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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000708-MR

DEXTER W. BURGESS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 99-CR-00904

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Dexter W. Burgess (Burgess) brings this appeal from an order of the Fayette Circuit Court, entered March 18, 2005, summarily overruling his motion to vacate or correct sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Because the issues herein involve the interplay of cases from both Fayette and Hardin counties, the following is a summary of the proceedings from both cases.

In August, 1998, a criminal complaint alleged an attempted murder charge against Burgess in Hardin County.

Almost a year later, on July 14, 1999, the instant charges of first-degree trafficking in a controlled substance, possession of drug paraphernalia, possession of marijuana, terroristic threatening, and alcohol intoxication arose against Burgess in Fayette County.² Fayette County Information No. 99-CR-00904.

On September 3, 1999, Burgess entered an unconditional guilty plea to the first three Fayette County charges, with a recommended sentence of five years, 12 months, and 12 months, and the last two charges dismissed. Although mention was made during the plea of the pending Hardin County charge, no part of the plea was conditioned upon the pending charge. Apparently at the time of the plea, the Hardin County charge was still on a pending complaint -- Burgess had not yet been indicted.

On May 31, 2000, in Fayette Circuit Court, Burgess was sentenced to a total of five years' imprisonment pursuant to his guilty plea. The pending Hardin County charge was discussed at

² Kentucky Revised Statutes 218A.1412 (class C felony); 218A.500 (class A misdemeanor); 218A.1422 (class A misdemeanor); 508.080 (class A misdemeanor); 222.202 (violation).

sentencing insofar as the total amount of custody credit. The only specific reference in the Fayette County judgment to the pending Hardin County charge was that Burgess was to be delivered to the state department of corrections "upon disposition of (his) pending criminal charge in Hardin County." Additionally, the Fayette County judgment was "run concurrently with any other previous felony sentence (Burgess) must serve."

On June 5, 2000, Burgess entered an unconditional guilty plea to the Hardin County charge, which had been amended to first-degree wanton endangerment.³ On August 16, 2000, judgment was entered sentencing Burgess to a total of five years' imprisonment, said sentence probated for five years. Hardin County Indictment 99-CR-00349.

On December 20, 2000, the Fayette Circuit Court probated Burgess's Fayette County judgment for a period of five years under the "shock" probation statute.⁴

On July 30, 2002, Burgess was arrested and charged in Hardin District Court with various felonies (02-F-00376), as well as on a bench warrant issued May 6, 2002 (Hardin County Indictment No. 02-CR-00190). Upon arraignment on the circuit court indictment, he was served with a motion to revoke probation on Hardin Indictment No. 99-CR-00349. On September 3,

³ Kentucky Revised Statutes 508.060 (class D felony).

⁴ Kentucky Revised Statutes 439.265.

2002, the five years' probation on the Hardin County Indictment was revoked and Burgess was sentenced to five years.

On September 13, 2002, Burgess was served with a bench warrant for violation of probation on the Fayette County Indictment. Appearing before the Fayette Circuit Court on October 11, 2002, the trial court revoked Burgess's probation. Burgess's attorney asked for any revocation to run concurrently with the five years from the Hardin County revoked sentence. Counsel also noted for the court that Burgess had additional pending charges in Hardin Circuit and District Court. At the revocation hearing the court ordered the revoked five year sentence to run *consecutively* with "any other time." At odds with the circuit court's directive from the bench, the order revoking probation, entered October 15, 2002, erroneously reflected that the revoked sentence was to run *concurrently* with any other previous felony sentence. The next day, October 16, 2002, the revocation order was amended to reflect that the sentence was "run consecutively with any other previous felony sentence (Burgess) must serve."

On July 12, 2004, Burgess filed a *pro se* RCr 11.42 motion, later supplemented by counsel, claiming that the court's probation revocation order, which ran his revoked Fayette County sentence *consecutive* with any previous felony sentence, improperly changed the terms of the court's original judgment

that provided for a five year sentence to run *concurrently* with any previous felony sentence, the practical effect of which was that the five year revoked sentence in Fayette County would run consecutively with the five year revoked sentence in Hardin County for a total of ten years. More specifically, he argued that the Fayette Circuit Court was without any authority in the shock probation revocation order to amend its original final judgment. His requested relief was to impose the five year Fayette Circuit Court judgment concurrently with the five year Hardin Circuit Court judgment. The trial court summarily denied Burgess's motion, concluding based on stated authority that it was within the court's discretion to run the five year revoked sentence consecutive or concurrent, citing Kentucky Revised Statutes (KRS) 533.040; Myers v. Commonwealth, 836 S.W.2d 431 (Ky.App. 1992), *overruled on other grounds* Sutherland v. Commonwealth, 910 S.W.2d 235 (Ky. 1995); Snow v. Commonwealth, 927 S.W.2d 841 (Ky.App. 1996); and Commonwealth v. Brewer, 922 S.W.2d 380 (Ky. 1996). This appeal followed.

