

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001444-MR

KEVIN MCGREGOR

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 98-CR-002507

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Kevin McGregor appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to CR² 60.02. For the reasons stated below, we affirm.

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

² Kentucky Rules of Civil Procedure.

In October 1998, McGregor was indicted by the Jefferson Circuit Court on charges of second-degree possession of a forged instrument and second-degree persistent felony offender. On March 29, 1999, McGregor, in connection with a guilty plea, was sentenced to an enhanced sentence of five-years imprisonment and was placed on probation for a five-year period (Case No. 98-CR-002507).

In 2003, McGregor committed additional felonies and was sentenced to ten-years imprisonment (Case 2003-CR-000070) while still on probation. Final sentencing in that case occurred on January 22, 2004. On February 10, 2004, the Commonwealth filed a motion to revoke McGregor's probation in the 1998 case.³ On March 30, 2004, the Jefferson Circuit Court entered an order revoking the appellant's original probation and imposing the five-year sentence that was placed upon him by the judgment entered March 29, 1999.

On April 5, 2004, McGregor filed a pro se motion to alter, amend or vacate judgment, claiming that the five-year probated sentence could not be imposed upon him because the court's order was entered on March 30, 2004, which was one day beyond the five-year period of the original imposition of sentence on March 29, 1999. The circuit court denied the motion

³ Prior to this time and subsequent to the 1998 judgment McGregor committed various other crimes and there had been various other motions to revoke his probation; however those events are not relevant to this appeal.

by order entered April 13, 2004. McGregor appealed the circuit court's decision to this Court but the appeal was dismissed by order entered August 11, 2004; his motion to file a belated appeal was also denied.

On May 24, 2005, McGregor filed a pro se motion pursuant to CR 60.02 again arguing that the trial court erred by revoking his probation one day beyond the expiration of his probationary period. The motion argued in the alternative that his sentence in the 1998 case should be ordered to run concurrently with the sentence imposed in his 2003 case. By order entered on May 27, 2005, the circuit court denied the motion. This appeal followed.

Before us, McGregor abandons his late-revocation argument and argues only that the trial court erred by failing to run his 2003 sentence concurrently with his 1998 conviction. The Commonwealth raises several procedural and preservation arguments, with which we generally agree. However, we will address the issue raised by McGregor upon the merits.

In support of his argument, McGregor contends that the 2003 judgment did not specify whether his 2003 sentence would run concurrently with his 1998 sentence and cites us to KRS 532.110(2), which provides as follows:

If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any

other sentence which the defendant must serve **unless the sentence is required by** subsection (3) of this section or **KRS 533.060 to run consecutively.** (Emphasis added).

However, KRS 533.060(2) states as follows:

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).

KRS 533.060(2) is clear and unambiguous - if a defendant commits a felony while on probation for a prior felony, the sentence on the second felony may not be run consecutively with the sentence on the first felony. It follows that the sentences must be run consecutively. Hence, by operation of law, the sentence in the 2003 case must be run consecutively with the sentence in the 1998 case.

The Circuit Court accordingly did not err by denying McGregor's motion for post-conviction relief.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin McGregor, pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky