

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001993-MR
AND
NO. 2008-CA-001994-MR

TIMOTHY FRAZER

APPELLANT

v. APPEALS FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NOS. 06-CR-00552 AND 07-CR-00432

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

CLAYTON, JUDGE: These appeals from the sentencing of the appellant, Timothy Frazer. The Boone Circuit Court found that Frazer's sentences should run consecutively pursuant to statute. Frazer, however, contends that they should run concurrently. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Frazer pled guilty to receiving stolen property over \$300 and was sentenced to two years which was probated for two years in December of 2006. On April 11, 2007, Frazer's probation officer, Cassandra Stella, filed an affidavit with the trial court alleging he had violated the conditions of his probation. When Frazer was arrested on May 21, 2007, for the probation violations, he gave false information to the officers. Based upon this act, Frazer was indicted on July 17, 2007, for theft of identity of another and for being a persistent felony offender in the second degree.

On September 19, 2007, Frazer pled guilty to the theft of identity charge and on October 3, 2007, was sentenced to three years which was probated for five years. While the trial court stated that the sentence would run concurrently with Frazer's prior sentence, he ordered the sentence to run consecutively to the "sentence for which he is currently on probation."

On February 22, 2008, Stella tendered another affidavit alleging Frazer had again violated the terms and conditions of his probation. Specifically, Stella contended that he had absconded from supervision. Frazer was arrested on this charge on July 1, 2008, and on September 24, 2008, the court revoked his probation. The trial court held that the sentences would run consecutively for a total of five years. Frazer now appeals that decision, arguing that the sentences should run concurrently.

DISCUSSION

The crux of this issue lies in which of two statutes should be applied in this case. The trial court concluded that Kentucky Revised Statutes (KRS) 533.060(2) is controlling. It provides as follows:

When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

Frazer argues that this is not the appropriate statute to apply in his case. He contends that KRS 533.040(3) is the correct one. It provides that:

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.

In *Brewer v. Com.*, 922 S.W.2d 380 (Ky. 1996), the Kentucky Supreme Court held that KRS 533.060 controlled over KRS 533.040 since it was enacted later. The *Brewer* facts were very similar to the case at bar. In *Brewer*, the defendant was on probation for a felony when he was charged and sentenced on another felony. *Brewer* argued that he should have concurrent sentences based

upon KRS 533.040 since his probation was not revoked within ninety days of the Department of Corrections becoming aware of the grounds for his revocation.

The *Brewer* Court specifically held KRS 533.060 was controlling since it was enacted later and that it was “the General Assembly’s clear intention in enacting KRS 533.060(2) to provide stiff penalties in the form of consecutive sentences to those who, after having been awarded parole or probation, violate that trust by the commission of subsequent felonies.” *Id.* at 382. (Citations omitted). Frazer is in the same situation and we find that the trial court correctly held that KRS 533.060(2) was the controlling statute. The trial court’s imposition of a consecutive sentence was not in error and we affirm.

ALL CONCUR.

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