposing 18 years on each of the 15 counts in the indictment, to be served consecutively. The sentence totaled 270 years. On direct appeal, this Court affirmed, finding the guilty plea voluntary and stating that Jenkins had not preserved the issue of whether he should have been sentenced under the 1998 amendments to Kentucky Revised Statutes (KRS) 532.110, which could have greatly reduced his sentence.

In his first unsuccessful collateral attack on the judgment, Jenkins moved the trial court to reduce the sentence under KRS 532.110, citing Kentucky Rules of Civil Procedure (CR) 60.02. Jenkins did not appeal the denial of that motion.

Next, Jenkins filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging that his trial counsel was ineffective for failing to advise him that KRS 446.110 allowed him to consent to the 1998 amendments to KRS 532.110. The trial court denied the motion. The Court of Appeals affirmed Jenkins's conviction but vacated his sentence, agreeing with Jenkins that trial counsel was ineffective. The Court of Appeals remanded the case to the trial court for resentencing in accordance with KRS 532.110, which the Court of Appeals stated would establish a maximum sentence of 50 years' imprisonment.

On remand, the trial court commenced resentencing proceedings. Jenkins then filed various motions with the trial court, including (1) a motion requesting the preparation of a new Presentence Investigation Report (PSI), (2) a motion to allow appointed counsel to withdraw and for appointment of an inmate paralegal or alternative counsel to represent him and to limit the role of appointed counsel, and (3) another motion under CR 60.02. This CR 60.02 motion claimed that his attorney at the time his guilty plea was entered failed to communicate to him an alleged plea offer from the Commonwealth of five to seven years' imprisonment. The trial court ordered that a new PSI be prepared and allowed another attorney from the public defender's office to be substituted as counsel for Jenkins.

In August 2006, the trial court orally advised the parties in open court that they would be allowed to present whatever evidence they found necessary at the re-sentencing hearing and asked the parties exactly what they wanted. Jenkins's only

request was that the “court” consider the full range of punishment subject to the Court of Appeals’ statement that 50 years’ imprisonment was the maximum punishment.⁴

At the resentencing hearing a few days later, the Commonwealth played the videotape of the victim’s testimony from the 2001 sentencing hearing. In 2001, the victim testified to being forced by Jenkins on several occasions to engage in sexual intercourse or sodomy. Jenkins testified at resentencing, admitting that he had sexual relations with his stepdaughter but stating, “It wasn’t rape” because, in his view, the stepdaughter consented.⁵ Jenkins also called as witnesses his sister and his son, who both testified about his close family relationships, his work ethic, his employment history, and his academic and vocational progress while incarcerated. After verifying that the parties had presented all the evidence and arguments that they wanted to make on resentencing, the trial court resentenced Jenkins to the maximum punishment allowed by the Court of Appeals opinion, a term of 50 years’ imprisonment. In so doing, the trial court noted the seriousness of the crimes and its belief that imposing a punishment less than the maximum would unduly depreciate the seriousness of the crimes. Jenkins now raises several issues in this appeal from the trial court’s order resentencing him to 50 years’ imprisonment.

⁴ The Commonwealth argued to the trial court that the maximum allowable punishment was 70 years, according to more recent case law; but the Commonwealth did not file a cross-appeal.

⁵ We note that Jenkins had entered guilty pleas to first-degree rape and first-degree sodomy in 2001, and that this Court found these guilty pleas were made voluntarily. Jenkins had been indicted for first-degree rape and first-degree sodomy “through the use of forcible compulsion.” Furthermore, the victim was not under twelve years of age when Jenkins engaged in sexual intercourse and sodomy with her on various occasions from 1992 to 1994. Thus, Jenkins had clearly entered a guilty plea to forcible first-degree rape (KRS 510.040(1)(a)), and forcible first-degree sodomy (KRS 510.070(1)(a)), not first-degree rape and first-degree sodomy based on the victim being under the age of twelve. (KRS 10.040(1)(b)(2)); KRS 510.070(1)(b)(2)). His testimony at the resentencing hearing that the victim had consented was inconsistent with the guilty plea he entered.

II. No Relief Merited for Trial Court's Failure to Appoint Inmate Paralegal or "Conflict Attorney" from Outside Public Defender's Office to Represent Him.

Jenkins contends that the trial court erred to his prejudice by neither allowing him to be represented by an inmate paralegal at resentencing, nor appointing a "conflict attorney" from outside the public defender's office to represent him at resentencing. He also complains that the trial court refused to limit the role of counsel from the public defender's office.

Jenkins perceived a conflict in continuing to be represented by the public defender's office because of the Court of Appeals' finding of ineffective assistance by another attorney from the public defender's office. However, we note that shortly after Jenkins filed his pro se motion to be represented by the inmate paralegal or a conflict attorney outside the public defender's office, a different attorney from the public defender's office entered his appearance as substitute counsel to represent Jenkins. Jenkins voiced no objection to this new public defender. Although Jenkins originally requested conflict counsel in his written motion, the trial court never formally ruled upon this part of his motion; and Jenkins made no complaint with the new attorney appointed for him to the trial court,⁶ nor demanded a ruling upon his motion for conflict counsel.

⁶ We note that at an earlier hearing, Jenkins told the trial court of his dissatisfaction with the first attorney appointed for him for resentencing, indicating a number of reasons why he was not happy with that individual attorney. Jenkins did not then indicate that he wanted someone from outside the public defender's office because of a potential conflict of interest. The trial court refused to allow him a different attorney from the public defender's office at that time but, upon later motion, allowed a second attorney from the public defender's office to substitute as counsel. Because Jenkins did not reassert his argument about an inherent conflict of interest in anyone from the public defender's office continuing to represent him after the second attorney from the public defender's office entered his appearance and represented him at the resentencing hearing or explicitly state any other problem with the second attorney at resentencing, the trial court might have understandably thought that Jenkins had difficulties only with the individual attorney originally appointed to represent him

So it does not appear that Jenkins's request to be appointed conflict counsel from outside the public defender's office is properly before us because he did not request a ruling from the trial court on this motion.⁷ Nor did the trial court ever explicitly rule on his motion to limit the role of his counsel from the public defender's office. Again, Jenkins never demanded a ruling on this motion, nor did he raise any issues with the role of his counsel at the resentencing hearing. Thus, this issue is also not preserved for his review.

Jenkins now argues that his counsel at resentencing showed a "lack of interest" in his case and rendered ineffective assistance of counsel.⁸ However, his claims of ineffective assistance of counsel at resentencing cannot properly be decided by this court upon this direct appeal, especially given the lack of trial record on this specific issue.⁹

As for Jenkins' request to have a non-attorney represent him, the trial court properly denied this request. Despite Jenkins's creative argument that he had a right to "counsel" (citing dictionary definitions, such as "advice"), rather than a right to an "attorney," a criminal defendant's constitutional right to counsel is the right to legal

and no longer perceived a conflict with the entire public defender's office when he obtained representation with an attorney with whom he did not experience the same difficulties.

⁷ Bratcher v. Commonwealth, 151 S.W.3d 332, 350 (Ky. 2004) (trial court's failure to rule on motion not preserved for review where defendant failed to request ruling on issue).

⁸ We note that Jenkins also complains about ineffective assistance of counsel *before* the case was remanded for resentencing by the Court of Appeals, as well; but these ineffective assistance claims were already decided in the Court of Appeals' opinion remanding for resentencing.

⁹ Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998) ("As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment[] because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts.")

counsel, meaning representation by an attorney.¹⁰ As the trial court pointed out, Jenkins could choose to represent himself or to be represented by an attorney; but the trial court did not have authority to allow a non-attorney to represent Jenkins.¹¹ Denying this request was not error.

In sum, we find no reversible error in the trial court's refusal to let a non-attorney represent Jenkins and in it allowing substitute counsel from the public defender's office to represent Jenkins rather than appointing a "conflict attorney" from outside the public defender's office.

III. Trial Court Properly Ordered New PSI and Allowed Jenkins to State Any Disagreements with the PSI for the Record.

Jenkins contends that the trial court severely and unconstitutionally restricted him from controverting the information in the updated PSI before resentencing him. The record flatly refutes this contention. As Jenkins requested by pro se motion, the trial court ordered a new PSI because the information in the earlier PSI had become stale. And the trial court asked Jenkins about the PSI at the resentencing hearing and allowed him to state all his disagreements with it for the record. Although the trial court initially noted that it could not physically alter the PSI, it stated that it could enter orders for the Department of Corrections to disregard any erroneous information and struck a gratuitous comment by a probation and parole officer. Contrary to Jenkins's argument, the trial court did not restrict him in his efforts to controvert information in the updated

¹⁰ "Right to counsel" in the criminal law context is defined in BLACK'S LAW DICTIONARY (8th ed. 2004) as "[a] criminal defendant's constitutional right, guaranteed by the Sixth Amendment, to representation by a court-appointed *lawyer* if the defendant cannot afford to hire one." (Emphasis added.)

¹¹ May v. Coleman, 945 S.W.2d 426, 428 (Ky. 1997); SCR 3.020.

PSI. The trial court actually allowed Jenkins to express all disagreements with the PSI for the record, certainly granting him an opportunity to be heard on the matter.

