

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000354-MR

BRENT R. JENKINS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 02-CR-00528

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

VANMETER, JUDGE: Brent Jenkins appeals from the February 10, 2009, order of the Hardin Circuit Court revoking his eight-year probated sentence and sentencing him to eight years in prison. For the following reasons, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

In 2003, Jenkins pled guilty to charges of burglary in the second degree (two counts) and theft by unlawful taking over \$300 (two counts). The trial court sentenced him to ten years on each count of burglary and one year on each count of theft by unlawful taking over \$300. The trial court ordered the two ten-year sentences to run concurrently with one another, and the two one-year sentences to run concurrently with one another. The ten-year sentences and one-year sentences were to run consecutively with one another for a total sentence of eleven years. Since Jenkins had already served 291 days at the time of sentencing, the trial court credited him with serving one year, and probated the remaining ten years of his sentence. No appeal was taken from this final judgment.

In 2005, Jenkins appeared before the trial court for a probation revocation hearing. The trial court found Jenkins had violated the terms of his probation and revoked his sentence. Jenkins requested that the court sentence him to serve one year in prison and probate the remaining nine years of the original ten-year sentence. The Commonwealth requested that the court sentence Jenkins to serve two years in prison and probate the remaining eight years of his sentence. The trial court adopted the Commonwealth's request.

After serving the two-year sentence, Jenkins reappeared before the trial court for a probation revocation hearing in 2009. Jenkins moved to dismiss the Commonwealth's motion to revoke probation, arguing that at the 2005

revocation hearing the trial court impermissibly sentenced him to two-years' imprisonment, in violation of KRS 533.010(6). Jenkins argued because he served a two-year sentence, he became a state prisoner and subject to the exclusive jurisdiction of the Kentucky Parole Board. *See Commonwealth v. Cornelius*, 606 S.W.2d 172, 174 (Ky.App. 1980) (holding that when a person has been convicted of a crime and has begun to serve his sentence the function and authority of the trial court is finished). Thus, Jenkins asserted the trial court lacked jurisdiction in 2009 to revoke the impermissible eight-year probated sentence imposed in 2005. The court denied Jenkins's motion, revoked his probation, and ordered him to serve the remaining eight-year sentence. This appeal followed.

Our review of a trial court's decision to revoke a defendant's probation is "whether or not the trial court abused its discretion." *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky.App. 2008) (citing *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986)). The trial court abused its discretion if its "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." 258 S.W.3d at 807 (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

KRS 533.020(1) provides that if the defendant commits an additional offense or violates a condition of probation, the court may revoke the sentence at any time prior to the expiration or termination of the period of probation. KRS 533.010(6)(c) provides that upon modification or revocation of probation, the court may order probation with the defendant to jail time for a period not to exceed

twelve (12) months.² KRS 533.030(6) further provides: “when imposing a sentence of probation . . . the court . . . may require as a condition of the sentence that the defendant submit to a period of imprisonment[.] . . . The time actually spent in confinement . . . shall not exceed twelve (12) months[.]”

In this case, the sentence imposed by the trial court at the 2005 probation revocation hearing was not expressly permitted by the sentencing statutes. However, the Commonwealth argues, and we agree, Jenkins is estopped from now contesting the trial court’s jurisdiction because he chose not to appeal the 2005 order and accepted the benefit of a more lenient sentence following the revocation of his probation. *See Commonwealth v. Griffin*, 942 S.W.2d 289, 292 (Ky. 1997) (holding that a defendant is precluded from contesting the trial court’s jurisdiction to revoke his probation even where the trial court may lack jurisdiction, because defendant accepted the benefit of the trial court’s leniency). Here, Jenkins accepted the trial court’s sentence and jurisdiction to avoid spending more time in prison. He is now estopped from challenging that jurisdiction.

The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

² Though Jenkins cites to *Woll v. Commonwealth ex rel. Meredith*, 284 Ky. 783, 146 S.W.2d 59 (1940), for the proposition that the courts have no authority to split a sentence, the adoption of KRS 533.010(6) authorizes courts to impose a split sentence of no more than twelve months’ imprisonment in conjunction with a term of probation.

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