

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002121-MR

ROBERT LEE BROWN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NOS. 93-CR-000206 & 93-CR-001490

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

*** ** **

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Robert Lee Brown (Brown) appeals from the denial of his motion to vacate, set aside or correct judgment pursuant to RCr 11.42. We agree with Brown that the plea agreement should be enforced. However, we believe the plea agreement can be enforced short of reversal by reversing the sentence only and remanding for resentencing.

On January 20, 1993, Brown, along with Todd Ingram and Durand Murrell,¹ was indicted by the Jefferson County Grand Jury,

¹ Murrell is referred to throughout the record as both

(continued...)

Indictment No. 93-CR-0206, for a series of armed robberies involving a food mart, several fast food restaurants, an individual, and employees of the Citizen's Fidelity Bank, which occurred from September 13, 1992 to December 4, 1992. In that indictment, Brown was charged with eight counts of first-degree robbery. On July 8, 1993, Brown and Murrell were indicted by the Jefferson County Grand Jury, Indictment No. 93-CR-1490, on charges of first-degree robbery, third-degree assault, first-degree escape, promoting contraband, and six counts of first-degree wanton endangerment.

On August 18, 1993, Brown moved to enter a guilty plea under both indictments. The charge of first-degree robbery in Indictment No. 93-CR-0206 concerning the bank employees was not included in the plea agreement, and became the basis for a federal bank robbery charge. The Commonwealth's offer on a plea of guilty recommended a total sentence of 42 years, with said sentence to "run concurrently with federal sentence", in exchange for Brown's guilty plea to seven of the eight counts of first-degree robbery charged in Indictment No. 93-CR-0206, and one count of first-degree robbery, third-degree assault, first-degree escape, promoting contraband, and six counts of the amended charge of second-degree wanton endangerment charged in Indictment No. 93-CR-1490.

¹(...continued)
"Murrell" and "Murrell-Bey".

On August 23, 1993, the court entered its judgment of conviction and sentence,² finding Brown guilty of six counts of first-degree robbery under Indictment No. 93-CR-0206, and first-degree robbery, third-degree assault, first-degree escape, promoting contraband, and six counts of second-degree wanton endangerment as amended under Indictment No. 93-CR-1490. The court sentenced Brown to a total of 42 years' imprisonment as recommended, but failed to state that the sentence was to run concurrently with the federal sentence.³

Following the state proceedings, on February 17, 1994, Brown pled guilty under two indictments, CR-93-00121-01-L(J) and CR-94-00015-01-L(J), in the United States District Court for the Western District of Kentucky, to aiding and abetting bank robbery, use of a firearm in commission of a crime, and carjacking. Judgment was entered on September 6, 1994, with Brown sentenced to a total of 160 months. The federal court ordered the federal sentence "to be served consecutively to the state sentences presently being served."⁴

²In 95-CA-2170-MR, rendered May 16, 1997, this Court affirmed the judgments of conviction and sentence of Brown and Murrell.

³Co-defendants Ingram and Murrell also entered guilty pleas pursuant to plea agreements which provided that their state and federal sentences would run concurrently. Ingram's and Murrell's judgments of conviction and sentence, entered August 24, 1993 and October 7, 1993, respectively, did include language to the effect that their state sentences would run concurrently with their pending federal sentences.

⁴Murrell was sentenced in federal court to a total of 152 months to be served consecutively to his state sentence.

On April 30, 1996, the Franklin Circuit Court denied Brown and Murrell's petition for a writ of mandamus on grounds that their judgments of conviction did not state a specific federal sentence with which the state sentences were to run concurrently, as required by KRS 532.115 in order for such sentences to run concurrently.⁵ Brown and Murrell appealed, and this Court affirmed, on grounds that a proceeding for a writ of mandamus or prohibition was not appropriate under the facts presented. We stated that the correct procedure would be to file motions pursuant to RCr 11.42 in the court where the pleas were given, since if it is shown that the sentences should be vacated, it is in that court where it should be done.⁶

In a letter sent by Brown to the Jefferson Circuit Court, dated July 18, 1996, Brown informed the court that the plea agreement to run his state sentence concurrent with his federal sentence was not fulfilled, and requested an affidavit from the court and the Commonwealth Attorney that the state and federal sentences were to run concurrently per the plea agreement. In response, in a letter dated July 30, 1996, the court stated that it would follow the Commonwealth's

⁵ The Franklin Circuit Court's April 30, 1996 order stated, in part, "Because the Jefferson Circuit Court did not clearly indicate that Durand Murrell-Bey's sentence is to run concurrent with a specific federal sentence, we find that Corrections has not erred in refusing to transfer Petitioner Murrell to federal jurisdiction. Likewise, given the complete lack of any indication by the trial court that it intended to run Robert Lee Brown's state court conviction concurrent with a specific federal conviction, we see no error in Corrections' refusal to transfer Petitioner Brown."

⁶ Consolidated appeals 96-CA-1602-MR, 96-CA-2442-MR, 96-CA-2537-MR, 97-CA-0246-MR, rendered November 26, 1997.

recommendation that the state and federal sentences run concurrently, and that the correct procedure would be for Brown to file a motion to amend the judgment of conviction entered on August 23, 1993.⁷

On August 15, 1996, Brown filed a "Motion to Clarify and Enforce Judgment". On August 20, 1996, the court entered an order which stated, in part:

The Court further ORDERS that the Defendant's sentence under Indictment Nos. 93CR0206 and 93CR1490, shall run concurrent with his Federal Sentence under Indictment Nos. CR-93-00121-01-L(J) and CR-94-00015-01-L(J) by Amended Judgment entered simultaneously with this Order.

