

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002261-MR

STEVE MINTON

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 02-CR-00223

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,<sup>1</sup>  
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Steve Minton appeals from an order of the  
Ohio Circuit Court entered on October 11, 2007, denying his Kentucky Rules of  
Civil Procedure (CR) 60.02 motion. Minton, whose probation on a two-year

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<sup>1</sup> Senior Judge David C. Buckingham 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.

sentence was revoked in December 2005, contends (1) that his reinstated sentence should have been ordered to run concurrently, not consecutively, to his sentences on two other charges, and (2) that the trial court violated his constitutional rights by failing to provide written findings to support the probation revocation. We affirm.

This case involves three indictments: 02-CR-00223, 03-CR-00119, and 03-CR-00128. Under 02-CR-00223, a jury found Minton guilty of possession of anhydrous ammonia. He then entered into a plea agreement with the Commonwealth pursuant to which he received a two-year sentence in exchange for waiving his right to appeal the conviction. He was sentenced on February 4, 2004, and was granted shock probation on April 8, 2004.

Also on April 8, 2004, Minton was offered plea agreements by the Commonwealth under the two other indictments, 03-CR-00119 and 03-CR-00128. He agreed to plead guilty to trafficking in the second degree under 03-CR-00119 and unlawful possession of a methamphetamine precursor under 03-CR-00128. On September 2, 2004, he was sentenced to five years' imprisonment under each indictment to run consecutively with each other. On November 4, 2004, these sentences were also probated (shock probation).

About one year later, on December 8, 2005, the Commonwealth moved to revoke Minton's probation in the first case (02-CR-00223). Attached to the motion was a supervision report from Minton's probation officer that stated in part as follows:

On 8-10-05 a home visit was made due to allegations that Steve had beat up his wife. When this officer and Deputies from the Ohio Co. Sheriff Dept. arrived, we observed that Charity Minton did have a black eye. Steven Minton admitted that he did lose control and hit his wife. This officer advised Minton that this behavior could not be tolerated and if this happened again, a warrant would be requested because this is not the action of someone that is on Probation.

This officer was notified on this date [December 1, 2005] that Steven Minton had again beat up his wife and the court deemed it serious enough that the children were removed from the home. Charity Minton was sent to OASIS Spouse abuse shelter for her protection from Steven Minton.

This officer's records indicate that Steven Minton has not reported to Probation and Parole Office as Directed.

After conducting a hearing, the trial court entered a summary order on December 20, 2005, revoking Minton's probation and directing him to serve the remainder of his two-year sentence. According to Minton, when his probation was revoked, all the sentences under the three indictments were ordered to run consecutively for a total of 12 years.<sup>2</sup>

Minton made a motion on April 6, 2006, to file a belated appeal in 02-CR-00223, which was denied on October 19, 2006. Meanwhile, on August 11, 2006, he also filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate and set aside the judgment. On September 12, 2007, he filed a motion pursuant to CR 60.02 raising the same arguments. The trial court never

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<sup>2</sup> There is no order to this effect in the record.

ruled on the RCr 11.42 motion. On October 11, 2007, the trial court entered an order denying the CR 60.02 motion. This appeal followed.

On procedural grounds, Minton's appeal is barred because his arguments could have been raised in a direct appeal of the order revoking probation.

[CR 60.02] is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

*Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

“Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (citations omitted).

Although we affirm the trial court's order denying the CR 60.02 motion for the above stated reason, we will address Minton's argument concerning the effect of KRS 533.040(3), which provides 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.

According to Minton, the Department of Corrections would have been aware of his two later indictments (03-CR-00119 and 03-CR-00128) on April 8, 2004, the day he entered into the plea agreements in those cases. Because his probation in 02-CR-00223 was not revoked until December 2005, long after the statutory 90-day period had expired, he argues that the statute mandates concurrent sentencing.

The fallacy in Minton's argument is that his probation was revoked because he had committed domestic abuse, not for his commission of the other felonies. This is confirmed by a lengthy letter in the record from Minton to the trial court following the revocation hearing, in which he explains that his wife had been physically abusive towards him due to mental illness.<sup>3</sup> He blames his wife's family for spreading lies about him and trying to destroy his relationship with his wife.

In *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995), the Kentucky Supreme Court stated as follows:

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.

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<sup>3</sup> The probation revocation order does not state the reasons for revocation, and there is no recording of the probation revocation hearing in the record.

*Id.* at 237.

The Commonwealth's motion to revoke probation with its accompanying report from the probation officer was filed on December 8, 2005, and the court revoked Minton's probation on December 15, 2005. Minton's probation was revoked well within the 90-day period following the date that the grounds for revocation (the report of domestic abuse) came to the Department's attention and, therefore, was fully in accordance with the legislative intent underlying the statute.

Minton also argues that the circuit court erred in failing to make written findings of fact to support its revocation order. The minimal due process requirements applicable to a probation revocation proceeding include "a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]." *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972)). The function of this requirement is "to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." *Black v. Romano*, 471 U.S. 606, 613-14, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985).

In an opinion designated for publication that is currently before the Kentucky Supreme Court on motion for discretionary review, this Court recently held that oral findings are adequate to fulfill this requirement. *Moore v.*

*Commonwealth*, 2008 WL 820948 (Ky. App. 2008) (2007-CA-000244-MR).

However, there is no recording of the probation revocation hearing in the record.

Regardless of whether or not Minton's argument in this regard would otherwise

have merit, we decline to address it further since it was an issue that he could have

raised in a direct appeal of the probation revocation order. *See Gross, supra*.

The order of the Ohio Circuit Court denying Minton's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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