

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001665-MR

RUBEN HICKS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 94-CR-00764

COMMONWEALTH OF KENTUCKY

APPELLEE

AND:

No. 1997-CA-001943-MR

RUBEN HICKS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 91-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: EMBERTON, GARDNER and SCHRODER, Judges.

EMBERTON, JUDGE. Ruben B. Hicks appeals, pro se, from an order of the Fayette Circuit Court entered on July 23, 1997, revoking his probation and sentencing him to four years in the state penitentiary to run consecutively with any other felony sentences. Hicks contends his probation was revoked in violation of Ky. Rev. Stat. (KRS) 533.040(3). He argues that the circuit court should have corrected his sentence upon revocation of

probation to run concurrently with subsequent convictions because his probation was revoked more than ninety days after the grounds for revocation came to the attention of the Department of Corrections. After reviewing the record and considering the arguments of the parties, we affirm.

On March 15, 1991, Hicks pled guilty to a charge of possession of a controlled substance, for which the court imposed a sentence of probation. On September 19, 1995, an affidavit to revoke Hicks' probation was filed in Fayette Circuit Court. The basis for the affidavit was Hicks' violation of the terms of his probation by receiving a new conviction. A bench warrant for Hicks' arrest was issued on September 25, 1995, and was subsequently served on appellant on September 26, 1995, resulting in a detainer being placed on Hicks.

A probation revocation hearing was set for September 29, 1995. However, as a result of requests for continuances by appellant's counsel, and later by appellant himself, the hearing was not held until July 18, 1997. On July 23, 1997, an order was entered revoking Hicks' probation and ordering consecutive sentences to be served in the state penitentiary.

The sole issue to be addressed on appeal is whether the revocation violated the ninety-day requirement in KRS 533.040(3), which states:

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 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.

Generally a revocation of probation that occurs outside the ninety-day period is to be run concurrently with any other offense. Sutherland v. Commonwealth, Ky., 910 S.W.2d 235, 237 (1995). Hicks contends the court's revocation of probation did not meet the ninety-day requirement and as a consequence his sentences should run concurrently.

It has been held by this court that a defendant has a right to a hearing within ninety days of having a detainer placed on him. Myers v. Commonwealth, Ky. App., 836 S.W.2d 431, 433-434 (1992), overruled on other grounds by Sutherland v. Commonwealth, 910 S.W.2d 235 (1995). As applied to the case now before this court, the ninety-day time requirement would have taken effect at the time Hicks was placed on detainer. Therefore, Mr. Hicks is correct in asserting September 26, 1995, as the date from which the ninety-day limit should run. However, his conclusion that the sentences should run concurrently is incorrect.

The ninety-day limitation in KRS 533.040(3) is intended to require the Department of Corrections to push for revocation proceedings in a speedy manner. Sutherland at 237. However, the right to a revocation hearing within ninety days can be waived by the defendant. Myers at 434. In the case at bar, a revocation

hearing was originally set for September 29, 1995, three days following Mr. Hicks' detainer. On that date, Hicks' attorney, in the presence of Hicks, requested a continuance for the probation revocation hearing. At that time, the court set a new hearing for September 27, 1996. Similar requests continued to be made by appellant's counsel and later by appellant himself.

The effect of each request by Hicks was a waiver of his right to a hearing within ninety days of his detainer. Therefore, any delay in the revocation hearing was not a violation of KRS 533.040(3), and it was proper for the court to order consecutive sentences.

The other issues asserted by the appellant have not been appropriately raised for us to address at this time.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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