

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002006-MR
NO. 2003-CA-002009-MR
NO. 2003-CA-002724-MR
NO. 2003-CA-002779-MR

RONALD L. HORN

APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 95-CR-00010

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 95-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Ronald Horn appeals from the decisions of the Henry Circuit Court and the Oldham Circuit Court denying his petitions for extraordinary relief under RCr 11.42 and Civil Rule 60.02. Horn was on probation for sexual offenses in both Henry and Oldham counties, and his probation in both counties

was revoked for new offenses in Oldham County. Horn claimed in his motion for relief that the Commonwealth did not properly seek revocation of his probation within ninety days of the grounds for revocation coming to light, and that his counsel was ineffective for failing to object to the revocation on those grounds. The circuit court denied Horn's motion without conducting an evidentiary hearing. Because the applicable rule allows the Commonwealth prosecutorial discretion to give notice of a possible violation of probation to the Department of Corrections, and because the revocation was ultimately based on Horn's conviction of new charges as well as violation of the terms of his probation, we affirm.

Horn pled guilty to charges of rape in the third degree and sodomy in the third degree in Henry County, and similar charges in Oldham County, in 1995. His sentences on the charges were to be served consecutively for a total of seventeen years in prison. He received shock probation in March 1996, and the terms of his probation included not being alone with juvenile females and not residing in a home with a juvenile female. In March 2001, before Horn's probationary period expired, the Department of Corrections sought revocation of his probation, referring to two indictments in Oldham County, each charging two counts of sexual abuse in the first degree, and also alleging that he had been alone with juvenile females. The

circuit court allowed a continuance at Horn's request to a date beyond the expiration of his five-year probationary period, so that Horn could obtain the testimony of out-of-state witnesses. Horn waived the requirement of a warrant or summons and waived any jurisdictional argument.

On May 10, 2001, Horn admitted the violations of his probation after guilty pleas to two of the four new charges, for which he received an additional five years in prison to be served consecutively with the seventeen-year sentence in this case. No direct appeal was taken from the revocation of his probation, but instead Horn filed a petition for extraordinary relief under CR 60.02 and RCr 11.42 alleging that his counsel was ineffective for failing to object to the Department of Corrections' alleged failure to seek revocation within 90 days of receiving notice of the violation. Horn contends that the Department could have, admittedly, used his guilty plea to the new offenses as grounds for revocation, but also argues that because the Department sought revocation before the guilty plea, that it elected to proceed with the revocation using the allegation rather than the conviction as grounds. Because of that, Horn argues, the Department should have acted within 90 days of the indictment being handed down. The circuit court rejected this argument, and this appeal follows.

Horn cites a statute, Kentucky Revised Statute (KRS) 533.040(3), in support of his argument. However, Horn's argument has already been conclusively refuted by the Kentucky Supreme Court in Sutherland v. Commonwealth, 910 S.W.2d 235 (Ky. 1995). There, the court addressed a very similar argument that the court was without authority to rule on a revocation of probation when that ruling was made outside of the 90-day period set by the statute. The court concluded that the statute was not designed to prevent any revocation after the expiration of the 90-day period, but instead only required any sentence to be run concurrently instead of consecutively if the revocation occurs outside of the time frame specified in the statute. The court stated,

Reading KRS 533.040(3) within the context of the entire legislative scheme, it appears to be the legislative intent to require the Department of Corrections to push for revocation proceedings in a speedy manner, if any subsequent term of sentence is to be served consecutive to any time spent in incarceration as a result of a revocation of probation. Sutherland at 237 (citations omitted.)

The court having interpreted the statute this way, we are bound to reject Horn's argument.

The question of whether Horn's sentence must be run concurrently, if the revocation was sought outside the 90-day period, is resolved by Brewer v. Commonwealth, 922 S.W.2d 380 (Ky.App. 1996). In Brewer, the Kentucky Supreme Court addressed

the question left by Sutherland of whether the requirement that a probated sentence revoked after the expiration of the 90-day period must be served concurrently with new charges or consecutively as required by KRS 533.060. The Brewer court held that the latter statute, as it was enacted after 533.040(3), was controlling, thus preventing any revoked probated sentence from being run concurrent with a sentence upon a new conviction. Since KRS 533.040(3) does not prevent a probation revocation brought later than 90 days after the Department becomes aware of the violation, and Brewer holds that KRS 533.060 prohibits a sentence for new charges being run concurrently with a revoked probated sentence, the circuit court's ruling was correct and Horn's 60.02 motion was properly denied. Likewise, since Horn's counsel had no basis to object, he could not be ineffective for not objecting to the revocation of probation or the decision to run the sentences consecutively.

The judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald L. Horn, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky