

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001136-MR

JOEY SALLEE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 00-CR-00657

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Joey Sallee appeals from the order of the Kenton Circuit Court denying his request to run his Kenton County sentence concurrently with his sentence from Grant County. Sallee argues that he was not “awaiting trial” in Kenton County and thus the trial court should have run his sentences concurrently,

to which the Commonwealth disagrees. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm the Kenton Circuit Court.

The facts that give rise to this appeal began on July 26, 1999, when Sallee was arrested in Kenton County for trafficking in marijuana within 1000 yards of a school and for possession of drug paraphernalia. When a police officer failed to appear for the third time, when the case was called in district court on September 20, 1999, the charges were dismissed. Thereafter, on December 15, 2000, the Kenton County Grand Jury returned a true bill charging Sallee with trafficking in marijuana in connection with his July 1999 arrest¹, in Kenton Circuit Court. On January 22, 2001, Sallee, without counsel, appeared for arraignment. Because he lacked counsel, the trial court rescheduled arraignment for February 5, 2001. Sallee did not appear for the rescheduled arraignment and a warrant was issued for his arrest.

Thereafter, on December 21, 2005, well after his indictment in December, 2000 in Kenton County, Sallee appeared in Grant Circuit Court and pled guilty to one count of theft of identity and one count of alcohol intoxication. On January 25, 2006, Sallee was formally sentenced to 3.5 years and fined \$1000 for identity theft and \$25 for alcohol intoxication. The Grant Circuit Court probated Sallee's sentence for five years, with the condition that he serve 120 days of his sentence.²

¹ Case number 00-CR-657.

² On November 14, 2007, Sallee's probation in Grant County was revoked due to his failure to comply with the probation conditions, namely, "absconding probation supervision, failure to attend AA/NA meetings as directed, failure to pay court ordered monies, and failure to enroll in

Sallee next appeared before the Kenton Circuit Court on February 27, 2006, more than five years later, and was arraigned on the trafficking charge, pleading not guilty. Thereafter, Sallee changed his plea to guilty. In two subsequent orders, the trial court scheduled Sallee's sentencing for July 10, 2006, and then on July 31, 2006. On September 12, 2006, an arrest warrant was issued for Sallee and later served upon him on September 13, 2006. On November 5, 2007, Sallee was formally sentenced to serve two years in prison. In the sentencing order the court did not specify whether Sallee's sentence was to run concurrently or consecutively to the Grant County sentence.

On April 27, 2009, Sallee, *pro se*, asked the Kenton Circuit Court to "clarify" for the Department of Corrections that his Kenton County sentence was to run concurrently with his Grant County sentence. According to Sallee, the Department of Corrections determination that his sentence should run consecutively was wrong and stemmed from its mistaken belief that the acts giving rise to the Grant County charges occurred while he was "awaiting trial" in Kenton County. Sallee argued that after his initial arrest and charge of trafficking in Kenton County was dismissed, he was released from custody, his bail money was returned, and when he was later indicted in Kenton County for trafficking he was unaware of the indictment until the early part of 2006. Thus, Sallee argued that he was not awaiting trial in Kenton County since he had never been served with an arrest warrant or indictment from the Kenton County case. Sallee argued that he

GED classes."

was not awaiting trial in Kenton County until the execution of the indictment and/or his formal arraignment of the charges.

The trial court denied Sallee's request on June 3, 2009, and stated:

This matter is before the court on the defendant's motion for clarification which is really a motion to run his sentences concurrently.

The defendant was arrested for "Trafficking in a Controlled Substance within 1000 yards of a School", the charges in this case, on July 26, 1999. The Police Officer failed to appear at the September 20, 2000 call of the case and the charges were dismissed. The defendant was indicted directly on these charges on December 15, 2000. On January 22, 2001 the defendant was present but without counsel for the first arraignment call. On that date the court re-scheduled arraignment for February 5, 2001. The defendant did not answer the call and a warrant was issued on the indictment on February 6, 2001 based on the defendant's failure to appear. The defendant's next appeared in this court on February 27, 2006.

Based on these facts, the court concludes that the defendant was notified and present before the court on these charges prior to his indictment in Grant Circuit Court 05-CR-122.

Therefore, pursuant to KRS 533.060(B)[sic] the Defendant's sentence must run consecutively.

IT IS HEREBY ORDERED AND ADJUDGED the Defendant's Motion for Clarification is OVER-RULED.

Kenton County Circuit Court's Order of June 3, 2009.

It is from this order that Sallee now appeals.

