

RENDERED: NOVEMBER 7, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002321-MR

DANA GREEN

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 01-CR-00281

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Dana Green appeals the denial of her 60.02 motion to amend the credit for time served on an order revoking her shock probation and ordering her to serve her original five year sentence. After careful review, we affirm.

¹ Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Pursuant to a plea agreement with the Commonwealth in the instant case, Dana pled guilty to trafficking in a controlled substance in the first degree, endangering the welfare of a minor, and possession of marijuana. She was sentenced to a total of five years' imprisonment. On April 25, 2002, in Division I of Daviess Circuit Court, Dana also pled guilty to criminal facilitation to commit robbery and criminal facilitation to commit burglary. She was then sentenced to another five year sentence, which the record indicates she understood was to be served consecutively with her other sentence for a total sentence of ten years.

On July 8, 2002, Dana filed a motion for shock probation, which was denied. On August 6, 2002, another motion for shock probation was filed and denied. Finally, on September 12, 2002, Dana filed a third motion for shock probation, which was granted. Dana was placed on probation for five years but remained in custody pursuant to the five year sentence she had received in Division I of Daviess Circuit Court. She was ultimately paroled and released from incarceration on the Division I case fifteen months after being granted shock probation in the instant case.

On October 25, 2006, Dana's probation officer filed a supervision report with the Daviess Circuit Court informing the court that Dana had been arrested on both August 17, 2006, and September 6, 2006, for additional offenses.

The report also indicated that Dana had not yet obtained her GED, which was a condition of her shock probation.

Based on this report, an arrest warrant was issued for Dana, and the Commonwealth filed a motion to revoke probation. A hearing was conducted on November 19, 2006. Dana did not contest the facts in the report regarding the new offenses or her failure to acquire her GED. The parties then agreed that in lieu of revocation, Dana would be found to be in contempt of court and would be sentenced to ninety days for her probation violations. The Commonwealth withdrew its motion for revocation, and the court entered an order sentencing Dana to ninety days' imprisonment.

On July 9, 2007, Dana's probation officer filed another supervision report with the Daviess Circuit Court, informing the court that Dana had again been arrested on June 29, 2007, and July 2, 2007, for additional offenses. The report also indicated that she had not attended GED classes during June 2007.

The Commonwealth filed a motion to revoke Dana's probation, and another arrest warrant was issued for Dana. A hearing was conducted on the Commonwealth's motion to revoke, and the motion was granted. Dana was re-sentenced to her original sentence of five years' imprisonment. She was given three days of jail time credit as reflected in her original judgment of conviction; 129 days of jail time credit for the time she was incarcerated until she was shock probated; and 13 days of jail time credit for the time she served after being arrested for the recent probation violation.

On September 10, 2007, Dana filed a CR 60.02 motion, asking the court to reconsider its order revoking her shock probation. A hearing was held on August 13, 2007, but Dana withdrew her motion to reconsider and altered her motion to a request for additional credit for time served. She argued that when the trial court granted her shock probation in the instant case, she remained incarcerated on the five year sentence she had received on the separate charge from the Division I case until she was paroled some fifteen months later. She maintained that since she was never released from custody when she was granted shock probation, she should receive credit on her sentence in the present case for the fifteen months she remained incarcerated until she was paroled on the Division I conviction. The trial court denied the request, and she now appeals.

We review a trial court's ruling denying a 60.02 motion for an abuse of discretion. *See Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *White v. Commonwealth*, 325 S.W.3d 83 (Ky.App. 2000). For a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

It is undisputed that Dana was sentenced to two separate five year sentences to run consecutively with one another. She was probated on one, but not the other. The disputed fifteen months served was time served on the Division I case, not the instant case. If we were to find that this time counted as time served,

we would be in direct contravention of the trial court's sentencing order that the sentences were to run consecutively. We have to agree with the Commonwealth's argument that if Dana were to receive credit on her sentence in the instant case for the fifteen months served on her Division I case's sentence, she would in essence be receiving double credit for her time. Therefore, we do not find the trial courts denial either unfair or unsound.

As to the assertion that the ninety days Dana served as a result of her first probation violations should count as time served, we find no merit in this claim either. The court generously sentenced her to those ninety days for parole violations instead of revoking her probation altogether. The ninety days was a separate sentence from the original five year sentence, therefore to allow this time to count as time served would again be giving Dana double credit on her time.

Accordingly, we do not find that the trial court abused its discretion, and we affirm the denial of Dana's 60.02 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Aubrey Williams
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky