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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002228-MR

JULIUS COLE — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00334

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Julius Cole appeals from an order of the McCracken Circuit Court, entered September 29, 2004, revoking his conditional discharge from prison and ordering him to serve the remaining three years of his sentence. Cole contends that the statute creating the three-year extension of his sentence is an unconstitutional usurpation by the General Assembly of a

judicial function and that the extension amounts to a cruel and unusual punishment. Because Cole's attack upon the statute was not preserved and because his four-year total sentence for first-degree sexual abuse is not grossly disproportionate, we affirm.

In April 2003, a McCracken County jury found Cole guilty of first-degree sexual abuse, a Class-D felony in Chapter 510 of the Penal Code,[1] and fixed his sentence at one year in prison. Cole was accused of having forcibly fondled the breasts of a girl less than twelve years of age. His felony implicated KRS 532.043, which provides in pertinent part that

> (1) In addition to the penalties authorized by law, any person convicted of . . . a felony offense under KRS Chapter 510 . . . shall be subject to a period of conditional discharge following release from . . . [i]ncarceration upon expiration of sentence;
> (2) The period of conditional discharge shall be three (3) years;
> (3) During the period of conditional discharge, the defendant shall (a) Be subject to all orders specified by the Department of Corrections; (b) Comply with all education, treatment, testing, or combination thereof required by the Department of Corrections.
> . . .
> (5) If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court to revoke the defendant's conditional discharge and

[1] KRS 510.110.

> reincarcerate the defendant as set forth in KRS 532.060.

KRS 532.060(3) provides that

> [f]or any felony specified in KRS Chapter 510 . . . the sentence shall include an additional three (3) year period of conditional discharge which shall be added to the maximum sentence rendered for the offense. During this period of conditional discharge, if a defendant violates the provisions of conditional discharge, the defendant may be reincarcerated for: (a) The remaining period of his initial sentence, if any is remaining; and (b) The entire period of conditional discharge, or if the initial sentence has been served, for the remaining period of conditional discharge.

Accordingly, by judgment entered June 2, 2003, the McCracken Circuit Court sentenced Cole to one year in prison plus three years of conditional discharge, in effect a four-year sentence. Cole served out the first year and was conditionally discharged from prison in February 2004. Among the conditions of his discharge were requirements that he complete a two-year sex-offender treatment course, that he refrain from drinking alcohol, and that he not be convicted of any additional crimes.

In June 2004, he was brought before the Court on allegations that he had refused to attend sex-offender treatment classes. When he explained that he did not refuse to take the classes but only sought to postpone commencing them until his car was operable, which it then was, the court gave him the benefit of the doubt and did not revoke his discharge.

Only four months later, however, in September 2004, Cole was again brought before the court on allegations this time that he had pled guilty to a charge of driving under the influence. During the hearing he admitted the offense and admitted further that on several weekends during his release he had possessed and consumed alcohol. For these breaches of the conditions of Cole's release, the court revoked his discharge and ordered him reincarcerated for the remainder of the three-year discharge period. It is from that order that Cole has appealed. He contends that the mandatory three-year extension of certain sex-offense sentences under KRS 532.043 amounts to legislative usurpation of judicial sentencing discretion in violation of the separation-of-powers doctrine, that it violates the penal code's policy of individualized sentencing, and that it diminishes a defendant's right to be sentenced by a jury.

None of these issues was raised before the trial court and so was not preserved for appellate review. In particular, to the extent that Cole complains that KRS 532.043 is unconstitutional he failed to give notice of his claim to the Attorney General as required by KRS 418.075 and CR 24.03. For this reason alone his claim that KRS 532.043 is invalid must fail.[2]

[2] Brashars v. Commonwealth, 25 S.W.3d 58 (Ky. 2000).

His claim also lacks merit. Defining crimes and their punishments is purely a legislative function.[3] Neither the federal nor the state constitution forbids mandatory sentences,[4] or requires individualized[5] or jury sentencing.[6] KRS 532.043 does not usurp a judicial function, therefore, and is not unconstitutional for any of the reasons Cole suggests. To the extent that Cole relies on statutory policies favoring individualized or jury sentencing, his argument overlooks the fact that the General Assembly is free to give effect to and to alter those policies as it sees fit.[7] KRS 532.043 is within that authority.

Cole also insists that the three-year extension of his jury sentence mandated by KRS 532.043 violates the protections against cruel and unusual punishments provided by the Eighth Amendment to the United States Constitution and Section 17 of the Kentucky Constitution. Cole argues that he has, in effect,

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[3] Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004).

[4] Harmelin v. Michigan, *supra;* Bartrug v. Commonwealth, 582 S.W.2d 61 (Ky.App. 1979).

[5] Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

[6] Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Perry v. Commonwealth, 407 S.W.2d 714 (Ky. 1966).

[7] Commonwealth, ex rel. Cowan v. Wilkinson, 828 S.W.2d 610 (Ky. 1992) Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968).

been given a three-year sentence for the misdemeanor of first offense DUI.

In fact, of course, Cole's entire sentence, including the three years' conditional discharge which has become three years' imprisonment, is punishment not for DUI but for first-degree sexual abuse, for his forcible sexual assault upon a child under twelve. The United States Supreme Court has recently held that a sentence for a term of years does not violate the Eighth Amendment unless it is grossly disproportionate to the gravity of the offense.[8] The Court noted that "courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare."[9] Similarly, a sentence to a term of years does not violate Section 17 of Kentucky's Constitution unless it is so disproportionate to the crime as to shock the conscience.[10]

Cole's four-year sentence does not meet those standards. Even with the additional three years mandated by KRS 532.043, Cole's sentence is less than the maximum for a class-D felony; he was assured of conditional discharge after having

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[8] Ewing v. California, 532 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003).

[9] *Id.* at 22, 1186.

[10] Workman v. Commonwealth, *supra.*

served one year; and he may still benefit from parole. This sentence, which rationally reflects the General Assembly's concern about sex-offender recidivism by requiring the additional three years of supervision and treatment, is not grossly disproportionate to a felony sex crime against a child.

In sum, Cole has failed to establish that either KRS 532.043 or the particular sentence that statute has given rise to in this case is unconstitutional or otherwise invalid. Accordingly, we affirm the September 29, 2004, order of the McCracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda Roberts Horsman
Assistant Pubic Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonego
Assistant Attorney General
Frankfort, Kentucky