

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000072-MR

FLOYD V. EVANS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NOS. 00-CR-00064 AND 01-CR-00232

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Floyd V. Evans appeals from a December 5, 2005, Order of the Hardin Circuit Court revoking his probation and sentencing him to seven years imprisonment . We reverse and remand.

On March 29, 2000, appellant was indicted by a Hardin County Grand Jury for complicity to commit burglary in the second degree (Kentucky Revised Statutes

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(KRS) 511.030, KRS 502.020), complicity to commit theft by unlawful taking over \$300.00 (KRS 514.030, KRS 502.020) and for unlawful transaction with a minor in the second degree (KRS 530.065)(Indictment No. 00-CR-00064). On May 30, 2001, Appellant was subsequently indicted for assault in the second degree (KRS 508.020), burglary in the first degree (KRS 511.020), and criminal mischief in the third degree (KRS 512.040)(Indictment No. 01-CR-00232). Appellant ultimately entered a plea of guilty.² On June 21, 2002, a Judgment and Order Imposing Sentence was entered and appellant was sentenced to seven years' imprisonment probated for a period of five years.

On February 21, 2003, the Commonwealth filed a motion to revoke appellant's probation. Therein, the Commonwealth alleged appellant tested positive for marijuana and failed to pay restitution and court costs as ordered. Following a probation revocation hearing, the court entered an order on May 7, 2003, dismissing the motion to revoke without prejudice.

On July 15, 2004, a second probation revocation hearing was conducted. At the hearing, the Commonwealth introduced evidence that appellant violated the conditions of his probation by again testing positive for marijuana use, failing to pay restitution, and incurring a new felony arrest for theft by unlawful taking over \$300.00. Following the hearing, the court entered an order revoking "a portion" of appellant's probation and imposing a one-year sentence.

² Pursuant to an order entered April 24, 2002, the burglary in the first degree was amended to burglary in the second degree (KRS 511.030). Appellant pleaded guilty to the amended charge.

On November 1, 2005, the court conducted a third probation revocation hearing. At this hearing, the court considered appellant's new felony conviction.³ Following the hearing, the court entered an order revoking appellant's probation and sentencing him to seven years' imprisonment. This appeal follows.

Appellant contends the circuit court erred by utilizing the same probation violation as the basis for revoking his probation in July 2004 and again in November 2005. Specifically, appellant maintains that the basis for both revocations was his new felony arrest. We disagree.

The record reflects that the July 2004 revocation was based upon appellant's second positive drug test and failure to pay restitution. Although the Commonwealth also presented evidence that appellant had been arrested on a new felony charge, the court expressed that it was not considering the felony arrest and specifically stated that it was "not giving weight to that in this particular case." The record further reflects that the November 2005 revocation was based upon the conviction that resulted from that felony charge. Thus, it is clear that the court did not use the same probation violation as the basis for both revocations.

Appellant next contends the circuit court erred by imposing a total of eight years' imprisonment upon revoking his probation in July 2004 and November 2005.

Appellant points out that his original sentence of imprisonment was for seven years. By

³ Appellant was convicted for theft by unlawful taking over \$300.00, which was one of the charges presented at the revocation hearing in 2004. Appellant was also convicted for being a persistent felony offender in the second degree.

imposing the eight years' imprisonment, the court improperly exceeded the original sentence by one year.

In *Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970), the Court held that a court shall not impose a greater sentence upon probation revocation than originally ordered. *See also, Howard v. Ingram*, 452 S.W.2d 410 (Ky. 1970). The *Hord* Court further held that due process is offended when a sentence greater than the original sentence is imposed upon revocation of probation. *Hord*, 450 S.W.2d 530.

In the case *sub judice*, appellant was originally sentenced to a seven-year term of imprisonment. Following a probation revocation hearing in July 2004, the court determined that appellant had violated the conditions of his probation. The court revoked “a portion” of appellant's probation and imposed a one-year sentence. In November 2005, the court conducted another probation revocation hearing. Based upon appellant's new felony conviction, the court determined that his probation should be revoked. Thereupon, the court entered an order revoking appellant's probation and imposing a seven-year sentence. From the above undisputed facts, it is clear that the circuit court sentenced appellant to a one-year term of imprisonment and then to a seven-year term of imprisonment for a total sentence of eight years. However, appellant's original sentence was only for seven years. Under the precepts of *Hord*, we conclude the circuit court erred by imposing an eight year sentence of imprisonment when the original sentence was only seven years. Simply put, the court's action in sentencing appellant to a greater sentence upon revocation of probation than his original sentence is improper. *Id.*

As such, the circuit court's December 5, 2005, order revoking appellant's probation is reversed. Upon remand, the court is directed to enter an order sentencing appellant to a term of imprisonment that when combined with the one-year sentence previously imposed does not exceed the original seven-year sentence.

For the foregoing reasons, the Order of the Hardin Circuit Court is reversed and this cause remanded for proceeding not inconsistent with this opinion.

ALL CONCUR.

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