Further, the Defendant having requested the Court to issue an Order to the Department of Corrections to release him to Federal Authorities, hereby finds that although the Court has ordered Defendant's state sentence to run concurrently with his federal sentence, the site of the Defendant's incarceration is at the discretion of the Department of Corrections, or the Federal Bureau of Corrections, when appropriate, and therefore, IT IS FURTHER ORDERED that Defendant's Motion for an Order releasing him to Federal Authorities, be and the same is hereby denied.

This is a final and appealable order, there being no just cause for delay.

As stated in the order, on August 20, 1996, the court entered an Amended Judgment of Conviction and Sentence to reflect the plea agreement, adding the language that Brown's state

⁷ The letter stated, in part, "[T]his Court will follow the recommendations of the Commonwealth, however, at the time the guilty plea was entered, there was no plea on the Federal Sentence. The Documentation from Federal Court, with the case numbers, is necessary. KRS 532.115 states that the cases will not run concurrent unless State and Federal case numbers are specified."

sentence "shall run concurrent with Federal time under Indictment Nos. CR-93-00121-01-L(J) and CR-94-00015-01-L(J)." Brown did not appeal from the August 20, 1996 order.

On September 22, 1997, Brown filed a motion to vacate, set aside or correct judgment pursuant to RCr 11.42. Brown contended that the plea bargain had not been fulfilled, as his state sentence was not running concurrently with his federal sentence because state authorities did not relinquish complete custody of him to federal authorities. Brown stated that the only way for the plea agreement to be fulfilled is for him to be released from state custody and placed in federal custody to begin serving his federal sentence. Brown additionally alleged ineffective assistance of counsel. An evidentiary hearing was held on August 13, 1999. On September 16, 1999, the court entered an order denying the motion, stating, in pertinent part:

[C]learly KRS 532.115 authorizes a court to run a state sentence concurrently "with any federal sentence received by the defendant for a federal crime." However, in August 1993 when Petitioner pled and was sentenced in this court he had not yet "received" a federal sentence. The federal sentences were "received" over a year later in August 1994. It is certainly questionable whether a state sentence can be imposed concurrently with a federal sentence where the defendant has not yet pled in federal court much less received a federal sentence.

In any event, in August 1996 Judge McAnulty amended the judgment to provide for concurrent sentences. This action fulfilled the plea agreement to the extent a state court could do so. At the same time Judge McAnulty issued the above-quoted order noting that the Petitioner's incarceration site was a matter for state and federal correction authorities and that "Defendant's Motion for an Order releasing him to Federal

Authorities" would be denied. The record reflects no appeal from that Order which plainly stated: "This is a final and appealable order, there being no just cause for delay." Under these circumstances, this Court is without jurisdiction and will not revisit the issue. Petitioner's recourse would appear to be in federal court--the only venue, given the timing of the various sentences, where Petitioner's objective could have been achieved.

This appeal followed.

On appeal, Brown contends that the Commonwealth violated the terms of the plea agreement by not running his federal and state sentences concurrently as bargained for. In the alternative, Brown contends that his counsel was ineffective for allowing him to enter a plea agreement which was impossible to fulfill. KRS 532.115 authorizes the court, in sentencing a person convicted of a felony, to run the sentence concurrent with any federal sentence received by that defendant for a federal crime and any sentence received by that defendant in another state for a felony offense. "If the court does not specify that its sentence is to run concurrent with a specific federal sentence or sentence of another state, the sentence shall not run concurrent with any federal sentence or sentence of another state." (emphasis added). KRS 532.115.

Brown's plea agreement and sentence, which provides for the federal and state sentences to run concurrently, cannot be performed because the state judgment imposing sentence was entered prior to the federal sentence. The federal judge made the federal sentence consecutive to the state sentence, rather than concurrent. We have no authority over the federal judge or

any subsequent sentencing court which sentenced after our Court sentenced. See KRS 532.115; KRS 197.035. Therefore, it was error for the Jefferson Circuit Court to sentence Brown to concurrent state and federal terms prior to his sentencing by the federal court. KRS 532.115. Nevertheless, per the plea agreement the sentences must be recognized to run concurrently. Brock v. Sowders, Ky., 610 S.W.2d 591 (1980). The government should not be permitted to welsh on its bargain. Workman v. Commonwealth, Ky., 580 S.W.2d 206, 207 (1979), overruled on other grounds, Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991). Brown is currently in state custody. We cannot dictate where a prisoner should serve his time or which time should be served first. However, in order to enforce the plea agreement, we believe the appropriate remedy is to vacate the sentence and remand to the Jefferson Circuit Court in order to resentence Brown, deducting his 160-month federal sentence from his 42-year state sentence. The net effect would be to recognize that the federal sentence runs consecutive to the state sentence and the total sentence would be 42 years, per the plea agreement.

For the aforementioned reasons, we affirm the guilty plea, but reverse the sentence and remand to the Jefferson Circuit Court for resentencing consistent with this opinion.

MILLER, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS.

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