Before us, Burgess argues that the trial court abused its discretion in violation of his federal and state constitutional rights⁵ by changing his sentence, upon the probation revocation, to run consecutively, instead of concurrently, with the Hardin County judgment. Additionally, he

⁵ U.S. CONST. amend. XIV; KY. CONST. § 2.

argues that the consecutive sentence violated his federal and state rights against double jeopardy.⁶

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). As we conclude that the findings of the circuit court are supported by substantial evidence and are not an abuse of discretion, and that the circuit court correctly applied the law, we affirm.

Burgess first argues that the trial court abused its discretion by changing his sentence from concurrent to consecutive, arguing that the "concurrent" reference in the original judgment related to the Hardin County charge. Specifically, he contends that because the pending Hardin County charge was discussed and understood by the court and all parties at the time the Fayette County sentence was imposed, that the Fayette County judgment was specifically referring to the Hardin County sentence when the Fayette County judgment provided that it was to "run concurrently with any other previous felony sentence (Burgess) must serve." The record does not, however, support this allegation. Although Burgess's motion to enter a guilty plea referenced the pending attempted murder charge in Hardin County, on the face of the motion the plea was not

⁶ U.S. CONST. amend. V; KY. CONST. § 13.

conditioned in any manner on the pending charge. The original Fayette County judgment ordered the five years "run concurrently with any other previous felony sentence (Burgess) must serve." There is no evidence of record that at the time of entry of the Fayette County judgment, Burgess had any previous felony conviction; to be sure, he had not entered a plea on or been sentenced to the Hardin County charge, and there is no evidence of record of any other *previous felony conviction*. As there was no previous felony conviction upon which to run the Fayette County charge concurrently, the language directing any previous felony conviction to be run concurrently has no legal effect and is, as such, surplusage. Bray v. Weaver, 453 S.W.2d 7, 8 (Ky. 1970); City of Harrodsburg v. McCord, 342 S.W.2d 714 (Ky. 1961).⁷

The Fayette Circuit Court's order overruling Burgess's RCr 11.42 motion makes factual findings consistent with the above evidence of record. In that order, the trial court emphasized that the provision in the Fayette County judgment ran that sentence "concurrently with any previous felony sentence (Burgess) must serve." Emphasis in original. As the record

⁷ Indeed, Burgess would have been in the same position had the original judgment omitted the referenced language, because Kentucky Revised Statutes 532.110(2) would have required in the absence of language otherwise that the Fayette County sentence run concurrently with any other sentence that Burgess must serve. The problem still would have remained, however, that at the time of the original judgment, Burgess was not subject to the Hardin County sentence.

substantially supports the trial court's findings, we conclude that the court's findings are not clearly erroneous.

With the "concurrent" language in the original judgment having no effect, the question arises as to whether the Fayette Circuit Court had the authority, upon revoking Burgess's probation, to order the revoked sentence run consecutively with any other previous felony sentence that Burgess must serve (e.g., the five years on the Hardin County revoked sentence, that occurred while Burgess was on shock probation for the Fayette County sentence). KRS 533.040(3) provides the authority. Pursuant to that statutory provision, a probated sentence (Fayette County) is required to run concurrently with any state jail or prison term for another offense to which the defendant became subject during the period of probation (Hardin County), *unless the sentence of probation (Fayette County) is revoked*. The revocation gives the trial court discretion to run the sentence consecutively. See generally, Myers, *supra* at 433; Snow, *supra* at 843; Gavel v. Commonwealth, 674 S.W.2d 953 (Ky. 1984); and, Walker v. Commonwealth, 10 S.W.3d 492 (Ky.App. 1999). Thus, the Fayette Circuit Court had authority to run Burgess's revoked time consecutively with any previous felony conviction, in this case, the Hardin County sentence. We see no error in the court's application of the law.

Additionally, Burgess's argument that the trial court lost jurisdiction of the judgment is without merit. The trial court is allowed to reacquire jurisdiction for the purpose of shock probation. Mullins v. Commonwealth, 956 S.W.2d 222, 223 (Ky.App. 1997). Obviously, thus, the trial court is allowed to reacquire jurisdiction for the purpose of probation revocation.

We further conclude that the imposition of the consecutive sentence on the probation revocation does not subject Burgess to double jeopardy. There was no alteration of Burgess's original Fayette County sentence of five years. Burgess cites us to no authority disallowing the court's discretion, under the law, to run a revoked sentence consecutively to a previous felony conviction. The trial court, when presented with Burgess's subsequent Hardin County felony and probation revocation, was presented with the statutory discretion to run the Fayette County probation revocation consecutive. There was no error in the trial court's application of the law.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brian Thomas Ruff
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky