

Commonwealth of Kentucky
Supreme Court
File No. 2009-SC-00671

FILED

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SUPREME COURT CLERK

APPELLANT

COMMONWEALTH OF KENTUCKY

v.

Appeal from McCracken Circuit Court
Hon. R. Jeffrey Hines, Judge
Indictment No. 2004-CR-00109-02

RAYCINE MANUEL LOVE

APPELLEE

Brief For Appellant

Submitted by:

JACK CONWAY

Attorney General of Kentucky

JOSHUA D. FARLEY

Assistant Attorney General
Office for Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502)696-5342

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 15th day March, 2010, to: Hon. R. Jeffrey Hines, Judge, McCracken Circuit Court, McCracken County Courthouse, 301 S. 6th St., Paducah, Ky. 42003; via state delivered messenger mail to: Hon. Karen Shuff Maurer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601. Sent via electronic Mail to: Hon. Tim Kaltenbach, Commonwealth's Attorney, Courthouse, 301 S. 6th St., Paducah, Ky. 42003.



Joshua D. Farley

Assistant Attorney General

INTRODUCTION

This is a criminal case in which Appellant is appealing the trial Court's revocation of his probation and the running of his sentences consecutively.

STATEMENT CONCERNING ORA ARGUMENT

The Commonwealth does not believe oral argument would be helpful to the Court in this case because the issues are thoroughly addressed in the parties' briefs.

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COUNTERSTATEMENT OF THE CASE

On June 14, 2004, Appellant pled guilty to one (1) count of Trafficking in a Controlled Substance, Cocaine, First Offense, in the First Degree, one (1) count of Possession of Marijuana, and one (1) count of Use /Po session of Drug Paraphernalia, First Offense. Final Judgment was entered on August 30, 2004, and Appellant received the recommended sentence of six and one half (6 Yi) years of imprisonment, which was then probated for five (5) years. (TR at 34-43). While on probation, Appellant was arrested and convicted of Federal Felony Possession of a Firearm and finally sentenced to thirty (30) months in federal prison, on August 1, 2006. (VR Hearings: 5/22/08; 14:06:00). The McCracken County Commonwealth's Attorney became aware of the new federal conviction and placed a detainer on the Appellant on October 13, 2006, stating that Appellant had violated his probation. This was filed seventy-three (73) days after Appellant's new conviction. The detainer receipt received by the Commonwealth's Attorney notified him that the Appellant would be released to him on March 27, 2008. (TR at 79). On February 27, 2008, the Kentucky Division of Probation and Parole filed a Supervision Report seeking revocation of Appellant's probation due to his new Federal conviction. (Id. at 52). The trial court ordered the Appellant transferred to the McCracken County Regional Jail and a show cause hearing to revoke the Appellant's probation on the same day. (rd. at 50, 52A). A revocation hearing was held on May 22, 2008 and the trial court issued Findings of Fact and Conclusions of Law in revoking the Appellant's probation on June 25, 2008. (Id. at 84-86). The trial court ordered the

Appellant's revoked time to be served consecutively to his Federal sentence of (30) months. (Id.).

Appellant now appeals the trial court's decision to run his sentences consecutively.

ARGUMENTS

I.

THE TRI COURT PROPERLY RA APPELLANT'S SENTENCES CONSECUTIVELY.

Appellant claims that the trial court erred in ruing his sentences consecutively, because his probation was not revoked within the 90 day window provided for in KRS 533.040(3). (App. Br. at 3). However, the trial court addressed these concerns and determined that the Appellant's sentences should be run consecutively. In doing so the trial court stated,

The Court finds that a detainer was filed with the US Department of Justice, Federal Bureau of Prisons within 90 days of the defendant's federal conviction. The detainer Action Letter specifically stated that the purpose of the detainer was for "Probation Violation." According to this letter, a copy was served on the inmate/defendant, giving him notice that it was the intent of the Commonwealth to revoke his probation. Also, the letter stated the tentative release date of 3-27-08 and that the Commonwealth would receive notice of release 60 days prior to release. Based upon review of the facts and the applicable case law, the Court finds that the Commonwealth pushed for a revocation within a speedy manner and has substantially complied with KRS 533.040, and this sentence shall be served **CONSECUTIVELY** to his federal sentence.

TR at 85-86).

This Court has consistently held that when revoking a defendant's probation based on a subsequent felony conviction, it is appropriate to allow the Department of Corrections to wait until after a conviction has been attained. Warren v. Commonwealth, 981 S.W.2d 134, 137 (Ky. App. 1998) citing Myers v. Commonwealth, 836 S.W.2d 431 (Ky. App. 1992)(overruled on other grounds by Sutherland v. Commonwealth, 910 S.W.2d 235 (Ky. 1995). The Court also stated that when the grounds for revocation is a subsequent felony conviction the 90 day period begins to run on the day the conviction becomes final which is the day of the Defendant's sentencing hearing. (Id.). However, the Kentucky Supreme Court found that this 90 day period in which a revocation is to be made under KRS 533.040 is not to be construed in such a strict manner.

