

RENDERED DECEMBER 18, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001922-MR

JOHN ALLEN CALDWELL, JR.

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT  
HONORABLE ROBERT G. JOHNSON, JUDGE  
ACTION NO. 05-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER  
AFFIRMING

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BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: John Allen Caldwell seeks review of the trial court's decision denying him probation and its decision to run his sentence in this

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<sup>1</sup> Senior Judge Joseph E. Lambert 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.

case consecutive to a prior sentence. Discovering no error, we affirm the judgment and sentence of the Woodford Circuit Court.

Caldwell was indicted for two counts of first degree trafficking in a controlled substance. He was additionally indicted for one count of being a persistent felony offender in the second degree. He entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), after the Commonwealth had amended the two trafficking charges to possession of a controlled substance and dismissed the persistent felony offender charge. Upon the Commonwealth's recommendation, the trial court imposed sentences of three and one-half years on each of the two possession charges, to run concurrently. Caldwell requested probated sentences and requested that the sentences imposed run concurrently with a prior 13-year sentence from which he had been previously paroled.

In this Court, Caldwell's attorney filed a brief in accord with *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1397, 18 L.Ed.2d 493 (1967), addressing Caldwell's arguments on appeal. Counsel requested additional time for Caldwell to file a *pro se* brief, but he failed to do so. Counsel further sought to withdraw as counsel of record.

Ordinarily, a trial court is required to consider probation before imposing a sentence of imprisonment. However, where the trial court finds the

existence of one or more of the factors set forth in KRS 533.010, probation is inappropriate. Here, the trial court specifically found, based on Appellant's past behavior while on parole, that there was a substantial risk that he would commit another crime. Additionally, KRS 533.060(2) requires incarceration when a parolee is convicted of a new felony. *See Corman v. Commonwealth*, 822 S.W.2d 421, 422 (Ky. App. 1991). As such, a probated sentence was not available in this case.

With respect to consecutive or concurrent sentencing, Caldwell relies on KRS 532.110 which grants the trial court discretion to determine whether a new sentence should be concurrent or consecutive with a prior sentence where parole has been granted. However, KRS 533.060(2) prohibits concurrent sentences when a parolee is convicted of a new felony. As KRS 533.060(2) is the more specific statute and as it was enacted after KRS 532.110, KRS 533.060(2) controls. A felon on parole who is sentenced for a new felony conviction must serve the new sentence consecutive to any prior sentence. *Devore v. Commonwealth*, 662 S.W.2d 829, 830 (Ky. 1984), *overruled on other grounds by Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008).

The motion of Appellant's counsel for leave to withdraw is granted.  
The judgment of the Woodford Circuit Court is affirmed.

ALL CONCUR.

ENTERED: December 18, 2009

/s/ Joseph E. Lambert  
SENIOR JUDGE, COURT OF APPEALS

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