

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000092-MR

DEMETRIUS D. COHEN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. McANULTY, JR., JUDGE
ACTION NOS. 93-CR-1922, 93-CR-1936,
and 93-CR-2183

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order revoking appellant's shock probation. Appellant argues that the court erred in revoking his probation because of the delay in holding the revocation hearing and because the court ordered the sentence to run consecutively instead of concurrently. Upon reviewing the record and the applicable law, we deem appellant's arguments to be without merit and, thus, affirm.

Appellant, Demetrius Cohen, pled guilty to several offenses under three indictments and was sentenced to five years' imprisonment. On April 15, 1994, the court entered an order granting appellant's motion for shock probation and placed appellant on probation for five years.

On April 11, 1997, the Commonwealth filed a motion to revoke appellant's probation on grounds that appellant had absconded supervision and had been charged with carrying a concealed deadly weapon, wanton endangerment, and possession of a handgun by a convicted felon. On April 21, 1997, appellant failed to appear in court and a bench warrant was issued for his arrest. On September 8, 1997, the Commonwealth filed another motion to revoke appellant's probation on grounds that appellant had been convicted of one of the above-stated offenses. Apparently, appellant had been arrested on the above-stated offenses on February 1, 1997 and had completed service of the sentence on the conviction thereof on October 1, 1997, which explains why appellant failed to appear on April 21, 1997. On November 3, 1997, the probation hearing was held. Thereafter, on December 29, 1997, the court entered an order revoking appellant's probation and ordered that the sentence was to run consecutive to any other sentences. This appeal by Cohen followed.

Appellant argues that the delay in holding the revocation hearing some seven months after it had notice of the grounds for revocation and after he had served his sentence on the conviction which served as the basis for the probation revocation constituted arbitrary state action in violation of Section 2 of the Kentucky Constitution. Under the plain language of KRS 533.020(1) and KRS 533.050(1), the court can revoke probation at any time prior to the expiration of the period of probation. Here, the revocation of probation was well within

appellant's five-year probationary period which started on April 15, 1994. We reject appellant's argument that the delay in the revocation hearing constituted arbitrary state action, as we see nothing arbitrary about the court's action.

Appellant also argues that under KRS 533.040(3), the court erred in ordering his sentence to run consecutively instead of concurrently since his revocation was not ordered within 90 days of when the grounds for revocation came to the attention of the corrections cabinet. This issue has previously been addressed by our Supreme Court in Brewer v. Commonwealth, Ky., 922 S.W.2d 380 (1996), wherein the Court held that the language of KRS 533.060(2) supersedes that in KRS 533.040(3) such that, regardless of whether revocation occurs within 90 days, a sentence imposed upon revocation of probation must run consecutively with the sentence on the felony for which the defendant was convicted while on probation. Accordingly, the court properly ordered the sentence to run consecutively and not concurrently.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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