

RENDERED: October 3, 1997; 2:00 p.m.  
NOT TO BE PUBLISHED

96-CA-2681-MR

CARLOS WAYNE ALVEY

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE KEN COREY, JUDGE  
ACTION NO. 93-CR-1431

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: GARDNER, COMBS, and ABRAMSON, Judges.

ABRAMSON, JUDGE: Carlos Wayne Alvey appeals an order of the Jefferson Circuit Court denying his Motion to Correct Judgment pursuant to CR 60.02. Alvey alleges that his probation was revoked contrary to the provisions of KRS 533.040(3). After reviewing the record and considering the arguments of the parties as well as the applicability of KRS 533.060(2), we affirm.

On October 13, 1990, Alvey forcibly entered the apartment of Terri L. Brown. Upon gaining entrance, he assaulted Ms. Brown and ransacked her apartment. As a result of the assault, Ms. Brown was left permanently blind in her left eye. On January 7, 1994, Alvey pled guilty to various charges related to this incident pursuant to indictment 93-CR-1341. Alvey was sentenced to five years for third-degree burglary; five years for

first-degree assault under extreme emotional disturbance; and ninety days for third-degree criminal mischief, to be served concurrently with the two five-year sentences, for a total of ten years. However, rendition of sentence was withheld and Alvey was placed on probation subject to his compliance with the conditions set forth in the trial court's January 12, 1994 order. On July 27, 1995, Alvey was arrested for burglary, forced entry, and receiving stolen property. On September 5, 1996, the Division of Probation and Parole issued a report recommending revocation of Alvey's parole. Parole violations alleged were Alvey's 1) failure to report his July arrest within 72 hours; 2) failure of an August 15, 1995, drug screening; and 3) failure to pay court-ordered restitution to Ms. Brown. On September 6, 1995, the trial court issued a warrant for Alvey's arrest for parole violations and on September 13, 1995, the Commonwealth filed a motion requesting the revocation of his parole. On September 25, 1995, Alvey was arrested pursuant to the probation violation warrant.

On November 8, 1995, in conjunction with his July 1995 arrest, Alvey pled guilty to four counts of second-degree burglary and one count of receiving stolen property. This conviction was pursuant to indictment 95-CR-2248. On December 10 he was sentenced to ten years on each burglary count, to be served concurrently, and two years on the receiving stolen property count, for a total of twelve years. On February 16, 1996, the trial court issued an order revoking Alvey's probation

in case 93-CR-1431. The order further specified that the total ten-year sentence in 93-CR-1431 was to run consecutively with the total twelve-year sentence in 95-CR-2248.

On June 18, 1996, Alvey filed a motion to correct judgment pursuant to CR 60.02 alleging that the sentence imposed for his conviction in case 95-CR-2248 must, pursuant to KRS 533.040(3), be run concurrently with his sentence in 93-CR-1431 because the Department of Corrections failed to revoke his probation within 90 days after becoming aware of the grounds for revocation in 93-CR-1431. On September 5, 1996, the trial court issued its order denying the motion stating that, "[t]he defendant's revocation was based upon the conviction for new offenses, not for the arrest for those offenses." This appeal followed.

Alvey argues that the trial court was required, pursuant to KRS 533.040(3), to run his sentence in 93-CR-1431 concurrently with his sentence in 95-CR-2248. KRS 533.040(3) 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 Alvey, since the grounds for probation revocation came to the attention of the Department of Corrections (DOC) on September 25, 1995, the date of his arrest for violation of probation, DOC had to revoke his probation within ninety days of that date, or the reinstated sentence would have to run concurrently with any other prison term. Alvey argues that his September 25, 1995 arrest triggered the ninety-day clock because, "if a detainer is placed on the defendant by Probation and Parole at anytime prior to the revocation hearing, . . . this would be notice to [DOC] and this prosecutorial decision (notice that they are treating the allegations as having substance) would commence the ninety-day period for revocation." Myers v. Commonwealth, Ky. App., 836 S.W.2d 431, 433 (1992). Because his probation was not revoked until February 16, 1996, well beyond the ninety-day statutory limit, Alvey insists the statute mandates concurrent sentencing. See also Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432 (1992). The Commonwealth argues that the foregoing aspect of Myers was overruled in Sutherland v. Commonwealth, Ky., 910 S.W.2d 235 (1995). While Sutherland did overrule Myers "to the extent it conflicts with this opinion," Sutherland, 910 S.W.2d at 237, we do not believe the Myers language cited by Alvey was overruled. Sutherland recognizes that "it is the Legislature which provided the 90-day time limitation within KRS 533.040(3). The statute provides that any revocation of probation (which occurs outside of the 90-day period) is to be run concurrently with any other offense. If this time frame is deemed to be too

short, it is up to the General Assembly to make a change.”  
Sutherland, 910 S.W.2d at 237. More specifically, Sutherland  
does not contradict that portion of Myers which holds that the  
clock begins to tick if a detainer is placed on the probated  
party.

In denying Alvey’s CR 60.02 motion, the trial court  
reasoned that parole in 93-CR-1431 was revoked because of the  
conviction in 95-CR-2248 and not because of Alvey’s arrest.  
Under this theory (advanced by the Commonwealth and incorporated  
by reference in the court’s order), because sentencing was not  
until December 10, 1995,<sup>1</sup> the February 16, 1996 revocation was  
within the ninety-day mandate of KRS 533.040(3). We disagree  
with the reasoning of the trial court. Pursuant to Myers, we  
believe the ninety-day limit began to run on September 25, 1995.  
However, the trial court’s error was harmless because, as  
explained below, the court reached the correct conclusion, i.e.,  
that the sentences should not run concurrently. It is well-  
settled that a correct decision will not be disturbed merely  
because it was based upon incorrect grounds. Haddad v.  
Louisville Gas and Electric Company, Ky., 449 S.W.2d 916 (1969).  
Richmond v. Louisville and Jefferson County Metropolitan Sewer  
District, Ky. App., 572 S.W.2d 601, 603 (1977).

The controlling authority on this appeal is Brewer v.  
Commonwealth, Ky., 922 S.W.2d 380 (1996). Addressing the

---

<sup>1</sup> It’s unclear why, under this theory, the sentencing date rather than the date the plea was  
entered (November 8, 1995) should trigger the 90-day clock.

conflict between KRS 533.040 and 533.060(2), Brewer held that since KRS 533.040 was enacted in 1974, while KRS 533.060 was enacted in 1976, statutory construction principles dictate that the latter controls. Brewer, 922 S.W.2d at 382. KRS 533.060(2) provides:

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.

(emphasis added).

Under the holding of Brewer the emphasized language of KRS 533.060(2) supersedes any relief that might have been available to Alvey under KRS 533.040(3). Under the facts sub judice Alvey 1) was a person convicted of a felony; 2) who had been released by the trial court on probation; and 3) who subsequently entered a plea of guilty to a felony committed while on probation. KRS 533.060(2) clearly and unambiguously requires that Alvey's second sentence (the twelve-year sentence in 95-CR-2248) not run concurrently with his first sentence (the initially probated ten-year sentence in 93-CR-1431). See also Commonwealth v. Hunt, Ky. App., 619 S.W.2d 733 (1981). Thus, the circuit court's denial of Alvey's CR 60.02 motion is correct, although

for a reason not advanced by the Commonwealth or considered by the circuit court.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court denying Alvey's Motion to Correct Judgment Pursuant to CR 60.02.

ALL CONCUR.

BRIEF FOR APPELLANT - PRO SE:

Carlos Wayne Alvey  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III  
Attorney General

J. Kirk Ogrosky  
Asst. Attorney General  
Frankfort, Kentucky