RENDERED: May 1, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-001031-MR

EDWIN LEE MORAN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY NOBLE, JUDGE
ACTION NO. 95-CR-725

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: ABRAMSON, DYCHE AND HUDDLESTON, JUDGES.

HUDDLESTON, JUDGE. Edwin Lee Moran appeals pro se from an order denying his motion for relief under Ky. R. Civ. Proc. (CR) 60.02. Moran is serving consecutive sentences received on a 1996 felony conviction and the revocation of his probation on a 1995 felony conviction. He argues that the circuit court should have corrected his sentence upon revocation of probation to run concurrently with subsequent convictions because his probation was revoked more than ninety days after the grounds for revocation came to the attention of the Department of Corrections.

Moran pleaded guilty to theft by deception over $300.00, Ky. Rev. Stat. (KRS) 514.040 and second-degree persistent felony

offender (PFO II), KRS 532.080, in case 95-CR-725 on October 13, 1995 in Fayette Circuit Court. The court sentenced him to five years on the theft charge, enhanced to ten because of the PFO II charge, but probated the sentence for five years. One of the conditions of probation was that Moran not commit any crimes. He soon committed another offense and pleaded guilty to a felony and PFO I in case 96-CR-088 on March 22, 1996, again in Fayette Circuit Court. The court imposed a sentence of ten years. He later pleaded guilty to additional felonies and PFO charges in Jessamine and Fayette Circuit Courts, none of which are relevant to this appeal.

On April 2, 1996, a probation and parole officer filed an affidavit supporting a motion to revoke Moran's probation because of Moran's conviction in case 96-CR-088. The court revoked his probation in case 95-CR-725 on June 25, 1996. The court sentenced Moran to ten years for PFO II, and ordered the sentence to run consecutively to the sentence in 96-CR-088 and any other previous felony sentence.

Moran filed a motion under CR 60.02 asking the court to correct the sentence under 95-CR-725 to run concurrently with the sentence in 96-CR-088. On March 27, 1997, the court entered an order amending its June 25, 1996, order but retaining the requirement that the sentence be consecutive to any previous sentence. Moran filed a motion to reconsider and to supplement his CR 60.02 motion. In separate orders, the court denied Moran's CR 60.02

motion and denied his motion to reconsider the amended order. Moran appeals the latter order.

On appeal, Moran asserts that his sentence in this case, 95-CR-725, should run concurrently with subsequent sentences because (1) KRS 533.040(3) requires this result, in spite of Brewer v. Commonwealth, Ky., 922 S.W.2d 380 (1996); (2) Moran committed only a Class D felony while on probation; and (3) KRS 533.060(2) requires consecutive sentences only where a person has been committed to a detention facility and then released on probation. Moran also claims that the circuit court lacked the authority to amend the June, 1996, judgment under Ky. R. Crim. Proc. (RCr) 10.10.

Moran argues that the trial court was required to run his sentence in 95-CR-725 concurrently with his sentence in 96-CR-088 pursuant to KRS 533.040(3), which 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.

Generally, a revocation of probation that occurs outside of the 90-day period is to be run concurrently with any other offense. Sutherland v. Commonwealth, Ky., 910 S.W.2d 235, 237 (1995). Moran assumes that the court's revocation of probation did not meet the ninety-day requirement and that as a consequence his sentences should run concurrently.

However, by the operation of KRS 533.060(2) it does not matter whether or not this time frame was met. 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 supplied.)

The emphasized language of KRS 533.060(2) supersedes any relief that might have been available to Moran under KRS 533.040(3). Brewer, supra. Moran was (1) 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 requires that

Moran's second sentence in 96-CR-088 not run concurrently with his first sentence in 95-CR-725.[1] For this reason, "[i]n practical terms, the result of this case will not give the appellant the relief he seeks . . . ." Id. at 381 (emphasis supplied).

Moran asks this Court to overrule Brewer. Even if we were so inclined, this Court is bound to apply the precedent of the Kentucky Supreme Court. Sup. Ct. R. (SCR) 1.030(8)(a). Brewer is directly on point and requires that Moran's sentences run consecutively.

Moran's second argument seizes on dicta in Brewer that KRS 533.040(3) would still apply where a probationer commits a misdemeanor while on probation. Id. at 382. Thus, if the Commonwealth did not meet the ninety-day requirement, the sentence on the earlier offense would run concurrently with the sentence on the misdemeanor. Moran argues that this should be extended to his case because he committed only a Class D felony while on probation, the least serious of felonies. However, KRS 533.060(2) on its face applies to all felonies committed while on probation, Class D or otherwise. This argument is without merit.

Moran's third argument is that KRS 533.060(2) requires consecutive sentences only where a person has been committed to a detention facility and then released on probation because the statute uses the phrase, "released by the court on probation, shock

[1] The same judge presided over both 95-CR-725 and 96-CR-088. In its April 10, 1997, order, the court noted that when it sentenced Moran in 96-CR-088, it ordered the sentence to run consecutively to his sentence in this case, 95-CR-725.

probation, or conditional discharge." This could occur if a court imposed a sentence of probation and imposed the condition that the defendant submit to a period of imprisonment in the county jail, KRS 533.030(6), or if a court granted a motion for shock probation after a period of incarceration, KRS 439.265. Moran contends KRS 533.060(2) does not apply to him because neither scenario took place.

We decline to adopt Moran's narrow reading of the statute. "[T]he General Assembly's clear intention in enacting KRS 533.060(2) [was] 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." Brewer, supra at 382 (emphasis supplied). In view of the intent of the statute the phrase "released by the court on probation" means release from service of sentence. KRS 533.060(2) applies to all forms of probation.

Finally, Moran argues that the court's March 27, 1997, order was improper because it impermissibly corrected a judicial error. We disagree. Clerical mistakes and errors arising from oversight or omission in judgments, orders or other parts of the record may be corrected by the court at any time upon its own initiative. RCr 10.10; CR 60.01. This authority extends to any phase of a proceeding when as a result of inadvertence, mistake, oversight, omission or neglect an accurate record has not been made. 7 Phillips, Kentucky Practice, CR 60.01 (5th Ed. 1995).

The court's June 25, 1996, judgment reads that the sentence in 95-CR-075 "shall run CONSECUTIVELY WITH 96-CR-088 and run CONSECUTIVELY with any other previous felony sentence the Defendant must serve." The March 27, 1997, order amended the earlier order by eliminating any reference to 96-CR-088. In a later opinion and order, the court explained that this correction was necessary because the sentence in 95-CR-725, coming first, could not run consecutively to the sentence in 96-CR-088. Thus, in imposing the original sentence that had been suspended, the court reasoned that the judgment should and could not refer to Moran's subsequent sentence in 96-CR-088.

The chronology of the court's orders admittedly was confusing. However, the amended order did not change the meaning or effect of Moran's sentence. The original judgment granting probation ordered that the sentence imposed run consecutively to any previous felony sentence, the judgment revoking probation ordered that the sentence run consecutively to 96-CR-088 and any other previous sentence, and the amended order returned to the language of the original order. At no time did the court order a concurrent sentence. The amended order merely corrected the judgment to conform with the record and was proper under RCr 10.10.

For the foregoing reasons, the decision of the circuit court is affirmed.

ALL CONCUR.

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