

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001423-MR

RAYCINE LOVE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 04-CR-00109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * * * * *

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Raycine Love brings this appeal from a June 25, 2008, order of the McCracken Circuit Court revoking his probation and ordering his state sentence of imprisonment to be served consecutively with a federal sentence of imprisonment. We reverse and remand with directions.

¹ Senior Judge Michael L. Henry 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.

The procedural facts of this case are largely undisputed. In a final judgment entered August 30, 2004, by the McCracken Circuit Court, Love was sentenced to six and one-half years' imprisonment for various drug-related offenses; this sentence of imprisonment was probated for a period of five years (state sentence of imprisonment). While on probation, Love committed and was convicted of a federal offense, felony possession of a firearm. By final judgment entered August 1, 2006, the United States District Court sentenced Love to thirty months in the federal penitentiary (federal sentence of imprisonment).

On October 13, 2006, the McCracken County Commonwealth Attorney lodged a detainer against Love with the U.S. Department of Justice, Federal Bureau of Prisons. The detainer was filed against Love for violating the terms of probation as to his state sentence of imprisonment. Thereafter, on February 27, 2008, the Kentucky Division of Probation and Parole filed a report with the McCracken Circuit Court seeking revocation of Love's probation. By order entered June 25, 2008, the circuit court revoked Love's probation and ordered Love to serve the remainder of the original six and one-half year state sentence of imprisonment. The court also concluded that Love's probation was timely revoked and ordered the six and one-half year state sentence of imprisonment to run consecutively with his federal sentence of imprisonment. This appeal follows.

Love contends that the circuit court erred by concluding that his probation was timely revoked and by ordering his state and federal sentences of

imprisonment to be served consecutively. Specifically, Love asserts that his probation under the state sentence of imprisonment was not revoked within the ninety-day time requirement of Kentucky Revised Statutes (KRS) 533.040(3); consequently, Love maintains that his federal and state sentences of imprisonment must run concurrently.

As this appeal involves the interplay between a Kentucky sentence and a federal sentence of imprisonment, KRS 533.040(3) and KRS 532.115 control. *See Gavel v. Com.*, 674 S.W.2d 953 (Ky. 1984).

KRS 533.040(3) provides:

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.

KRS 532.115 reads:

The court in sentencing a person convicted of a felony, shall be authorized 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. The time spent in federal custody and the time spent in custody in another state under the concurrent sentencing shall count as time spent in state custody; but the federal custody and custody in another state shall not include time spent on probation or parole or constraint incidental to release on bail. 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.

Relevant to this appeal, KRS 532.115 allows a court to run a sentence of imprisonment upon a felony offense committed in this state concurrent or consecutive with a federal sentence of imprisonment. And, pertinent herein, KRS 533.040(3) requires that a defendant's probation be revoked within ninety days "after the grounds for revocation come to the attention of the Department of Corrections." If a defendant's probation is untimely revoked in violation of the ninety-day time requirement of KRS 533.040(3), the defendant's state and federal sentences of imprisonment shall be ordered to run concurrently and not consecutively.²

In the case *sub judice*, it is clear that Love's probation was not timely revoked within the ninety-day time requirement of KRS 533.040(3). Love was sentenced to thirty months' imprisonment on the federal charge by judgment entered August 1, 2006. On October 13, 2006, the McCracken County Commonwealth Attorney lodged a detainer against Love with the Federal Bureau of Prisons. And, the circuit court revoked Love's probation by order entered June

² When dealing with the "interplay" between two state sentences of imprisonment as opposed to state and federal sentences of imprisonment, our Supreme Court has held that KRS 533.060 controls over KRS 533.040, as the later enacted statute. *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). Thus, when a defendant commits a felony in this state while on parole, probation, shock probation, or conditional discharge under a judgment of imprisonment also in this state, the protections of KRS 533.040(3) are unavailable, and the two state sentences must run consecutively. *Id.* However, the Supreme Court specifically limited its holding in *Brewer* by noting "that this case is distinguishable from *Gavel v. Comm[.] [sic] Ky.*, [674] S.W.2d 953 (1984), which involved the interplay between federal and state jurisdiction." *Brewer*, 922 S.W.2d at 382.

25, 2008. As such, Love's probation was revoked some twenty-two months after his federal conviction and some twenty months after the Commonwealth Attorney lodged a detainer against him – neither being within the ninety-day time requirement of KRS 533.040(3).

In ordering Love's state and federal sentences of imprisonment to run consecutively, the circuit court reasoned that the Commonwealth "substantially complied" with KRS 533.040(3) by filing a detainer against Love within ninety days of his federal conviction:

The Court has further reviewed the briefs of the parties regarding the issue of whether or not this sentence should run consecutive or concurrent to his sentence he is currently serving in federal court. The Court finds that a detainer was filed with the US Department of Justice, Federal Bureau of Prisons within 90 days of the defendant's federal conviction. The Detainer Action Letter specifically stated that the purpose of the detainer was for "Probation Viol." According to this letter, a copy was served on the inmate/defendant, giving him notice that it was the intent of the Commonwealth to revoke his probation. Also, the letter stated the tentative release date of 3-27-2008 and that the Commonwealth would receive notice of release 60 days prior to release. Based upon review of the facts and the applicable case law, the Court finds that the Commonwealth pushed for a revocation within a speedy manner and has substantially complied with KRS 533.040, and this sentence **shall be served CONSECUTIVELY** to his federal sentence.

We believe the circuit court's reasoning is in error. In *Myers v. Com.*, 836 S.W.2d 431, 433-434 (Ky.App. 1992), *overruled on other grounds by Sutherland v. Com.*, 910 S.W.2d 235 (Ky. 1995), the Court observed that a "defendant does have a right to a hearing within ninety days of the detainer being

placed on him” under KRS 533.040(3). Also, the *Myers* Court held that a “conviction was notice and grounds which commenced the running of the statutory ninety-day revocation period.” *Id.* at 434. Under either scenario, Love’s probation was not revoked within the ninety-day time requirement of KRS 533.040(3). It is undisputed that Love’s probation was revoked some twenty-two months after his federal conviction, and some twenty months after the Commonwealth Attorney lodged a detainer against him with the Federal Bureau of Prisons.

Accordingly, we conclude that revocation of Love’s probationary sentence was violative of the ninety-day time requirement of KRS 533.040(3). As a result, we direct the circuit court upon remand to order Love’s six and one-half year state sentence of imprisonment to run concurrently with his federal sentence of imprisonment.

For the foregoing reasons, the June 25, 2008, order of the McCracken Circuit Court is reversed and this cause is remanded with directions that the circuit court order Love’s state and federal sentences of imprisonment to be served concurrently.

LAMBERT, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

HENRY, SENIOR JUDGE, DISSENTING. I respectfully dissent. In my view this case is controlled by *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996), and the circuit court did not err in making the sentences run consecutively.

If *Gavel v. Commonwealth*, 674 S.W.2d 953 (Ky. 1984), is all that stands in the way of implementing the intent of the General Assembly in cases such as this, then the Kentucky Supreme Court should take another look at it. For that reason I respectfully dissent.

BRIEFS AND ORAL ARGUMENT
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