

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001711-MR

JOSEPH MCCLURE HARRIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY NOBLE, JUDGE
ACTION NO. 94-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

BARBER, JUDGE: This is an opinion affirming in part, and reversing in part, the sentencing order of the Fayette Circuit Court.

Appellant Joseph McClure Harris entered a plea of guilty to a charge of flagrant non-support. He was sentenced to two and one-half years imprisonment, probated for three years. As terms of probation, Harris was required to enter an in-patient drug treatment program and remain current in his child support payments. At Harris' request, the court agreed to drop the in-house drug treatment program requirement which was modified to require Harris to attend Alcoholics Anonymous and Narcotics

Anonymous meetings. The sentence was rendered in 1994 and modified in 1995.

A probation revocation hearing was held in 1997. Harris was in arrears in his child support payments at that time. The probation was extended until June, 2000. In 1998, Harris was arrested for trafficking in a controlled substance, loitering, and criminal trespass in the third degree. Harris failed to appear for a probation revocation hearing and a warrant was issued for his arrest on July 16, 1998. The Division of Probation and Parole made a motion that Harris' probation be revoked as a result of his failure to pay child support, failure to report to his probation officer, and failure to report the new charges against him. A second warrant for his arrest was issued on August 21, 1998. A Fayette County detainer was placed upon him on December 12, 1998.

In January 1999, Harris entered a plea of guilty to the new non-felony charges against him. A probation revocation hearing was set for March 26, 1999. That hearing was continued at Harris' request. On April 22, 1999, Harris filed a motion to dismiss the Commonwealth's probation revocation request due to the trial court's non-compliance with KRS 533.040(3). The trial court overruled Harris' motion to dismiss, and ordered Harris to serve the original sentence consecutively with any other felony sentence. Harris appealed the trial court's order.

KRS 533.040(3) provides that a defendant has a statutory right to a probation revocation hearing within ninety

days after being detained for a violation of probation. This statute holds, in pertinent part:

The revocation [of probation] shall take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation first come to the attention of the Department of Corrections, whichever occurs first.

The phrase "whichever comes first" is to insure that the Department of Corrections act quickly to revoke sentences of probation. Sutherland v. Commonwealth, Ky., 910 S.W.2d 235, 237 (1995).

The trial court held, in its order denying motion to dismiss, that at the time the arrest warrants were issued for Harris his whereabouts were unknown, and the arrest warrants could not be served upon him. The trial court cited Sutherland, supra, as showing that KRS 533.040(3) does not preclude a court from conducting a parole revocation hearing after the ninety day period has expired. We concur, and find that Harris was not entitled to dismissal of the probation revocation proceeding. That portion of the trial court's ruling is affirmed.

Harris argued, in the alternative, that the sentence which was probated should run concurrently with any other sentence he may have to serve. This argument is preserved for review on appeal. KRS 533.040(3) holds that the probated sentence shall run concurrently with any other sentence after the ninety day period has expired. KRS 533.060 holds that probated sentences run consecutively with sentences on new charges only

where the more recent conviction is for a felony offense. The statute states that:

When a person has been convicted of a felony and is committed to a correctional detention facility and is 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.

_____ Sentences shall be run consecutively, rather than concurrently, where the newer sentence is for a felony offense. Brewer v. Commonwealth, 922 S.W.2d at 382.

Harris asserts that he did not plead guilty to a felony offense. The trial court's order revoking probation cites only the charge of probation violations. No felony offense is found in the record on appeal. The Commonwealth claims that Escape II, to which Harris pleaded, is a Class B felony, pursuant to KRS 520.030. The Commonwealth claims that the plea agreement on the Escape II charge is omitted from the record, but that any such omission is the fault of the appellant. As a general rule, Kentucky law holds that a silent record supports the finding of the trial court. Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 144-45 (1985). However, no order issued by the trial court dealt with the propriety of the consecutive sentencing, or the existence of the felony conviction referred to by the Commonwealth. Escape in the Second Degree is a Class D felony. Class D felony convictions and misdemeanor convictions may be

viewed more leniently by the trial court in the exercise of its discretion as they are non-violent offenses.

Harris claims that the Sutherland ruling was incorrect in determining that the two general statutes, KRS 533.020(1) and KRS 533.050, take precedence over the more specific statute, KRS 533.040(3). KRS 533.040 deals with the remedy available to a defendant when a revocation proceeding does not take place in a speedy manner. Harris argues that this statute provides that when revocation proceedings do not take place in a timely fashion, the revoked sentence must run concurrently, rather than consecutively, with any new or additional sentence. Sutherland v. Commonwealth, supra, at 237. Recognizing that KRS 533.060(2) mandated that individuals who commit other crimes while on probation are to be denied probation, shock probation, or parole, and that concurrent sentencing is forbidden under such factual circumstances, the Sutherland court stated:

Reading KRS 533.040(3) within the context of the entire legislative scheme, it appears to be the legislative intent to require the Department of Corrections to push for revocation proceedings in a speedy manner, if any subsequent term of sentence is to be served consecutive to any time spent in incarceration as a result of a revocation of probation.

Id., at 237. The Court ruled that if the ninety day period expired, the directive found in KRS 533.060(2) could not be applied to require consecutive sentencing. The Court held "it is the Legislature which provided the 90-day time limitation. . . 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." Id. This Court has affirmed that:

Although concurrent sentencing is the general rule, KRS 533.040(3) creates an exception for cases in which probation is revoked. By providing this exception, the General Assembly has implied that consecutive sentencing is an option when probation is revoked within the required ninety day period.

Warren v. Commonwealth, Ky. App., 981 S.W.2d 134, 137 (1998), citing Snow v. Commonwealth, Ky. App., 927 S.W.2d 841 (1996). Thus, when judgment was rendered on the earlier conviction, the Commonwealth had ninety days to hold a revocation hearing. If the hearing date fell after that ninety day period, then KRS 533.040(3) requires that the probated sentence run concurrently with any new sentence. Snow v. Commonwealth, Ky. App., 927 S.W.2d 841, 841-43 (1996). The Court in Warren v. Commonwealth, supra, discussed the impact of KRS 533.040(3) on other statutes relating to sentencing, and held that:

Even though Snow involved revocation of a probated felony sentence following conviction for a misdemeanor offense, rather than the reverse, the language of KRS 533.040(3) would readily apply in either situation. . . . As the court in Snow v. Commonwealth, supra, held, KRS 533.040(3) is more specifically directed toward situations involving the running of revoked sentences and therefore takes precedence over the more general KRS 532.110(1) in these cases.

Id. at 137. Similarly, we find that KRS 533.040(2), relating directly to the fact pattern at issue here, should take precedence over the more general KRS 533.060(2).

In the present case, a detainer was placed upon Harris on December 12, 1998. Harris plead guilty to the Jefferson

County offenses on January 20, 1999. He was not scheduled to be brought before the Fayette Circuit Court for a revocation hearing until March 26, 1999, more than ninety days after the initial detainer. For this reason, the sentence rendered by the Fayette Circuit Court in the probation revocation proceeding should be reversed with regard to that portion of the order holding that the Fayette Circuit Court sentence is to run consecutively with the Jefferson Circuit Court sentence. The case shall be remanded for a sentencing order consistent with this opinion.

EMBERTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority in its opinion that Harris was not entitled to a dismissal of the probation revocation proceeding. However, I must dissent as to that portion of the opinion which determined that the sentences should not run consecutively. I believe that when both statutory law and case law is applied to the facts of the case, the probation revocation hearing was timely held. As such, the trial court properly ran Harris's time consecutively. Therefore, I would affirm the trial court's order.

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