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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001172-MR

JOHN C. MARTIN — APPELLANT

APPEAL FROM ANDERSON CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 09-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

and

NO. 2012-CA-001299-MR

JONATHAN McDANIEL — APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 09-CR-00181

COMMONWEALTH OF KENTUCKY — APPELLEE

and

NO. 2012-CA-001513-MR

DAVID L. DeSHIELDS — APPELLANT

APPEAL FROM McCRACKEN CIRCUIT COURT
v. HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 09-CR-00547

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

COMBS, JUDGE: These consolidated appeals involve denial of motions to amend criminal sentences. John Martin appeals the order of the Anderson Circuit Court; Jonathan McDaniel appeals the order of the Calloway Circuit Court; and David DeShields appeals the order of the McCracken Circuit Court. After our review, we affirm.

Each of the three appellants pled guilty to sex offenses. Martin entered his plea on January 31, 2011. He received a sentence of twenty-three years' incarceration followed by five years of conditional discharge. DeShields pled guilty on September 10, 2010; his sentence was six-years' incarceration followed by five years of conditional discharge. McDaniel entered his guilty plea on March 12, 2010. On May 10, 2010, the court sentenced him to eleven-years' incarceration followed by a term of conditional discharge of five years.

In 2012, Martin, DeShields, and McDaniel filed nearly identical motions on May 4, July 13, and May 23, respectively. Each motion was styled "Motion to Amend Sentence" and sought the same relief – removal of the conditional discharge. All three trial courts denied the motions. Martin, DeShields, and McDaniel all appealed. This court, *sua sponte,* consolidated the three appeals for the sake of judicial economy.

We must first address the characterization of the motions to amend the sentence. None of the motions contained a citation to any rule under which it was brought. On appeal, the Commonwealth construes the motions as having been made pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. On the other hand, the Appellants argue that their motions were filed pursuant to Kentucky Rule[s] of Civil Procedure (CR) 60.02. We agree with the Commonwealth that the motions were made pursuant to RCr 11.42.

Our Supreme Court has explicitly limited recourse to CR 60.02 "for relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The sole relief sought by Appellants' motions was amendment of their sentences. The caption of RCr 11.42 is "Motion to vacate, set aside or correct sentence." However, the Appellants contend that their motions were not made pursuant to RCr 11.42 because they are not alleging ineffective assistance of counsel. Nonetheless, that rule specifically directs that "[t]he motion ***shall state all grounds*** for holding the sentence invalid[.]" RCr 11.42(3). (Emphasis added.) It is *not limited* to claims for ineffective assistance of counsel. Moreover, *Gross* holds that RCr 11.42 motions must precede CR 60.02 motions, and the record does not indicate that any of the appellants filed RCr 11.42 motions prior to the motions now before us on appeal. *Gross, supra*. Therefore, we are compelled to conclude that the motions were filed pursuant to RCr 11.42, and we may only disturb the decisions of the trial courts if

they were clearly erroneous. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007).

Martin and McDaniel both claim that their guilty pleas were not entered knowingly, voluntarily, or intelligently because they were not aware of the conditional discharge portion of their sentence. Although they have raised this issue on appeal, it was not presented to the trial court. In fact, Martin and McDaniel never contested the validity of their pleas. They merely requested an amendment of their sentences. Therefore, the allegation is not properly before us, and we may not address it. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

All three Appellants argue that they have been denied due process by being subject to the current conditional discharge revocation procedures. KRS 532.043 governs conditional discharge, which is mandatory for all convicted sex offenders. In 2010, our Supreme Court declared KRS 532.043(5) unconstitutional. *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010). At that time, conditional discharge was supervised by the Division of Probation and Parole. However, revocation proceedings were being conducted by the courts. The Kentucky Supreme Court held that because the Division of Probation and Parole is in the executive branch of government, the statute had resulted in a violation of the doctrine of separation of powers: "KRS 532.043(5) violates Section 27 and Section 28 of the Kentucky

Constitution by impermissibly conferring an executive power to revoke a post-incarceration or post-parole conditional release upon the judiciary." *Id*. at 300.

After the *Jones* decision, the General Assembly duly revised the statute. The term *conditional discharge* is no longer used; it has now become *post-incarceration supervision*. Revocation decisions are now within the exclusive purview of the Parole Board, which conducts the revocation proceedings according to the mandates of Kentucky Administrative Regulation 501 KAR 1:070.

The Appellants argue that the new procedures diminish their constitutional right to due process. They claim that they were not given fair warning of a stricter punishment at the time they entered their guilty pleas. Under the old version of KRS 532.043, revocation hearings were held in a courtroom; counsel was required for defendants; judges from the jurisdiction where charges were incurred presided; and defendants were granted direct appeals to the Court of Appeals. The trial court could revoke the conditional discharge "so long as the evidence support[ed] at least one violation. *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988).

Under the current version, the offender is notified of the violation and is also assigned a date for a preliminary hearing. 501 KAR 1:070 § 1(1). The offender is given at least five days to prepare for the hearing. *Id*. at § 1(3). An administrative law judge conducts the preliminary hearing. *Id*. at § 1(5). The offender is permitted to obtain counsel and may move for a continuance for the purpose of obtaining counsel. *Id*. at § 1(11).

If the administrative law judge determines that there is probable cause to support the charges upon completion of the preliminary hearing, the offender is referred to the Parole Board. *Id*. at § 1 (6). The Parole Board conducts its own hearing. *Id*. at § 3. Following the hearing, a revoked offender may petition the Board for reconsideration. *Id*. at § 4. All proceedings are conducted within the executive branch in accordance with *Jones, supra*.

It appears that the new procedures actually afford offenders more due process than did the previous proceedings. The Department of Corrections is still required to provide notice to the offender. Under the old procedures, he only had one opportunity to present evidence and arguments to a judge. Now, he receives two chances to present his case – one before an administrative law judge and another before the Parole Board. While it is true that when they pled guilty the Appellants were not able to anticipate the changes to the revocation procedures, we cannot agree that their punishment become stricter or that their right to due process has been diminished. Therefore, we are persuaded that the circuit courts did not err when they denied Appellants' motions.

One argument remains. Martin alleges that five of his charges were *not* subject to post-incarceration supervision and that imposition of such supervision has occurred in violation of the constitutional prohibition against *ex post facto* punishment. However, he admits that at least two of his charges render him subject to supervision. The period of supervision was for five years -- regardless

of the number of charges for which supervision was mandated. Therefore, there is no merit to this argument.

We affirm the orders of the McCracken, Anderson, and Calloway Circuit Courts.

ALL CONCUR.

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