

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001210-MR

MICHAEL BRADFORD

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 98-CR-00104

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * **

BEFORE: HUDDLESTON, McANULTY, and MILLER, Judges.

McANULTY, JUDGE: Michael Bradford appeals from a final judgment of the Mercer Circuit Court sentencing him to five years' imprisonment on two counts of trafficking in a controlled substance to be run consecutively to a five year sentence on a prior state felony conviction. Bradford challenges that portion of the trial court's judgment ordering the sentence to run consecutive to the prior sentence and its denial of his motion to run the above sentences concurrently. Having concluded that Bradford was not eligible for concurrent sentencing, we affirm.

On December 11, 1998, the Mercer County Grand Jury indicted Bradford on one felony count of trafficking in a controlled substance (marijuana) in the first degree within 1000 yards of a school building (KRS 218A.1411) and one felony count of trafficking in a controlled substance (cocaine) in the first degree (KRS 218A.1412) involving the sale of illegal drugs to a confidential informant. On April 16, 1999, Bradford entered a guilty plea to the two offenses pursuant to a plea agreement. Under the plea agreement, the Commonwealth recommended sentences of two years' imprisonment reduced to one year for first-degree trafficking in a controlled substance (marijuana) within 1000 yards of a school building upon payment of \$250 to the Kentucky State Police (KSP) prior to final sentencing, and six years' imprisonment reduced to five years for first-degree trafficking in a controlled substance (cocaine) upon payment of \$210 to the KSP prior to final sentencing with the two sentences to run concurrently with each other. The trial court postponed sentencing pending preparation of a presentence investigation report.

On May 12, 1999, Bradford filed a motion requesting that the trial court run the sentences concurrent with, rather than consecutive to, a five year sentence he had received on a prior felony conviction in Case No. 96-CR-0075. Bradford was out on probation from the 1996 conviction when he committed the offenses in the current appeal. In the motion, Bradford argued that under the principle that when two statutes conflict the latter enacted statute controls the earlier statute, the trial

court had discretion under KRS 532.110(1) to order the sentence in Case No. 98-CR-0104 run concurrently with the sentence in Case No. 96-CR-0075, despite the existence of KRS 533.060(2), which requires consecutive sentencing for offenses committed while on probation.

On May 14, 1999, the trial court conducted a sentencing hearing at which defense counsel requested concurrent sentencing based on the argument in the motion. The trial court denied the motion stating that KRS 533.060(2) was applicable as the more specific statute, thereby making Bradford ineligible for concurrent sentencing. The court then sentenced Bradford to serve five years for first-degree trafficking in a controlled substance (cocaine) and one year on first-degree trafficking in a controlled substance (marijuana) within 1000 yards of a school building to run concurrently with each other but consecutively to the five year sentence in Case No. 96-CR-0075. This appeal followed.

Bradford argues on appeal that the trial court erred in holding that he was not eligible for concurrent sentencing. He contends that KRS 533.060(2), which provides that a sentence received for a felony conviction committed while on probation shall not run concurrently with any other sentence, and KRS 532.110(1), which gives the trial court discretion in deciding whether to run multiple sentences of imprisonment concurrently or consecutively, are in direct conflict. Given this dilemma, Bradford asserts that under the rules of statutory construction, the statute last enacted should prevail. Finally, he maintains

that KRS 532.110(1) should control because it was republished in 1998, while KRS 533.060 was last amended in 1994. The trial court found this argument unpersuasive and instead relied upon another rule of statutory construction which states that the more specific statute controls.

In the recent case of White v. Commonwealth, Ky. App., ___ S.W.3d ___ (2000) (1998-CA-002765-MR, rendered April 28, 2000) (discretionary review denied November 15, 2000), this Court specifically addressed the apparent conflict between KRS 532.110 and KRS 533.060(2) and the effect of various amendments to the statutes in determining which prevails. In White, the court noted that the 1998 amendment to KRS 532.110 did not involve that aspect of the statute dealing with concurrent sentencing.¹ The court referred to long standing case law holding that KRS 532.060(2) took precedence over KRS 532.110(1)². In discussing the effect of amendments, the court stated:

Under section 51 of the Kentucky Constitution, the entire statute is required to be re-enacted even though only a portion of the statute is amended. The re-enactment and amendment of KRS 532.110(1) do not evidence an intent by the Legislature to have that statute take priority over KRS 533.060(2). As the Court stated in Butler v. Groce, Ky., 880 S.W.2d 547 (1994):

In substantially reenacting a statute, the legislature is

¹ The July 1998 amendment added a provision to Subsection (4)(c) by creating a 70-year limitation on the aggregate of consecutive indeterminate sentences.

² See, e.g., Commonwealth v. Hunt, Ky. App., 619 S.W.2d 733 (1981); Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984), cert. denied, 469 U.S. 836, 105 S.Ct. 132, 83 L.Ed.2d 72 (1984); Riley v. Parke, Ky., 740 S.W.2d 934 (1987); Handley v. Commonwealth, Ky. App., 653 S.W.2d 165 (1983).

well aware of the interpretation of the existing statute and has adopted that interpretation unless the new law contains language to the contrary. Brown v. Harrodsburg, Ky., 252 S.W.2d 44 (1952). If the legislators intended to depart from the existing statutory interpretation, it is incumbent that they use "plain and unmistakable language" which leaves no doubt that a departure from the prior interpretation is intended. Long v. Smith, 281 Ky., 512, 136 S.W.2d 789 (1940). [Id. at 549].

Long existing case law interpreting KRS 532.110 and KRS 533.060(2) has clearly established the primacy of the latter statute. The General Assembly has not amended either statute with clear language evidencing an intent to change or overrule the courts' interpretation of these statutes on that issue. White's argument that the re-enactment of KRS 532.110 in 1998 allows the trial court discretion to impose a concurrent sentence of an offense committed while the defendant was on probation in contravention of KRS 533.060(2) is without merit.

___ S.W.3d at ___, slip op. at 7.

Given the decision in White rejecting the same argument now raised by Bradford, we find that the trial court correctly applied KRS 533.060(2) in ordering that his sentence for the felony drug trafficking offenses committed while on probation run consecutively to the sentences for a prior felony conviction for which he was on probation. The trial court properly held that Bradford was not eligible for concurrent sentencing.

For the foregoing reasons, we affirm the judgment of the Mercer Circuit Court.

ALL CONCUR.

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