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**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2009-SC-671**

COMMONWEALTH OF KENTUCKY

APPELLANT

V.

**APPEAL FROM MCCRACKEN CIRCUIT COURT
HON. R. JEFFREY HINES, JUDGE
NO. 04-CR-00109-02**

RAYCINE M. LOVE

APPELLEE

BRIEF FOR APPELLEE

Submitted by:

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The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail, postage prepaid, on April 7, 2010: Hon. R. Jeffrey Hines, Judge, McCracken Circuit Court, McCracken County Courthouse, 301 S. 6th Street, Paducah, Kentucky 42003; Hon. Raymond D. McGee, Assistant Commonwealth Attorney, McCracken County Courthouse, 301 S. 6th Street, Paducah, Kentucky 42003; Hon. Sarah M. Steele, Assistant Public Advocate, Department of Public Advocacy, 400 Park Avenue, Suite B, Paducah, Kentucky 42001; and to Hon. Jack Conway, Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

Karen Shuff Maurer

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INTRODUCTION

Raycine Manuel Love, Appellant herein, pled guilty to trafficking in a controlled substance, first degree, first offense; possession of marijuana; and possession of drug paraphernalia. He was sentenced to six and a half years that was probated for five years. While on probation, he was convicted of felony offense of possession of a firearm and sentenced to 30 months imprisonment. When his probation was finally revoked, nearly two years later, the sentences were erroneously ordered to run consecutive. The Court of Appeals found the trial court's sentencing to be in error. This Court granted discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Love believes oral argument is necessary in this case. He believes the Court will have a much better understanding of the issues herein through oral argument.

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COUNTERSTATEMENT OF THE CASE

Raycine M. Love, Appellee herein, pled guilty on June 14, 2004, to three charges, including trafficking in a controlled substance first degree, first offense; possession of marijuana; and possession of drug paraphernalia, first offense. (TR, 34, 38, 41; VR No. Hearings Tape: 6/14/04; 13:55:20; 8/25/04; 14:43:34). On August 30, 2004, he was sentenced to 6 ½ years which was probated for five years. (Id.).

While on probation, Love committed the felony offense of possession of a firearm and was sentenced on August 1, 2006, to 30 months in federal prison. (VR No. Hearings Tape: 5/22/08; 14:06:15; 14:06:53). Even though the Department of Corrections was notified about this charge as early as April 21, 2006, nothing was done to begin revocation proceedings against Love until February 27, 2008. (VR No. Hearings Tape: 5/22/08; 14:08:55). A revocation hearing was held May 22, 2008. The trial court, however, erroneously ordered the 6 ½ years to run consecutively to Love's federal sentence on June 25, 2008. As this was in direct violation of KRS § 533.040(3), the trial court should have ordered the state sentence to run concurrent with his subsequent federal sentence.

On direct appeal to the Kentucky Court of Appeals, the Court found that the Commonwealth had not acted within the required 90 days to seek revocation and reversed Love's sentence, ordering that the state and federal sentences must be run concurrently. This Court then took the matter on discretionary review.

As the Court of Appeals' decision was a correct reading of the law and facts, this Court must uphold the ruling of the Court of Appeals.

ARGUMENT

I.

THE COMMONWEALTH DID NOT ACT IN A SPEEDY MANNER IN REVOKING LOVE'S PROBATION.

The Court of Appeals correctly ruled that the trial court erred in running Love's state and federal sentences consecutively because his state probation was not revoked within the 90 days required by KRS 533.040(3).

KRE § 533.040(3) states as follows:

A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation *shall* take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first. (emphasis added).