In Sutherland supra, the Kentucky Supreme Court held that it was the legislative intent under KRS 533.040(3) "to require the Department of Corrections to push for revocation in a speedy manner." (Id. at 237). The Kentucky Supreme Court also stated that "KRS 533.020(1) provides that a probated sentence may be revoked "at any time" prior to the expiration or termination of the period of probation." (Id. at 236). In the case at bar, the Commonwealth did indeed act in a speedy manner in attempting to have the Appellant released to its custody, by properly filing a detainer with the federal prison within 90 days after he was finally sentenced on his federal conviction. This detainer put the Appellant on notice that the Commonwealth was seeking to revoke his probation. The Commonwealth was informed that the Appellant would be released to it on approximately March 27,2008, which appears to be prior to the completion of his federal sentence. One month prior to the Appellant's release to it, the Commonwealth

scheduled the necessary hearings and the Appellant's transfer. Under the circumstances the Commonwealth acted in as speedy a manner as was possible in obtaining the Appellant in order to revoke his probation. As such, under Sutherland, the 90 day window, in which to revoke the Appellant's probation and run his sentences consecutively had not tolled. Also, Appellant points out the legislative intent in constructing KRS 533.040 was to prevent a person from being basically blind-sided by a probation revocation just as he was about to obtain freedom from his new sentence. (App. Br. at 3). This is not the case here. Appellant was apprized of the detailed upon him, and the fact that the Commonwealth was planing on revoking his parole well within the 90 day period under KRS 533.040. Appellant was not taken by surprise and had no expectation of gaining his freedom on the date he was released from his Federal sentence. Appellant cites to Gavel v. Commonwealth, 674 S.W.2d 953 (Ky. 1984), for the proposition that KRS 533.060(2) does not control the sentencing in the case at bar. (App. Br. at 4). However, the holding in this case seems misplaced in that it holds that in circumstances involving a subsequent federal conviction for a felony while on probation or parole in the Commonwealth of Kentucky, that KRS 532.115 controls the sentencing process not KRS 533.060.

This holding allows a defendant released on probation or parole to avoid automatic consecutive sentencing mandated under KRS 533.060 when convicted of a subsequent federal felony. This holding undermines the intention of the legislature in enacting KRS 533.060, which was to provide stiff penalties in the form of consecutive sentences to those who, after having been awarded parole or probation, violate that trust

by the commission of subsequent felonies. See White v. Commonwealth, 32 S.W.3d 83 (Ky. App. 2000); Commonwealth v. Hunt, 619 S.W.2d 733 (Ky. App. 1981); Devote v. Commonwealth, 662 S.W.2d 829 (Ky. 1984); Riley v. Parks, 740 S.W.2d 934 (Ky. 1987); and Brewer v. Commonwealth, 922 S.W.2d 380 (Ky. 1996). In Gavel, the Kentucky Supreme Court stated, We hold that the trial court may run the state sentence concurrently or consecutively with the federal sentence because KRS 533.060(2) is not applicable to the facts in the present case. The conviction referred to in that section is the subsequent one, not the first. That section provides that when a person while on probation is "convicted or enters a plea of guilty to a felony, ... the period of confinement for that felony shall not run concurrently with any other sentence." In the present case that felony would be the federal conviction, which the state court has no control over.

(Id. at 954).

While technically correct, this holding fails to carry the intent of the legislature in enacting KRS 533.060(2). Kentucky Courts may not have any control over whether or not a federal prison sentence is run consecutively or concurrently to a Kentucky sentence; however when the Kentucky sentence is probated and probation is not revoked until after conviction and sentencing for a federal felony, the Kentucky Courts do then have the power, mandated under KRS 533.060(2), to run the newly reinstated sentence consecutively to the federal sentence. The language of KRS 533.060 states that the second imposed sentence cannot be run concurrently to any other sentence. While it is true that the Kentucky Courts cannot control how the federal courts impose this new sentence, the Courts can still control whether or not they allow the sentence to run

concurrently with the reinstated sentence. By holding that KRS 533.060(2) mandates that the reinstated sentence be served consecutively to any federal sentence imposed due to a new felony conviction while on parole, the legislative intent of KRS 533.060(2) is upheld. The statute states that this new sentence shall not run concurrently with any other sentence, why then would Kentucky Courts allow it to run concurrently to the reinstated sentence? It is inherent that allowing the Kentucky sentence to run concurrently with the federal sentence is the same as allowing the federal sentence to run concurrently with the reinstated Kentucky sentence. This is precisely the situation that KRS 533.060(2) was meant to prevent. See Brewer. There should be no difference in subsequent federal felonies and subsequent state felonies. This Court should find that the Commonwealth acted in a speedy manner in obtaining the Appellant's revocation and properly ordered the sentences be served consecutively. There was no error.

CONCLUSION

Competent credible evidence existed to support the trial court's finding that Appellant had violated the terms and conditions of his probation. The trial court properly revoked Appellant's probation for a new felony conviction and properly ran that sentence consecutively to the new sentence being served. Appellant's assignment of error is without merit and should be overruled.

For the foregoing reasons, the order of the McCracken County Circuit Court revoking Appellant's probation and running his sentences consecutively should be affirmed.

Respectfully submitted,

JACK CONWAY

Attorney General of Kentucky



JOSHUA D. FARLEY

Assistant Attorney General
Office of Criminal Appeals
Office of Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204
(502) 696-5342

Counsel for Appellee