

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001495-MR

JAMES CHARLES MAXIE

APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HON. CRAIG Z. CLYMER, JUDGE
INDICTMENT NOS. 00-CR-00096 AND 00-CR-00256

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

ACREE, JUDGE: James Maxie, *pro se*, appeals the McCracken Circuit Court's August 19, 2015 Order denying his Motion to Vacate, Set Aside, Modify and/or Correct Sentence filed pursuant to CR¹ 60.02 and RCr² 10.26. We affirm.

¹ Kentucky Rules of Civil Procedure.

² Kentucky Rules of Criminal Procedure.

Factual and Procedural Background

“Appellant [Maxie] was arrested after the police completed an undercover buy of crack cocaine at his home on March 16, 2000. . . . Appellant was subsequently indicted[.]” *Maxie v. Commonwealth*, 82 S.W.3d 860, 862 (Ky. 2002) (“*Maxie I*”). There were three counts to the indictment: first-degree trafficking in a controlled substance (cocaine) – first offense (Class C felony); possession of drug paraphernalia – first offense (Class A misdemeanor); and second-degree persistent felony offender (Enhancement). (Record (R.1.) at 1-2, McCracken Cir. Ct. Indictment No. 00-CR-00096). On May 10, 2000, Maxie was released on bail pending trial. (R.1. at 13).

While released from custody and awaiting trial for these offenses, Maxie was caught up in a second course of criminal activity.

On September 14, 2000, the McCracken County Sheriff’s Department was involved in a drug investigation focused upon Aaron Rottering. Rottering was arrested and agreed to cooperate with the police to arrest his cocaine supplier, whom Rottering identified as [Maxie]. As instructed by the police, Rottering paged [Maxie] and arranged a buy at [Maxie’s] residence. Rottering was outfitted with a transmitter, drove to [Maxie’s] residence, and, upon Rottering’s signal, the police entered [Maxie’s] residence for which they had obtained a search warrant. . . .

Officers outside the residence observed [Maxie at] an upstairs window . . . drew their guns and told him not to move. . . .

Maxie v. Commonwealth, No. 2001-CA-001892-MR, slip op. at 2-3 (Ky. App. July 26, 2002) (“*Maxie II*”). He was then arrested.

Shortly after this arrest, and because Maxie was in custody, the surety on Maxie's bail bond on the first indictment was exonerated in accordance with RCr 4.50. (R.1. at 35-36).

Maxie's second indictment, like the first, had three counts: first-degree trafficking in a controlled substance (cocaine) – first offense (Class C felony); tampering with physical evidence (Class D felony); and second-degree persistent felony offender (Enhancement). (Record (R.2.) at 1-2, McCracken Cir. Ct. Indictment No. 00-CR-00256).

On May 21, 2001, Maxie went to trial on the first indictment and “[t]he jury convicted [Maxie] on all charges.” *Maxie I*, 82 S.W.3d at 862. As to the second indictment, “[a] jury trial was held on June 27, 2001. . . . The jury found [Maxie] not guilty of the trafficking or possession charges, but guilty of the tampering charge [and] of being a second-degree persistent felony offender (PFO II).” *Maxie II* at 2-3.

Sentencing on both convictions took place on July 27, 2001.

In *Maxie I*, the circuit court sentenced Maxie to ten (10) years' imprisonment on his conviction for first-degree trafficking, and 365 days and a \$500 fine on his conviction for possession of drug paraphernalia. In lieu of those sentences, and upon Maxie's conviction as a second-degree persistent felony offender, Maxie's sentence was enhanced to twenty (20) years' imprisonment. (R.1. at 76).

In *Maxie II*, the circuit court sentenced Maxie to five (5) years' imprisonment on his conviction for tampering with physical evidence. In lieu of that sentence, and upon Maxie's conviction as a second-degree persistent felony offender, Maxie's sentence was enhanced to ten (10) years imprisonment. (R.2. at 81). The circuit court ordered that this sentence on Indictment No. 00-CR-00256 shall be served "consecutive to Indictment No. 00-CR-00096" (*Id.*).

Maxie's matter-of-right appeals in both cases were unanimously affirmed. *Maxie I*, 82 S.W.3d at 866; *Maxie II* at 4.

Maxie also filed several post-conviction motions seeking relief from his sentence. In *Maxie v. Commonwealth*, 2004-CA-001643-MR, 2006 WL 73479 (Ky. App. Jan. 13, 2006) ("*Maxie III*"), he moved the circuit court pursuant to RCr 11.42 claiming his attorney was ineffective during his trial in *Maxie II*. In *Maxie v. Commonwealth*, 2005-CA-001822-MR, 2006 WL 3457598 (Ky. App. Dec. 1, 2006) ("*Maxie IV*"), Maxie moved the circuit court in *Maxie I* and argued a second court-appointed counsel was ineffective in defending him as to the first indictment. Both these motions were denied, and this Court affirmed the circuit court's order in each case. *Maxie III* at *6; *Maxie IV* at *2.

Fourteen years after his convictions and sentencings in *Maxie I* and *Maxie II*, Maxie filed with the circuit court a Motion to Vacate, Modify, Set Aside and/or Correct Sentence pursuant to CR 60.02(e) and (f), and RCr 10.26, arguing his sentence of thirty years exceeded statutory limits established in KRS 532.110(1)(c). That statute says: "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.” This statute, he says, caps his maximum sentence at twenty years. The motion was denied and this appeal followed.

Standard of Review

We review the circuit court’s denial of a CR 60.02 motion for an abuse of discretion. *Kurtsinger v. Bd. of Trustees of Kentucky Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). The circuit court abuses its discretion when it’s decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a “flagrant miscarriage of justice[.]” we will affirm the circuit court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Additionally, “it is well-settled that an appellate court may affirm a lower court for any reason supported by the record.” *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009) (citation omitted).

Analysis

The circuit court gave two reasons when it denied Maxie’s motion: (1) his motion was not brought within a reasonable time under CR 60.02(e) or (f); and (2) his motion seeks relief that “could and should have been raised in prior proceedings[.]” (Supp. Record at 29, McCracken Cir. Ct.). The Commonwealth adopts this same reasoning in its responsive brief.

Maxie argues, and he does so effectively, that these are inadequate reasons for denying his motion. He asks us to exercise an “appellate court’s inherent jurisdiction to correct an illegal sentence.” *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011).

Frankly, we are not persuaded by the circuit court’s or the Commonwealth’s reasoning. First, there is “precedent holding that an illegal sentence may be corrected ‘at any time[.]’” *Winstead v. Commonwealth*, 327 S.W.3d 479, 490 (Ky. 2010) (citing *Skiles v. Commonwealth*, 757 S.W.2d 212, 215 (Ky. App. 1988)).³ Second, “an appellate court is not bound to affirm an illegal sentence just because the issue of the illegality was not presented to the trial court” or as an argument in a prior appeal. *Jones*, 382 S.W.3d at 27. These reasons, therefore, do not persuade us.

However, we are persuaded by the controlling statute, KRS 533.060(3). This statute says:

³ However, the Supreme Court, referencing *Skiles*, also says:

We have expressed at least some skepticism about whether the Court of Appeals painted with too broad a brush when it declared that an illegal sentence could be corrected “at any time.” See *Neace v. Commonwealth*, 978 S.W.2d 319, 322 (Ky. 1998) (“It is unnecessary to consider whether the *Skiles* ‘at any time’ correction standard is too liberal or far-reaching.”).

With some rare exceptions, the law generally requires parties to assert diligently and timely their rights. Even CR 60.02, which the Commonwealth attempted to utilize in this case, contains some express time limits (one year if based upon mistake, newly discovered evidence, etc.) and some implied time limits (for example, motions under the catch-all subsection (f) must be made “within a reasonable time . . .”). Adoption of the “at any time” standard would appear to encourage, or at least would not punish, sloth or negligence. We question, therefore, whether an illegal sentence may always be subject to correction “at any time.”

Winstead, 327 S.W.3d at 491 n.40.

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

KRS 533.060(3). Maxie committed an offense while awaiting trial for another offense and was subsequently convicted. The circuit court was correct to sentence Maxie to consecutive sentences because the law requires it.

“The legislative intent expressed by the statute calls for stricter sentencing for offenses committed while released on bail.” *Commonwealth v. Martin*, 777 S.W.2d 236, 237 (Ky. App. 1989) (citation omitted). This Court in *Martin* elaborated:

Although the statute [KRS 532.110(1)] relied upon by *Martin* [and Maxie] gives a trial court discretion in the imposition of multiple sentences of imprisonment, KRS 533.060(3) is clearly applicable. Basic rules of statutory construction require that where two statutes are in apparent conflict, their inconsistencies should be reconciled if possible. *Butcher v. Adams*, 310 Ky. 205, 220 S.W.2d 398 (1949). However, where this cannot be done, the one containing express and positive language relating to the particular subject should take precedence over a provision dealing with a matter in general terms. *Morgan County Board of Education v. Elliot*, 260 Ky. 672, 86 S.W.2d 670 (1935). In this case KRS 533.060(3) is not only more specific, tailored to the facts of this case, this is not the first time that the apparent conflict resulted in sentencing under KRS 533.060. *Corbett v. Commonwealth*, Ky., 717 S.W.2d 831 (1986). (Dealing with conflict between KRS 533.060(2) and KRS 532.110(1)(c)). *Riley v. Parke*, Ky., 740 S.W.2d 934 (1987). *Devore v. Commonwealth*, Ky., 662 S.W.2d 829 (1984). (Holding that the General Assembly clearly

showed its intent to provide stiff penalties for convicted and paroled felons who commit subsequent felonies while on appeal.)

Id. at 238.

Although we do so on grounds other than those given by the circuit court and argued by the Commonwealth, we affirm the McCracken Circuit Court's August 18, 2015 order denying Maxie's motion brought pursuant to CR 60.02 and RCr 10.26.

ALL CONCUR.

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