

RENDERED: FEBRUARY 15, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001974-MR  
AND  
NO. 2010-CA-002210-MR

KENNETH THROGMORTON

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NOS. 10-CR-00072 AND 10-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING  
WITH DIRECTIONS

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BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Kenneth Throgmorton brings Appeal No. 2010-CA-001974-MR and Appeal No. 2010-CA-002210-MR from two judgments entered September 29, 2010, in the Ballard Circuit Court Action Nos. 10-CR-00072 and 10-CR-00073

sentencing him to five years' imprisonment and eleven years' imprisonment, respectively. We reverse and remand with directions in Appeal No. 2010-CA-001974-MR and Appeal No. 2010-CA-002210-MR.

In 2010, appellant was indicted upon multiple charges related to a series of thefts in Ballard and Carlisle Counties. Relevant to this appeal, there were three separate criminal actions, one in Carlisle County and two in Ballard County. Each action will be set forth in chronological order below.

In Carlisle Circuit Court Action No. 10-CR-00010, appellant pleaded guilty to three counts of third-degree burglary (Class D felony) and one count of theft by unlawful taking over \$500 (Class D felony). By judgment entered September 16, 2010, appellant was sentenced to a total of sixteen years' imprisonment in Action No. 10-CR-00010.<sup>1</sup>

Thereafter, appellant pleaded guilty in Ballard Circuit Court (Action No. 10-CR-00072) to four counts of third-degree burglary (Class D felony) and one count of theft by unlawful taking over \$500 (Class D felony). By judgment entered September 29, 2010, appellant was sentenced to a total of five years' imprisonment in Action No. 10-CR-00072.

Also, in Ballard Circuit Court (Action No. 10-CR-00073), appellant pleaded guilty to three counts of third-degree burglary (Class D felony) and eight counts of theft by unlawful taking over \$500 (Class D felony). By judgment

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<sup>1</sup> Although irrelevant to disposition of these appeals, appellant also pleaded guilty to myriad misdemeanor charges in Carlisle Circuit Court Action No. 10-CR-00010 and Ballard Circuit Court Action No. 10-CR-00072. The sixteen-year sentence in Carlisle County was not directly appealed but is relevant to disposition of these appeals.

entered September 29, 2010, appellant was sentenced to a total of eleven years' imprisonment in Action No. 10-CR-00073.

Being first in time, the September 16, 2010, judgment of the Carlisle Circuit Court (Action No. 10-CR-00010) was silent regarding whether such sentence would run concurrently or consecutively with any other sentence of imprisonment. However, the September 29, 2010, judgment of the Ballard Circuit Court (Action No. 10-CR-00072) specifically stated the sentence of imprisonment therein was to run consecutively with the sentence of imprisonment imposed in Carlisle Circuit Court (Action No. 10-CR-00010) and consecutively with the sentence of imprisonment imposed in Ballard Circuit Court (Action No. 10-CR-00073). And, the September 29, 2010, judgment of the Ballard Circuit Court (Action No. 10-CR-00073) stated it was to run consecutively with the sentence imposed in Carlisle Circuit Court (Action No. 10-CR-00010) and consecutively with Ballard Circuit Court (Action No. 10-CR-00072). The cumulative effect was an aggregate sentence of thirty-two years' imprisonment for the commission of the crimes in Carlisle County and Ballard County. Appellant filed notices of appeal from the two September 29, 2010, judgments rendered in Ballard Circuit Court (Action Nos. 10-CR-00072 and 10-CR-00073). These appeals follow.

Appellant contends that the circuit court violated Kentucky Revised Statutes (KRS) 532.110 and KRS 532.080 by imposing sentences of imprisonment in Action Nos. 10-CR-00072 and 10-CR-00073 to run consecutively with each other and consecutively with the sentence of imprisonment imposed in Action No.

10-CR-00010 in Carlisle County. Appellant asserts pursuant to statutory law the maximum aggregate sentence the circuit court could impose upon him in all three criminal actions was twenty years as the highest felony he pleaded guilty to was a Class D felony. In support thereof, he cites this Court to KRS 532.110 and KRS 532.080.

KRS 532.110 governs concurrent and consecutive sentences of imprisonment and provides, in relevant part:

(1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime . . . the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

. . . .

(c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by [KRS 532.080](#) for the highest class of crime for which any of the sentences is imposed. . . .

And, the relevant portion of KRS 532.080 provides:

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

. . . .

(b) If the offense for which he presently stands convicted is a Class C or Class D 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 ten (10) years nor more than twenty (20) years.

KRS 532.080(6)(b). Essentially, appellant argues that the maximum sentence upon convictions for multiple Class D felonies may not exceed twenty years, and as his sentences of imprisonment were ordered to run consecutively for a total sentence of thirty-two years, such sentence is void as violative of KRS 532.110 and KRS 532.080.

We view the Supreme Court case of *Goldsmith v. Commonwealth*, 363 S.W.3d 330 (Ky. 2012), as dispositive. Therein, Goldsmith was convicted upon multiple felony charges in two separate actions, one in Hickman County and one in Carlisle County. The highest felony upon which Goldsmith stood convicted was a Class D felony. The Hickman Circuit Court and Carlisle Circuit Court each sentenced Goldsmith to fifteen years' imprisonment; however, neither circuit court specifically indicated whether its fifteen-year sentence was to run concurrently or consecutively with the other fifteen-year sentence. Nevertheless, Goldsmith was granted probation in both actions. He eventually violated the terms of probation, and upon revoking probation, the Hickman Circuit Court ordered its fifteen-year sentence of imprisonment to run consecutively to the fifteen-year sentence of imprisonment in Carlisle Circuit Court, for a total of thirty years' imprisonment.

In its opinion, the Supreme Court directly stated that KRS 532.110(1) and KRS 532.080 limited Goldsmith's maximum aggregate sentence at the time of sentencing to twenty years:

When imprisonment is imposed at the sentencing, a trial court must obviously state at that time how the sentences are to run in relation to each other. Likewise, it

is at that time that the trial court had discretion to run the sentence of imprisonment on the three Hickman County crimes concurrently or consecutively with the Carlisle County crimes, or any other crime for which Appellant was imprisoned. See [KRS 532.110\(1\)](#) (“the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence”). The limit at the time is that the aggregate of the indeterminate terms may “not exceed in maximum length the longest extended term which would be authorized by [KRS 532.080](#) for the highest class of crime for which any of the sentences is imposed.” [KRS 532.110\(1\)\(c\)](#). In this case, that would be 20 years, see [KRS 532.080](#), so it is obvious that the trial court would have erred by imposing a total of 30 years of imprisonment had he done so at sentencing rather than at the probation revocation proceeding. . . .

*Goldsmith*, 363 S.W.3d at 334. As Goldsmith’s highest felony conviction was a Class D felony, the Supreme Court opined that the thirty-year sentence was outside the maximum penalty and concluded that KRS 532.110 and KRS 532.080 limited Goldsmith’s maximum aggregate sentence to twenty years at the time of sentencing. *Goldsmith*, 363 S.W.3d 330.

Likewise, in our case, appellant’s total sentence of thirty-two years’ imprisonment was based upon separate offenses in three distinct criminal actions (Action Nos. 10-CR-00010, 10-CR-00072 and 10-CR-00073) in two counties, and the record is clear that the highest offense appellant pleaded guilty to was a Class D felony. Pursuant to *Goldsmith*, appellant’s maximum aggregate sentence could only be twenty years.<sup>2</sup> See *id.* Accordingly, we conclude that the circuit court

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<sup>2</sup> Most published opinions dealing with our issue involved multiple charges in the same criminal action; however, *Goldsmith v. Commonwealth*, 363 S.W.3d 330 (Ky. 2012), clearly involved multiple charges in two separate criminal actions in two different counties. As *Goldsmith*, 363 S.W.3d 330 is clearly dispositive, we are bound to follow it as Supreme Court precedent. Rules

violated the statutory mandates of KRS 532.110 and KRS 532.080 by imposing upon appellant a thirty-two-year aggregate sentence of imprisonment. Upon remand, the circuit court is directed to resentence appellant to not less than ten years and no more than twenty years' imprisonment, which shall run consecutively with the Carlisle County sentence of imprisonment in Action No. 10-CR-00010 up to the maximum aggregate sentence of twenty years for the conviction in both counties. KRS 532.110; KRS 532.080.

For the foregoing reasons, the judgments of the Ballard Circuit Court are reversed and remanded with directions.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
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ORAL ARGUMENT FOR  
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of the Supreme Court 1.030(8)(a).