

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

NO. 2009-CA-001743-MR

DOUGLAS KISER

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE REBECCA K. PHILLIPS, JUDGE  
ACTION NO. 02-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Douglas Kiser appeals *pro se* from an order of the Carter Circuit Court denying his motion to run his sentences concurrently to sentences he received in the Lewis Circuit Court. Kiser contends that since the

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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.

judgments sentencing him were silent as to whether they would run concurrently or consecutively with each other, they are required by KRS 532.110(2) to run concurrently. We disagree and thus affirm.

On May 3, 2003, the Carter Circuit Court entered a final judgment wherein Kiser was sentenced to three years in prison. On June 4, 2003, the court granted shock probation to Kiser for a period of five years.

In August 2007, the Lewis Circuit Court sentenced Kiser to seven years in prison. Based on these new convictions, on October 19, 2007, the Carter Circuit Court revoked Kiser's probation and ordered him remanded to the Department of Corrections for the service of his earlier three-year sentence. Neither the judgments of the Lewis Circuit Court nor the order of the Carter Circuit Court revoking Kiser's probation made any mention of whether the sentences in one court would run concurrently or consecutively with the sentences in the other court. According to Kiser's brief, however, the Department of Corrections has treated the sentences from the two courts as running consecutively with each other despite no mention being made of this in the judgments and orders themselves.

On May 21, 2009, Kiser filed a motion in the Carter Circuit Court seeking an order that the three-year sentence from that court should run concurrently to the seven-year sentence from the Lewis Circuit Court. Relying on

KRS 533.060(2), the court denied the motion. That statute provides in relevant part that when a person convicted of a felony and on probation is thereafter convicted of a felony while on probation, then “the period of confinement for that felony shall not run concurrently with any other sentence.” This appeal by Kiser followed.

Kiser argues that KRS 532.110(2), not KRS 533.060(2), controls and that concurrent sentencing is required. We disagree. KRS 532.110(2) reads in relevant part: “If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve[.]”

Kiser relies on the holding in *Gavel v. Commonwealth*, 674 S.W.2d 953 (Ky. 1984), and argues it provides that when KRS 533.060(2) and KRS 532.110(2) appear to require conflicting results, KRS 532.110(2) and the requirement that the sentences are to run concurrently is the controlling statute. Kiser has, however, neglected to consider an important distinction between that case and his own.

In *Gavel*, the defendant was on probation after being convicted of violations of state law. He then was convicted of violations of federal law. The Kentucky Supreme Court held that “the trial court may run the state sentence concurrently or consecutively with the federal sentence because KRS 533.060(2) is not applicable to the facts in the present case.” 674 S.W.2d at 954. When

considering the statute, the Supreme Court found the subsequent conviction “would be the federal conviction, which the state court has no control over.” *Id.*

In a case with facts very similar to those herein, the Kentucky Supreme Court has determined that even when separate judgments of conviction are silent as to whether the sentences should run concurrently or consecutively, the Department of Corrections has the authority and duty to run the sentences consecutively. *Riley v. Parke*, 740 S.W.2d 934, 935-36 (Ky. 1987).<sup>2</sup> The *Riley* court also stated that “[a]lthough there facially appears to be a conflict between KRS 532.110(2) and KRS 533.060(2), we hold that the latter controls.” *Id.* at 935. Pursuant to KRS 533.060(2), Kiser’s original three-year sentence and the subsequent seven-year sentence must be served consecutively. There was no error in that determination by the Carter Circuit Court.

The order of the Carter Circuit Court denying Kiser’s motion for concurrent sentencing is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas Kiser, *pro se*  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Joshua D. Farley  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>2</sup> We additionally recognize that the current version of KRS 532.110(2) includes language specifically requiring consecutive sentences in situations governed by KRS 533.060(2).