

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000474-MR

STACY L. MARSH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 98-CR-002522

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, Chief Judge; BUCKINGHAM and TACKETT, Judges.

COMBS, CHIEF JUDGE. Stacy Marsh ("Marsh") appeals from an order of the Jefferson Circuit Court overruling his motion to correct sentence pursuant to RCr¹ 11.42. After reviewing the record and applicable law, we have found no error in the decision of the trial court. Thus, we affirm.

On October 15, 1998, Stacy Marsh was indicted by a Jefferson County Grand Jury for: (1) trafficking a controlled substance, first-degree; (2) disorderly conduct; (3) possession of a controlled substance, first-degree; and (4) the status

¹ Kentucky Rules of Criminal Procedure

offense of being a second-degree persistent felony offender (PFO).

On August 25, 1999, Marsh filed a motion to enter a guilty plea. In exchange, the Commonwealth offered him the following proposal: (1) a ten-year sentence for trafficking a controlled substance; (2) a concurrent ninety-day sentence for disorderly conduct; and (3) dismissal of the PFO charge. On October 14, 1999, the trial court granted Marsh's motion, accepted the Commonwealth's sentencing recommendations, and entered a Final Judgment of Conviction.

Marsh filed a motion for shock probation on March 21, 2000. On May 3, 2000, the trial court probated him subject to requirements of enrollment in a substance abuse treatment program, submission to periodic and random drug testing, and payment of court costs and a nominal supervision fee.

On July 25, 2001, his probation officer received a report that Marsh was using cocaine. Marsh signed an Admission/Sanction form. On August 27, 2001, a report was filed that Marsh had failed to attend substance abuse counseling. After admitting to using cocaine on August 24, 2001, Marsh was arrested and placed at Daviess County Detention Center.

On September 19, 2001, his probation officer received notice that the Owensboro police intended to charge Marsh with felony theft and second-degree burglary. The probation officer

sent a "Special Supervision Report," requesting that the court issue a warrant for Marsh's arrest and that a hearing be set for revocation of his probation. The warrant was issued on September 29, 2001, and on October 22, 2001, the Commonwealth moved to revoke Marsh's probation.

A Daviess County Grand Jury indicted Marsh for felony theft and burglary, to which he entered a plea of not guilty. However, on March 15, 2002, he entered a guilty plea to receiving stolen property valued at \$300 or more and to second-degree burglary. On that same day, the Daviess Circuit Court sentenced him to five years for each of his convictions, to be served concurrently. However, the judgment recited that the sentences "shall run consecutively with any other sentence the Defendant has received."

On June 5, 2002, the probation officer sent a supplemental "Special Supervision Report" to the trial court, which scheduled a hearing on the Commonwealth's motion to revoke Marsh's probation. On August 13, 2002, the trial court entered an order revoking Marsh's probation. Four days later, the court filed a memorandum opinion setting forth the legal and factual basis for its order.

On January 22, 2003, Marsh filed a "Motion to Correct Sentence" pursuant to RCr 11.42. In denying the motion, the trial court entered a handwritten order, which appears to have

been entered on January 29, 2003. On February 3, 2003, Marsh tendered his notice of appeal to the trial court. On March 5, 2003, the notice of appeal was stamped filed by the clerk's office.

As of June 27, 2003, no appellate brief had been filed, and this Court ordered Marsh to show cause why the appeal should not be dismissed. Marsh responded on July 7, 2003, by filing a motion for appointment of counsel. On September 12, 2003, we ordered the Department of Public Advocacy ("DPA") to review Marsh's file in order to determine whether it would provide him with representation. DPA concluded Marsh's appeal "was an action that did not merit the appointment of appellate counsel under the guidelines of KRS² 31.110," adding that it did not "appear to be a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." On December 10, 2003, we denied Marsh's motion for appointment of counsel, ordering him to submit a pro se brief within thirty days.

