

RENDERED: DECEMBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002355-MR

TERRY WAYNE TYLER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 87-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CAPERTON, JUDGE: The Appellant, Terry Tyler, is currently serving a life sentence which he received in 1987 for burglary and robbery. Tyler appeals the trial court's denial of his "Motion for Modification of Sentence Pursuant to KRS 532.070." Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Tyler was indicted by the Henderson County Grand Jury for two counts of third-degree burglary, one count of first-degree robbery, and one count of second-degree persistent felony offender. On April 8, 1987, following a jury trial, Tyler was found guilty of one count of third-degree burglary and one count of first-degree robbery, as well as being found to be a second-degree persistent felony offender. Accordingly, Tyler was sentenced to ten years for the burglary and a life sentence for the robbery.

Since that time, Tyler has filed numerous appeals. This Court recently summarized that history as follows:

The lengthy procedural history in this case has been set forth in prior unpublished decisions by this Court.

In 1987, Tyler appealed his conviction directly. On March 3, 1988, the Kentucky Supreme Court affirmed Tyler's conviction in an unpublished opinion. In August 1988, Tyler filed a *pro se* motion pursuant to RCr 11.42 to vacate the circuit court's April 27, 1987 judgment. The Henderson Circuit Court denied his RCr 11.42 motion. In an attempt to appeal this denial, Tyler filed a motion for belated appeal with the circuit court, who lacked jurisdiction, and filed a similar motion with this court. On March 3, 1989, Tyler filed a *pro se* motion pursuant to CR 60.02 seeking a new trial on the alleged grounds of newly discovered evidence and perjured testimony. On April 17, 1989, he filed another *pro se* motion pursuant to CR 60.02 seeking relief from the circuit court's denial of his RCr 11.42 motion.

On June 22, 1989, the Henderson Circuit Court denied Tyler's two CR 60.02 motions, and Tyler failed to appeal this denial. Then on September 5, 1989, this Court denied Tyler's motion for belated appeal regarding the denial of his RCr 11.42 motion.

On April 26, 1990, Tyler filed his third motion pursuant to CR 60.02, claiming ineffective assistance of

counsel. The circuit court denied his third CR 60.02 motion on May 29, 1990, and Tyler appealed to this court which affirmed the Henderson Circuit Court on February 8, 1991.

Next, on September 13, 1993, Tyler filed a *pro se* motion pursuant to KRS 532.070 to modify his sentence, which motion the circuit court denied on October 21, 1993. Tyler appealed the denial of his KRS 532.070 motion, and on October 11, 1994, this Court affirmed the Henderson Circuit Court holding that Tyler's motion was untimely and his claims lacked merit.

On July 17, 1998, Tyler filed yet another motion pursuant to CR 60.02, claiming that an improper jury instruction was presented to the jury during the penalty phase. After the Commonwealth failed to respond, Tyler filed a motion for default judgment regarding his fourth CR 60.02 motion. On September 17, 1998, the Henderson Circuit Court denied both motions and concluded that Tyler's fourth CR 60.02 motion was untimely, and the relief he sought was not available pursuant to CR 60.02. Tyler appealed this denial. This Court again affirmed the circuit court and held that Tyler's motion was untimely. The issues should have been presented on direct appeal or in an RCr 11.42 motion and did not warrant relief pursuant to CR 60.02.

Finally, Tyler filed yet another motion pursuant to KRS 532.070 to modify his sentence. He claimed that an improper jury instruction had been presented to the jury during the penalty phase and that the Henderson Circuit Court still had jurisdiction to modify his sentence, although more than ten days had passed since the judgment against Tyler was entered. As stated above, on July 19, 2000, the circuit court denied Tyler's second motion to modify his sentence. On July 28, 2000, Tyler filed a motion with the Henderson Circuit Court requesting the circuit court issue findings of fact and conclusions of law regarding its denial ... [O]n August 3, 2000, the circuit court denied Tyler's motion for findings of facts and conclusions of law. Subsequently, Tyler appealed both denials to this court.

