

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001892-MR

JON ERIC FERRELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CR-00893

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

EMBERTON, CHIEF JUDGE. Jon Eric Ferrell alleges that he was improperly sentenced when his probation was revoked because of the Commonwealth's failure to comply with the time limitations contained in KRS¹ 533.040(3). We affirm.

Ferrell pleaded guilty to two counts of robbery, second degree. In December 1999, he was sentenced to a five-year term and a term of seven and one-half years to run

¹ Kentucky Revised Statutes.

concurrently. A motion for shock probation was granted on August 4, 2000.

In February 2001, Ferrell was arrested for theft over \$300 in Laurel County, and on March 12, 2001, his probation officer filed a report with the Fayette Circuit Court noting Ferrell's pending charges. A formal status report was filed on November 30, 2001, notifying the court that the theft charge had been dismissed but that Ferrell had been arrested by the London police on the charge of robbery, second degree.

On April 17, 2002, a third report was filed advising the trial court that Ferrell pleaded guilty to the robbery charge and persistent felony offender in the second degree with sentencing set for April 19, 2002, in the Laurel Circuit Court, and requesting the court to set a probation revocation hearing. Ferrell was sentenced to twelve-and-one-half years' imprisonment by the Laurel Circuit Court. On May 3, 2002, a fourth report was filed informing the Fayette Circuit Court that Ferrell had been sentenced on the robbery charge. A probation affidavit and a copy of the Laurel Circuit Court judgment and sentence were filed with the Fayette Circuit Clerk on May 6, 2002, again noting Ferrell's apparent probation violations. On May 8, 2002, a warrant was issued; the warrant, however, which contained an address other than that of Ferrell's place of confinement, the Roederer Correctional Complex, was not immediately served.

Subsequently a fax transmission from the Roederer Correctional Complex was filed with the Fayette Circuit Court on August 21, 2002, advising that Ferrell was lodged there on the Laurel County offenses and inquiring as to whether his shock probation had been revoked. An order was then entered by the Fayette Circuit Court on August 21, 2002, directing Ferrell be produced on August 30, 2002. The bench warrant for the setting of a probation revocation hearing was not executed until August 30, 2002.

Ferrell admits that the terms of his shock probation were violated by his commission of the Laurel County offenses but argues that because the probation revocation hearing was not held within ninety days after the grounds for revocation came to the attention of the Department of Corrections, his seven-and-one-half years sentence must run concurrently with the sentence received in Laurel County. KRS 533.040(3) provides:

A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation shall take place prior to parole or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.

The Fayette Circuit Court was apprised of Ferrell's probation violation when it was furnished a copy of the Laurel Circuit Court judgment and sentence. Because of the erroneous address on the arrest warrant, however, it was not served until well beyond the ninety-day provision specified in KRS 533.040(3).

Although Ferrell is correct that his probation was not revoked within the ninety days specified in KRS 533.040(3), he is not entitled to have his sentence run concurrently with the sentence given for the commission of a felony while on shock probation. KRS 533.060(2) states that:

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).

The apparent conflict between the two statutes was addressed in Brewer v. Commonwealth,² where the court held that the specific provision of KRS 533.060, enacted in 1976 and after KRS 533.040, is controlling in situations where a felony is

² Ky., 922 S.W.2d 380 (1996).

committed while on parole, probation, shock probation, or conditional discharge.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Rampulla
FAYETTE COUNTY LEGAL AID, INC.
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

J. Gary Bale
Assistant Attorney General
Frankfort, Kentucky