Marsh appeals from the order of the Jefferson Circuit Court overruling his motion to correct sentence pursuant to RCr 11.42. He argues that under KRS 533.040(3), his more recent sentence arising from the Daviess County convictions and his

² Kentucky Revised Statutes

original sentence in the earlier Jefferson County case must be served concurrently as to one another.

The Commonwealth argues that Marsh's appeal is procedurally barred because it was filed untimely. We disagree. Cr³ 73.02 provides that a notice of appeal must be filed within thirty (30) days of the judgment or order from which the appeal is taken. Marsh tendered his notice of appeal, along with a motion to proceed *in forma pauperis*, on February 3, 2003 -- five days after the order was entered. However, the clerk returned the notice to Marsh on February 6, noting that Marsh had failed to submit an order permitting him to proceed *in forma pauperis*. Despite his repeated efforts, Marsh's tendered order to proceed *in forma pauperis* was not signed by the court until February 28, 2003, and was not entered until March 5, 2003. Marsh's tendered notice of appeal was stamped "filed" in the clerk's office as of that date. Because Marsh was unable timely to secure an order permitting him to proceed *in forma pauperis*, his notice of appeal tendered just five days after entry of the court's order was not filed timely by the clerk until after the allotted thirty days had expired. Marsh complied with the rule as fully as possible.

Additionally, we are not persuaded that Marsh's failure to secure an order permitting him to proceed without the

³ Kentucky Rules of Civil Procedure

filing fee requires the automatic dismissal of this appeal. CR

73.02(1) provides in relevant part:

If an appeal or a cross-appeal is from an order or judgment of the circuit court, the filing fee required...shall be paid to the clerk of the circuit court at the time the notice of the appeal or cross-appeal is tendered, and the notice shall not be docketed or noted as filed until such payment is made...

CR 73.02(2) provides in relevant part:

The failure of a party to file timely a notice of appeal...shall result in a dismissal or denial. Failure to comply with other rules relating to appeals...does not affect the validity of the appeal...but is ground for such action as the appellate court deems appropriate...

Analyzing these rules, the Kentucky Supreme Court held in Norwest Bank Minnesota, N.A. v. Hurley, Ky., 103 S.W.3d 21 (2003), that when a notice of appeal is filed timely but the required filing fee has not been paid simultaneously, automatic dismissal of the appeal is not required. Instead, the Supreme Court held that the Court of Appeals shall have the discretion to determine what sanctions -- if any -- are appropriate. Under the circumstances of the case, we do not agree with the Commonwealth that Marsh's appeal should be dismissed for failure to comply with the provisions of CR 73.02(1).

Therefore, we shall address the merits of Marsh's appeal. Although he has invoked RCr 11.42, that rule is not the

proper procedural vehicle for his complaint. Because the motion does not contain any factual or legal allegations related in any way to the issue of ineffective assistance of counsel, Marsh has failed to state a claim on that basis.

However, even if we were to address his argument premised on KRS 533.040(3), it would fail. Marsh errs in contending that KRS 533.040(3) mandates that the more recent sentence arising from the Daviess County convictions must be served concurrently with his previous sentence in this case. At issue are the provisions of two statutes addressing concurrent/consecutive sentencing in the context of revocation of parole or probation. Enacted in 1974, 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. (Emphasis added.)

KRS 533.060(2) was enacted in 1976 to remove any doubt on this issue for the purpose of providing "stiff penalties in the form of consecutive sentences to those who, after having been awarded parole or probation, violate that trust by the commission of subsequent felonies." Brewer v. Commonwealth, 922

S.W.2d at 382. KRS 533.060(2) forcefully and unequivocally provides as follows:

When a person is 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.)

In Brewer, the Kentucky Supreme Court also emphasized that because "KRS 533.060(2) was enacted in 1976, and KRS 533.040(3) was enacted in 1974, the former controls."

Marsh was convicted of felony offenses in Daviess County, and these convictions occurred while he was on probation for his previous felony conviction. Thus, KRS 533.060(2) unambiguously requires that Marsh's sentences be served consecutively.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stacy L. Marsh, *pro se*
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BRIEF FOR APPELLEE:

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