IV. Trial Court Was Aware of and Properly Exercised Discretion in Resentencing Jenkins.

Jenkins correctly contends that the trial court was not required to impose the maximum sentence allowable for the crimes but had discretion to impose a less severe sentence so long as it was within the statutory minimum. That said, we find no error in the trial court's exercising its discretion to impose the maximum sentence. The trial court expressed its awareness that it was not compelled to impose the maximum sentence but had discretion to impose a lesser sentence. It did not immediately sentence Jenkins to fifty years' imprisonment but took extensive evidence from Jenkins and family members and heard the victim's testimony on videotape. After the taking of evidence was complete, the trial court recessed to consider what sentence would be appropriate, explicitly noting beforehand its consideration of the suffering of Jenkins's family members while he was incarcerated, as well as the severity of the crimes recounted by the victim.

Ultimately, the trial court decided to impose the maximum allowable punishment, noting for the record that it chose to do so based on the seriousness of the crimes as reflected by the victim's testimony. We conclude that in deciding as it did, the trial court did not abuse its discretion.¹² The victim's testimony alone amply supported the trial

¹² See Jones v. Commonwealth, 833 S.W.2d 839, 842 (Ky. 1992) ("the trial judge has wide discretion when imposing sentencing."). See also Bartrug v. Commonwealth, 582 S.W.2d 61, 63 (Ky.App. 1979) ("Unless there exists some constitutional or statutory limitation, the sentencing power in Kentucky is discretionary with the trial judge."). Because the sentence imposed by the trial court was within the statutory range deemed proper by the Kentucky Court of Appeals and the trial court expressly noted that it based the sentence on the valid

court's judgment. Although the trial court also considered the testimony of family members who sought a lesser sentence, it, nonetheless, reasonably concluded that the seriousness of the crimes merited the maximum punishment. The sentence imposed by the trial court was proper.

V. Trial Court Properly Resentenced Jenkins Without a Jury.

Jenkins contends that his resentencing should have been conducted by a jury. However, when entering his guilty plea, Jenkins specifically requested, and the Commonwealth agreed, that the trial judge, not a jury, conduct sentencing.¹³ Although Jenkins's prehearing brief asked for a jury to consider mitigation evidence upon re-sentencing, Jenkins did not ask for jury resentencing when asked by the trial court what he wanted before the resentencing hearing. Because he failed to request a ruling on whether he was entitled to a jury on resentencing, this issue is not properly before us.¹⁴ Furthermore, the argument is without merit because Jenkins pleaded guilty with the request that the trial judge conduct sentencing. And this Court specifically adjudged that guilty plea to be voluntarily made.

consideration of the seriousness of the crimes, we cannot conclude that the trial court abused this wide discretion in imposing the maximum allowable sentence.

¹³ Generally, while sentencing may be conducted by the trial judge, rather than by jury, when the defendant enters a guilty plea, the Commonwealth has a right to insist on jury sentencing even though the defendant has pleaded guilty. Lycans v. Commonwealth, 562 S.W.2d 303, 305 (Ky. 1978).

¹⁴ Bratcher, 151 S.W.3d at 350.

VI. Trial Court Properly Allowed and Considered Mitigation Evidence.

Jenkins argues that the trial court did not allow him to present mitigation evidence at the resentencing hearing and did not consider mitigation evidence before resentencing him. Again, this contention is refuted by the record. The trial court heard the mitigation evidence in the form of testimony of Jenkins, his sister, and his son. Furthermore, the trial court stated that it would let the parties present any evidence that they desired to present upon resentencing. Jenkins did not offer any other evidence nor indicate that he wished to offer any other evidence. So we cannot agree that the trial court blocked presentation of any mitigation evidence.

We do not agree with Jenkins's contention that the trial court did not consider mitigation evidence. The trial court specifically noted that it took into consideration the testimony of family members and how they suffered when Jenkins was in prison. Apparently, the trial court may not have given great weight to Jenkins's testimony that sexual intercourse and sodomy with the child-victim was not forcible but consensual. In light of the fact that Jenkins entered a guilty plea to all counts of forcible rape and sodomy and in light of this Court's earlier conclusion that the guilty plea was voluntary, the trial court's refusal to ascribe great weight to the inconsistent testimony presented at resentencing was reasonable. So we find no reversible error in the trial court's allowance of and consideration of mitigation evidence.

VII. Jenkins Failed to Preserve CR 60.02 Claim By Not Demanding Ruling.

Jenkins asks us to reverse the trial court for its failure to consider his successive CR 60.02 claim that his counsel at the 2001 plea hearing failed to communicate to him a

plea offer of 5 to 7 years' imprisonment. While he had made this claim in a pro se written motion, he did not demand a ruling on this claim before the trial court resented him. So this claim is not properly before us, and we cannot grant him relief.¹⁵

VIII. CONCLUSION.

Because the errors alleged by Jenkins are unpreserved or without merit, we affirm the judgment resentencing Jenkins.

All sitting. All concur.

¹⁵ Bratcher, 151 S.W.3d at 350.

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