A panel of this Court affirmed the trial court in the above-referenced unpublished opinion. Thereafter, in May 2004, Tyler, *pro se*, filed another RCr 11.42 motion

with the Henderson Circuit Court. The court denied the motion as untimely, and this Court affirmed. *Tyler v. Commonwealth*, 2004-CA-001666-MR (June 3, 2005).

In November 2006, Tyler filed a motion pursuant to CR 60.01, asking the Henderson Circuit Court to vacate his PFO conviction due to a constitutional error in the penalty-phase jury instructions. The court denied Tyler's motion on December 16, 2006. The court acknowledged that Tyler had raised this issue in previous motions and held that CR 60.01 did not afford relief for substantive legal errors.

...

CR 60.01 allows the court to correct clerical mistakes, not substantive legal errors. *See Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000). Here, the trial court's judgment clearly reflected the verdict of the jury. There is no clerical error in the judgment; rather, Tyler asserts a substantive legal argument attacking his conviction based on the validity of the jury instructions. As there is no clerical mistake at issue, Tyler's argument is not properly before us pursuant to CR 60.01.

Even if this issue were before us on collateral attack pursuant to RCr 11.42 or CR 60.02, review would be foreclosed because Tyler could have raised the issue on direct appeal. *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983). Likewise, Tyler has previously raised similar arguments in other post-conviction motions.

Tyler v. Commonwealth, 2007-CA-000103-MR (February 22, 2008)(quoting *Tyler v. Commonwealth*, 2000-CA-001872-MR (Jan. 25, 2002)). *Tyler v. Commonwealth*, 2009 WL 102901 (Ky. App. 2009)(alterations in original).

The aforementioned procedural history led directly to the current matters at issue in the matter *sub judice*. Following the events recited above, Tyler filed yet another "Motion for Modification of Sentence Pursuant to KRS 532.070."

On September 17, 2009, the trial court denied that motion in an order which stated in relevant part:

Tyler now moves the Court to reduce his life sentence pursuant to KRS 532.070. That statute allows the Court to reduce the jury's recommendation if it believes it is unduly harsh. He cites as support the 1998 crime bill (House Bill 455), which put a fifty-year limit on a term of years imposed for a Class A felony. KRS 532.060(2)(a).

First, it appears that the motion is untimely and that this Court no longer has the jurisdiction to modify Tyler's sentence under KRS 532.070. *See Sliverburg v. Commonwealth*, 587 S.W.2d 241, 244 (1979). This was the appellate court's ruling when it denied Tyler's previous motion under KRS 532.070 on October 11, 1994; and the present motion, filed on September 14, 2009, is just as untimely as that one.

Second, even if it were timely, the 1998 crime bill does not support Tyler's motion. While the crime bill did put a limit on a term of years, it did not take away the jury's option to impose life in prison. A life sentence for a Class A felony is valid under both the old law and the current one. Given the seriousness of his crimes and his previous criminal history, Tyler's sentence is not unduly harsh, nor is it cruel and unusual punishment. *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968).

See September 17, 2009, Order of Henderson Circuit Court, pp. 1-2.

This Court has reviewed the record and applicable law, and we are in agreement with the trial court that Tyler's latest motion in the matter *sub judice* was untimely filed. The judgment and sentence against Tyler were entered in 1988. The motion to modify sentence brought in the matter *sub judice* was brought over twenty years after the initial sentence was entered. Further, Tyler has twice brought this issue before the trial court and before this Court on appeal. Each time

such motions were found to be untimely and without merit. We do not find otherwise now, and are in agreement with the trial court that even if Tyler's motion were timely, which it is not, that the provisions of the crime bill which he cites does not curtail the option of the jury to impose life in prison if it believes such is a fitting sentence. *See Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979); *Commonwealth v. Gross*, 936 S.W.2d 85, 87-88 (Ky. 1996); *Commonwealth v. Gaddie*, 239 S.W.3d 59 (Ky. 2007).

Wherefore, for the foregoing reasons, we hereby affirm the September 17, 2009, order of the Henderson Circuit Court, overruling Tyler's latest motion for modification of sentence.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terry W. Tyler, *Pro Se*
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky