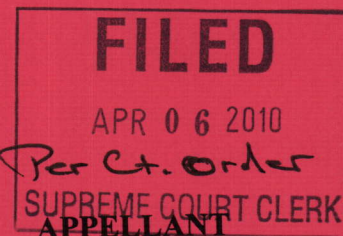


Commonwealth of Kentucky
Supreme Court
No. 2009-SC-00671



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,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served March 17th, 2010 as follows: by mailing to the Hon. R. Jeffrey Hines, Judge, McCracken Circuit Court, McCracken County Courthouse, 301 S. 6th St., Paducah, Ky. 42003; to, Hon. Karen Shuff Maurer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601; and via electronic mail to Hon. Tim Kaltenbach, Commonwealth's Attorney, Courthouse, 301 S. 6th St., Paducah, Ky. 42003.



Joshua D. Farley

INTRODUCTION

This is a criminal case in which the Commonwealth, Appellant, is appealing the Court of Appeals decision to reverse and remand the Appellee's case for the revocation of his probation and the running of his sentences consecutively.

STATEMENT CONCERNING ORAL 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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On June 14, 2004, Appellee 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/Possession of Drug Paraphernalia, First Offense. Final Judgment was entered on August 30, 2004, and Appellee received the recommended sentence of six and one half (6 ½) years of imprisonment, which was then probated for five (5) years. (TR at 34-43).

While on probation, Appellee 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 Appellee on October 13, 2006, stating that Appellee had violated his probation. This was filed seventy-three (73) days after Appellee's new conviction. The detainer receipt received by the Commonwealth's Attorney notified him that the Appellee 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 Appellee's probation due to his new Federal conviction. (Id. at 52). The trial court ordered the Appellee transferred to the McCracken County Regional Jail and a show cause hearing to revoke the Appellee's probation on the same day. (Id. 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 Appellee's probation on June 25, 2008. (Id. at 84-86). The trial court ordered the Appellee's revoked time to be served consecutively to his Federal sentence of 30 months. (Id.).

Appellee appealed and the Court of Appeals, while holding that his probation was properly revoked, determined that revocation fell outside of the ninety (90) day period set forth under KRS 533.040(3). The Court of Appeals relying on Gavel v. Commonwealth, 674 S.W.2d 953 (Ky. 1984), therefore reversed and remanded so that the Appellee's reinstated sentence could be ordered to run concurrently to his Federal sentence. (Love v. Commonwealth, 2009 WL 2971708 Ky. App. 2009). Dissenting from the majority's opinion Senior Judge Henry stated that this Court needed to re-examine Gavel. (Slip Op. at 6-7).

The Commonwealth now appeals the Court of Appeals decision on discretionary review to this Court.

ARGUMENTS

I.

IN REVOKING RESPONDENT'S PROBATION AND ORDERING HIS SENTENCE TO RUN CONSECUTIVELY TO HIS FEDERAL SENTENCE THE COMMONWEALTH ACTED IN A PROPER AND SPEEDY MANNER.

The Court of Appeals ruled that the trial court erred in running Respondent's sentences consecutively, because his probation was not revoked within the 90 day window provided for in KRS 533.040(3). However, the trial court addressed these concerns and determined that the Respondent'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 Viol." 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).

The Court of Appeals, as well as this Court, have 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 of Appeals 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, this 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, this 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). This 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 Appellee 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 Appellee on notice that the Commonwealth was seeking to revoke his probation. The Commonwealth was informed that the Appellee 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 Appellee's release to it, the Commonwealth scheduled the necessary hearings and the Appellee's transfer. Under the circumstances the Commonwealth acted in as speedy a manner as was possible in obtaining the Appellee in order to revoke his probation. As such, under Sutherland, the 90 day window, in which to revoke the Appellee's probation and run his sentences consecutively had not run.

Also, the legislative intent in constructing KRS 533.040 was to prevent a person from being blind-sided by a probation revocation just as he was about to obtain freedom from his new sentence. (KRS 533.040(3) commentary). This is not the case here. Appellee was apprised of the detainer upon him, and the fact that the Commonwealth was planning on revoking his parole well within the 90 day period under KRS 533.040. Appellee was not taken by surprise and had no expectation of gaining his freedom on the date he was released from his Federal sentence. The Commonwealth was not in a position to force the federal prison to release the Appellee to them any faster than what occurred, and regardless the Appellee was well aware of the Commonwealth's

intentions to revoke his probation for his new conviction. KRS 533.040 was substantially complied with as under Sutherland.

The Court of Appeals erred in finding that the Commonwealth did not act properly in revoking the Appellee's probation, and this Court should find that the Commonwealth acted in a speedy manner in obtaining the Appellee's revocation. In determining that the Commonwealth did not act in an expedient fashion the Court of Appeals ignored this Court's precedent in Sutherland. There was nothing more the Commonwealth could have done under these circumstances and it acted in a manner consistent with Sutherland and KRS 533.040. The Appellee was not blind-sided by the Commonwealth's decision to revoke his probation and was apprised of those efforts from the beginning. The Court of Appeals decision should not be allowed to stand in opposition to this Court's precedent.

II.

THIS COURT'S DECISION IN GAVEL V. COMMONWEALTH, 674 S.W.2d 953 (Ky. 1984), AS NOTED IN BREWER V. COMMONWEALTH, 922 S.W.2d 953 (Ky. 1984), SHOULD BE OVERRULED AS IT STANDS IN DIRECT CONTRAST TO KRS 533.060 AND FAILS TO CARRY THE INTENT OF THE LEGISLATURE.

As noted by the Court of Appeals below, this Court held in Brewer v. Commonwealth that when faced with the interplay between KRS 533.060 and KRS 533.040, that KRS 533.060 controls. Regardless, the Court of Appeals noted that this Court limited its holding in Brewer, by noting that the case was distinguishable from

Gavel v. Commonwealth. The logic utilized by this court in Gavel should be re-examined and overturned.

Appellee and the Court of Appeals cited 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. 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); Devore v. Commonwealth, 662 S.W.2d 829 (Ky. 1984); Riley v. Parke, 740 S.W.2d 934 (Ky. 1987); and Brewer v. Commonwealth, 922 S.W.2d 380 (Ky. 1996). In Gavel this 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. In a case such as this one, where the probated sentence is not discussed during Federal sentencing, the Kentucky Courts should uphold the legislative intent of KRS 533.060 and the ruling in Brewer, that KRS 533.060 controls regardless of the ninety (90) day period, and order a mandated consecutive sentencing for a revoked state probation.

While it is true, that should revocation be obtained prior to Federal sentencing, Kentucky Courts cannot control whether or not Federal Courts order the Federal sentence to be served concurrently with the recently reinstated Kentucky sentence, in situations where revocation is not obtained until after Federal sentencing the Kentucky Courts are then in position to uphold the language of KRS 533.060 and order that the Kentucky sentence be served consecutively to the new 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. As noted in the dissent authored by Senior Judge Henry at the Court of Appeals, the exception carved out by the Brewer court, relying on the holding in Gavel, should be re-examined and overruled.

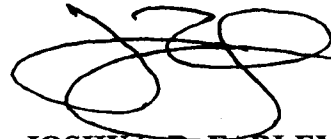
CONCLUSION

Competent credible evidence existed to support the trial court's finding that Appellee had violated the terms and conditions of his probation. The trial court properly revoked Appellee's probation for a new felony conviction and properly ran that sentence consecutively to the new sentence being served. This Court's ruling in Gavel v. Commonwealth, 674 S.W.2d 953 (Ky. 1984), should be re-examined and the Court of Appeals decision to reverse and remand should not be upheld. Appellee's probation was properly and speedily revoked and his sentences were properly run consecutively.

Respectfully submitted,

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