

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000565-MR

CHARLES WESLEY BRADSHAW

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 80-CR-00251

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Charles Wesley Bradshaw (Bradshaw) appeals from an order of the Oldham Circuit Court denying his CR 60.02 motion to vacate a final judgment entered on June 26, 1981, which ordered a twelve (12) month sentence to run consecutively to time he was already serving on other criminal offenses. We affirm.

On December 5, 1980, Bradshaw was indicted on two counts of promoting contraband, first degree, in violation of Kentucky Revised Statutes (KRS) 520.050. The indictment charged the following:

COUNT I
PROMOTING CONTRABAND, 1ST DEGREE

CHARLES WESLEY BRADSHAW, did on or about October 27, 1980, in Oldham County, Kentucky, promote contraband in the first degree, being a person confined at the Kentucky State Reformatory, Department of Corrections for the Commonwealth of Kentucky, knowingly made, obtained or possessed dangerous contraband, marijuana. All in violation of KRS 520.050 and contrary to other laws, statutes and regulations as made and provided in such cases. All against the peace and dignity of the Commonwealth of Kentucky.

COUNT II
PROMOTING CONTRABAND, 1ST DEGREE

CHARLES WESLEY BRADSHAW, did on or about November 15, 1980, in Oldham County, Kentucky, promote contraband in the first degree, being a person confined at the Kentucky State Reformatory, Department of Corrections for the Commonwealth of Kentucky, knowingly made, obtained or possessed dangerous contraband, marijuana and \$10 in U.S. currency. All in violation of KRS 520.050 and contrary to other laws, statutes and regulations as made and provided in such cases. All against the peace and dignity of the Commonwealth of Kentucky.

Dated this 5th day of December, 1980, at LaGrange, Oldham County, Kentucky.

Thereafter, on June 26, 1981, Bradshaw entered into a plea agreement by which he pled guilty to two counts of promoting contraband, second degree (KRS 520.060) and was sentenced to six months on each offense for a total of 12 months. The final judgment and sentence of imprisonment stated:

IT IS FURTHER ORDERED AND ADJUDGED by
the Court that the defendant is guilty of the
crime of

PROMOTING CONTRABAND-2ND DEGREE (Count 1 & 2)

and defendant's punishment is set at 6 months
on Ct. 1 and 6 months on Count 2 to run
consecutive to Count 1 for a total of 12
months and,

IT IS FURTHER ORDERED that the
defendant's crime being a misdemeanor and
being committed while the defendant was in
prison with the Bureau of Corrections, he
shall serve said

12 months

with the Bureau of Corrections and said sentence shall run consecutive to any other sentence the defendant may have to serve(.

On December 5, 2000, Bradshaw filed his CR 60.02 motion seeking to have the above-stated sentence vacated or to be ordered to be run concurrently with the time he was serving on other criminal charges. The trial court denied his motion finding that KRS 532.110(4) is controlling statutory authority for ordering the new sentence to run consecutive to any time he was already serving in prison. This appeal followed.

On appeal, Bradshaw maintains that KRS 532.110(1)(a) mandates that the sentences be run concurrently. We disagree. KRS 532.110(1)(a) states:

- (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
 - (a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by serviced of the indeterminate term;

However, KRS 532.10(4) states:

Notwithstanding any provision in this section to the contrary, if a person is convicted of an offense that is committed while he is imprisoned in a penal or reformatory institution, during an escape from imprisonment, or while he awaits imprisonment, the sentence imposed for that offense may be added to the portion of the term which remained unserved at the time of the commission of the offense. The sentence imposed upon any person convicted of an escape or attempted escape offense shall run

consecutively with any other sentence which the defendant must serve.

In Gaither v. Commonwealth, Ky., 963 S.W.2d 621 (1997) (as modified on denial of rehearing on April 16, 1998), our Supreme Court held:

The trial court imposed the consecutive sentence for the escape offense pursuant to KRS 532.110(4). The pertinent part of this statute states:

Notwithstanding any provision in this section to the contrary...[t]he sentence imposed upon any person convicted of an escape or attempted escape offense shall run consecutively with any other sentence which the defendant must serve.

(Emphasis added). The language of this section is unequivocal. The legislature obviously intended this section to be an exception to the other provisions of the statute.

....

The language of KRS 532.110(4) is even more explicit in creating an exception to the sentencing maximum of Section (1)(c) than the language of KRS 532.110(3). The impact, of course, is to mandate consecutive sentencing for escape offenses and modify the sentencing maximum set forth in KRS 532.110(1)(c). See e.g., Devore, supra. We note further that Section (1)(c) and Section (4) of KRS 532.110 were enacted in 1976. However, Section (4) has been twice changed by the legislature. In 1982, the legislature added this sentence to Section (4): "Provided, however, that the sentence imposed upon any person convicted of an escape or attempted escape offense shall run consecutively with any other sentence which the defendant must serve." 1982 Ky. Acts 405, p. 1371. In 1992, the words "[p]rovided, however, that" were struck from the statute. 1992 Ky. Acts 211, p. 576.

....

The sentence of twenty years was the sentence imposed for the escape offense within the meaning of KRS 532.10(4). KRS 532.110(4) mandates that a sentence imposed for an escape or attempted escape "shall run consecutively with any other sentence which the defendant must serve."

Gathier, Id. at 622, 623.

Although Gathier dealt with an escape charge, the same reasoning applies if a person is convicted of an offense that is committed while he is imprisoned in a penal institution in that both are KRS 532.110(4) exceptions to KRS 532.110(1)(a). See also Martin v. Commonwealth, Ky. App., 957 S.W.2d 262 (1997). As pointed out in the Commonwealth's brief, the legislative commentary found following KRS 532.110, states:

Subsection (4) serves to remove all restrictions on the power of the trial court to impose consecutive sentences on a person who commits an offense while incarcerated, pending incarceration, or during an escape from custody. The provision is necessary to eliminate the possibility of a situation in which an individual under sentence would have nothing to lose by committing another offense. For example, suppose that a misdemeanor had been sentenced to a maximum of one year in jail, and, on the way to the jail to commence his sentence, he attempted to escape, another misdemeanor. Without subsection (4), he could not be given additional jail time. With the provision, he can be given consecutive definite terms, the aggregate of which will exceed one year.

Despite Bradshaw's arguments to the contrary, KRS 532.110(4) controls the imposition of consecutive sentences based on his 1981 conviction. The trial court correctly ran the twelve (12) month sentence for offenses which he committed while he was in prison consecutive to his previous sentences. As such, the Oldham Circuit Court properly denied Bradshaw's CR 60.02 motion.

For the foregoing reason, the order of the Oldham
Circuit Court is affirmed.

ALL CONCUR.

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