In the Commentary to the statute, the legislative intent is clear: it "is designed to eliminate a problem that could exist with probation or conditional discharge sentences which are followed by a subsequent conviction for a separate offense. When this situation arises, authorities could wait until the defendant has served his prison sentence for the subsequent offense and then seek revocation of his prior sentence of probation... and reinstate his prior sentence of imprisonment. It is the purpose of this subsection... to prohibit such a practice." The case at bar is exactly the type of situation KRS § 533.040(3) is designed to prohibit. The Department of Corrections received notice of the federal charge on April 21, 2006, and the Commonwealth did not place a detainer on

Love until October 13, 2006, 166 days later. The Commonwealth did not proceed to revoke Love's probation until February 27, 2008, almost two years (678 days) after receiving notice of Love's subsequent federal charges. Because it did not respond within the 90 days required by the statute, the trial court should have ruled the state sentence to run concurrent with his subsequent federal sentence. The Court of Appeals ruled that the Commonwealth's revocation was not timely and therefore, the sentences should have been ordered to run concurrently. The Commonwealth only sought a retainer on Love 166 days after the Department of Corrections received notice of the federal charge. A "detainer" is not the same as revocation as is required by the statute.

The appellant relies on Warren v. Commonwealth, 981 S.W.2d 134 (Ky.App. 1998) for the proposition that "it is appropriate to allow the Department of Corrections to wait until after a conviction has been attained" when revoking a defendant's probation based on a subsequent felony conviction. (Brief for Appellant, page 4). However, in Warren, the Court of Appeals found that the Department of Corrections was not notified until the federal conviction became final. 981 S.W.2d at 137. This is not the situation in the present case. The Department of Corrections was notified of Love's federal charge on April 21, 2006, and revocation was not sought until February 27, 2008.

II.

THIS COURT'S DECISION IN GAVEL V. COMMONWEALTH, 674 S.W.2D 953 (KY 1984) IS STILL GOOD LAW AND DOES NOT NEED TO BE OVERRULED.

The Court of Appeals noted that this Court's holding in Brewer v. Commonwealth, 922 S.W.2d 953 (Ky. 1984) was distinguishable from Gavel v. Commonwealth, 674 S.W.2d 953 (Ky. 1984) because Brewer involved the interplay

between federal and state jurisdiction.” 922 S.W.2d at 382. Gavel, therefore, was not overruled by Brewer and is still good law.

Gavel v. Commonwealth, 674 S.W.2d 953 (Ky. 1984) has a nearly identical factual scenario as in the case at bar. In Gavel, the defendant was convicted of several counts of theft by deception in January, 1979. Those counts were ordered to run concurrently and were probated for a five year period. Subsequently, in October 1979, the defendant was convicted in federal court of robbery and was sentenced to 25 years in federal prison. The trial court revoked the defendant’s probation and ordered that the three year state sentence run consecutively with the federal sentence, relying on KRS § 533.060. This Court found KRS §§ 533.040(3) and 532.115 to be controlling, just as the Court of Appeals correctly did in the case at bar. (Slip opinion, page 3). Even the trial court’s findings in Love’s case were based on KRS 533.040 and held to be controlling. (TR, 85-86).

Accordingly, in Gavel, the Court held that the trial court had the authority to run the sentences either concurrent or consecutive because the Commonwealth had responded within the 90 day period. In the case at bar, nearly two years had been served prior to any attempt to revoke Love’s probation. It was not until Love’s federal sentence had expired on February 27, 2008, that revocation proceedings were initiated. (TR, 72). This is exactly the situation KRS § 533.040(3) prohibits.

The Commonwealth relies on Sutherland v. Commonwealth, 910 S.W.2d 235 (1995). Sutherland is not applicable to the case at bar because in Sutherland, proceedings to revoke probation had occurred within the 90 day period as required by statute.

KRS 533.060 does not apply or control in this case. The language of KRS 533.060 clearly applies to state sentences, whereas KRS 533.040(3) specifically discusses the situation involving the interplay between federal and state sentences. If the Legislature had intended for KRS 533.060 to involve the interplay between state and federal sentences, it would have included this language in the statute as it did in KRS 533.040(3). The Court of Appeals correctly applied the law to the facts. The decision of the Court of Appeals must stand and Love's case remanded with an order that his federal and state sentences must run concurrently.

CONCLUSION

For the foregoing reasons, and for the reasons cited in the Court of Appeals' decision, the Court of Appeals' ruling must be affirmed.

Respectfully submitted,


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