

Commonwealth Of Kentucky

Court of Appeals

NOS. 2001-CA-001201-MR
AND
2001-CA-001202-MR

DERRIC M. SMITH

APPELLANT

APPEALS FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 97-CR-00413
AND
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 95-CR-00370

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.
PAISLEY, JUDGE. These are consolidated appeals from orders entered in two different cases involving appellant, Derric Smith, which were presided over by separate divisions of the Daviess Circuit Court. In both divisions, appellant filed identical motions pursuant to CR 60.02 and CR 60.03 requesting each to modify its respective sentence in accordance with KRS

532.110, so as to allow appellant to serve his sentences concurrently rather than consecutively. Both divisions of the circuit court denied appellant's motion. We affirm.

In 1996, appellant was sentenced to five years in prison as a result of his guilty pleas in Daviess Circuit Court, Division II, to the charges of robbery in the second degree, burglary in the second degree, and four counts of unlawful transaction with a minor in the second degree. Appellant served part of his sentence, but was paroled in May 1997.

While still on parole, appellant committed three burglaries to which he pled guilty in Daviess Circuit Court, Division I, in March 1999. Although he was sentenced to six years in prison, appellant was placed on probation for three years as part of an alternative sentencing plan.

Appellant subsequently engaged in further criminal conduct which resulted in the revocation of both his probation and his parole for his 1999 and 1996 convictions, respectively. Thereafter, appellant began serving consecutive sentences for these convictions.

In both divisions of the court, appellant filed identical CR 60.02 and CR 60.03 motions requesting that each court modify its sentence to run concurrently with the other division's sentence, rather than consecutively. Both motions were denied, and these appeals followed.

Initially, we note as a matter of procedure that

[a] defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. (Citations omitted.)

McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). The purpose of CR 60.02 is such that appellant should have initially requested relief in the form of a direct appeal or an RCr 11.42 motion. He did neither. However, for the sake of judicial economy, we shall address the merits of his claims on appeal. In addition, although appellant requested relief pursuant to both CR 60.02 and CR 60.03, we shall address these claims simultaneously as appellant failed to state separate grounds for each.

Appellant's sole contention on appeal is that service of his sentences should be concurrent rather than consecutive. Appeal No. 2001-CA-001202, involving appellant's 1996 conviction in Division II of the Daviess Circuit Court, can be disposed of summarily because final sentencing for this conviction occurred at a time when there was no other sentence to consider. As a result, that court was without authority to determine whether

the sentence would run concurrently or consecutively with the later sentence imposed in 1999 by Division I. Clearly, denial of this motion was correct.

Moreover, we are not persuaded by appellant's contention that KRS 532.110 required the circuit court to run his 1999 sentence concurrent with his earlier sentence imposed in 1996. KRS 532.110 specifies that multiple sentences shall run concurrently unless otherwise specified by the trial court. Appellant claims that because the court failed to specify how his 1999 sentence was to be served with his earlier 1996 term, he is entitled to serve his sentences concurrently. However, KRS 533.060(2) states:

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 added.)

Since it is undisputed that appellant was on parole when he committed the burglaries which led to his 1999 conviction, KRS 533.060(2) requires consecutive service of appellant's sentences, and the trial judge was left without discretion over this matter.

Contrary to appellant's assertion, the rules of statutory construction do not mandate that KRS 532.110 should take precedence over KRS 533.060(2) simply because 532.110 was amended and reenacted in 1998 and is now the more recent of the two statutes. It is true that "[w]here a conflict exists between two statutes, the later statute enacted is generally controlling." Williams v. Commonwealth, Ky. App., 829 S.W.2d 942, 944 (1992), citing Commonwealth v. Hunt, Ky. App., 619 S.W.2d 733 (1981). However, our courts have consistently found that KRS 533.060 takes precedence because it was originally enacted after KRS 532.110, suggesting that the legislature intended its application notwithstanding the inconsistency. Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984), Riley v. Parke, Ky., 740 S.W.2d 934 (1987), Commonwealth v. Hunt, Ky. App., 619 S.W.2d 733 (1981), and Handley v. Commonwealth, Ky. App., 653 S.W.2d 165 (1983). Moreover, White v. Commonwealth, Ky. App., 32 S.W.3d 83 (2000), recently addressed this same argument by pointing out that the amendment to KRS 532.110 dealt with a portion of the statute which is irrelevant to its potential inconsistency with KRS 533.060(2). Reenactment of the entire statute was simply a procedural requirement mandated by the Kentucky Constitution, but it had no effect on the portion of the statute which is pertinent to this situation. Further, as stated in White, 32 S.W.3d at 86,

[i]n substantially reenacting a statute, the legislature is well aware of the interpretation of the existing statute and has adopted that interpretation unless the new law contains language to the contrary. 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-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 reenactment of KRS 532.110 in 1998 allows the trial court discretion to impose a concurrent sentence. . . in contravention of KRS 533.060(2) is without merit. (Citations omitted.)

We agree with this reasoning and find no basis to alter the current interpretation of these statutes.

The orders of the Daviess Circuit Court are affirmed.

ALL CONCUR.

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