On appeal Sallee argues³ that the trial court erred in applying KRS 533.060 instead of KRS 532.110 as he was unaware that he was awaiting trial in Kenton County until after he had committed the crime, and been convicted and

³ Sallee also argues that the Commonwealth's Appellee brief was untimely filed with this Court and should be stricken. However, a review of the record reveals this argument is without merit.

sentenced in Grant County. In support thereof, Sallee argues that he was not awaiting trial per KRS 533.060 when he committed the offense in Grant County since he was never arrested in connection with the Kenton County indictment, that proper notification never issued with respect to the indictment, and that he did not know he had been indicted.

Sallee claims to have appeared before the Kenton County Court in January 2001 because he was told there was a “matter” in Kenton Circuit Court and that court did not proceed because he did not have an attorney. Sallee further asserts that he was never advised to appear at any subsequent hearing to answer to a charged offense, nor was he remanded into custody. Moreover, Sallee argues that there was no record notifying state authorities that he was to be arrested for charges in Kenton County when he appeared before the Grant Circuit Court; otherwise, he would not have been released on probation. Thus, Sallee claims that because the Kenton County judgment of conviction did not specify whether his two-year sentence would run concurrently with or consecutively to his sentence from Grant County, KRS 533.060 is inapplicable and KRS 532.110(2) is applicable.

The Commonwealth argues that Sallee’s argument that he was unaware of his indictment must fail because it is illogical for Sallee to argue that he appeared in court in January 2001 for a warrant without there being an underlying charge. Moreover, the same trial court handled the case from indictment to conclusion, so this Court should give deference to the trial court’s factual finding

that Sallee was notified of the charges. Thus, the Commonwealth argues that Sallee committed an offense in Grant County while “awaiting trial” in Kenton County. Accordingly, the Commonwealth asserts that the trial court properly denied Sallee’s motion to run his sentences concurrently.

At the crux of this appeal are two statutes, KRS 533.060 and KRS 532.110. Thus, we note that in reviewing the trial court's decision in the matter *sub judice*, matters of statutory construction are subject to *de novo* review and the Court of Appeals is not bound by the circuit court's interpretation. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky.App.2000).

KRS 533.060 states in relevant part:

(3) When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

Whereas, KRS 532.110 states:

(2) 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.

In *Commonwealth v. Hunt*, 619 S.W.2d 733 (Ky.App.1981) this Court found KRS 532.110 and KRS 533.060 irreconcilable . However, this Court determined,

Upon careful consideration, the Court determined that KRS 533.060(2) controlled in situations where there is conflict between the two statutes. *Id.* Soon thereafter, this ruling was extended to hold that in cases where either KRS 532.110(1)(a) or KRS 533.060(3) may apply to direct sentencing, KRS 533.060(3) shall control. *Handley v. Commonwealth*, 653 S.W.2d 165, 166 (Ky.App. 1983).

Brown v. Commonwealth, 295 S.W.3d 854 (Ky.App. 2009).

Thus, KRS 533.060(3) is to be applied to cases where conflict between KRS 532.110 and KRS 533.060 exists. This is reflected in the legislative change in 2002 to KRS 532.110, which by its own language now makes a silent judgment on sentencing subject to KRS 533.060. Accordingly, the determinative question is whether Sallee was “awaiting trial.”

As held in *Moore v. Commonwealth*, 990 S.W.2d 618, 621 (Ky. 1999):

The phrase “awaiting trial” is not limited to indictment. An indictment is not all inclusive as to a definition of the phrase “awaiting trial.” It can also include the period of time following arrest. It is the intent of the legislature to punish persons who were convicted of committing a subsequent crime or crimes while awaiting trial more severely by eliminating the possibility of concurrent sentences. Such persons are considered to be awaiting trial if they have sufficient knowledge of the first offense by means of arrest for that crime or crimes and are released on bond or are otherwise incarcerated for the crimes charged. The phrase “awaiting trial” as used in this statute is broad enough to include the period of time immediately after arrest.

Moore at 621.

We agree with the Commonwealth that it is illogical for Sallee to argue that he appeared before the Kenton Circuit Court in January 2001 and was unaware that a criminal proceeding had been initiated against him. As *Moore* noted, “the contention that KRS 533.060(3) must be strictly or narrowly construed is without merit, and the suggestion that there is a notice requirement cannot be found in the language of the statute.” *Id.* at 620. Consequently, Sallee’s argument that he was unaware that he was awaiting trial in Kenton County when he committed the subsequent offenses in Grant County must fail. As such, the trial court did not err in denying Sallee’s motion for clarification, i.e., his motion to run his sentences concurrently.

Finding no error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joey Sallee, *Pro Se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky