

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001826-MR

MONICA WILSON

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NOS. 06-CR-00066 & 07-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

VANMETER, JUDGE: Monica Wilson appeals from an order of the Breckenridge Circuit Court denying her motion for relief pursuant to CR² 60.02. For the following reasons, we affirm.

¹ 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.

² Kentucky Rules of Civil Procedure.

On April 26, 2006, Wilson was arrested and charged with burglary in the second degree. While awaiting trial, Wilson was arrested for manslaughter in the second degree for an incident that occurred on May 26, 2006. On May 4, 2007, the trial court entered a judgment finding Wilson guilty of burglary in the second degree and sentencing her to five years' imprisonment. (No. 06-CR-00066). Wilson appealed that judgment. On October 10, 2007, Wilson pled guilty to an amended charge of reckless homicide and received a five-year felony sentence, ordered to run consecutively to the sentence imposed on May 4, 2007 for burglary in the second degree. (No. 07-CR-00029).

Upon reversal by this court of Wilson's conviction for burglary in the second degree,³ on August 6, 2008, Wilson entered a guilty plea to an amended charge of trespass in the first degree, and was sentenced to serve twelve months in jail, all of which she had already served.

In March 2009, Wilson moved for jail custody credit of 332 days to apply toward the five-year sentence she received for reckless homicide. The trial court denied her motion for failure to state an applicable rule of procedure upon which relief could be afforded. Wilson then moved for jail custody credit citing CR 60.02 as the proper grounds for relief, and further requested the court to modify the judgment in No. 06-CR-00066 to order the twelve-month sentence for trespass in the first degree to run concurrently with the five-year sentence for reckless homicide in No. 07-CR-00029. Wilson argued that at the time of the

³ *Wilson v. Commonwealth*, 2007-CA-001161-MR (Ky.App., June 6, 2008).

sentencing for the conviction of trespass in the first degree (No. 06-CR-00066), the trial court failed to order the sentence to run concurrently with any other sentence and that the language ordering the sentence to run consecutively was mistakenly added by the clerk on the prepared written judgment. In a single order entered August 31, 2009, the trial court denied both of Wilson's motions. This appeal followed.

On an appeal involving a CR 60.02 motion, we determine "whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000) (citation omitted).

Wilson argues the trial court abused its discretion by denying her CR 60.02 motion requesting the court to modify her sentence for trespass in the first degree (No. 06-CR-00066) to run concurrently with any prior sentence pursuant to KRS 532.110. We disagree.

KRS 532.110, states, in relevant part:

(1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(a) A definite and an indefinite term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term;

.....

(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.

Wilson maintains that KRS 532.110(1)(a) requires that a sentence for a misdemeanor must run concurrently with a prior felony sentence. However, in making this argument, Wilson overlooks KRS 533.060, which provides, in 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.

(emphasis added).

In *Moore v. Commonwealth*, 990 S.W.2d 618 (Ky. 1999), the Kentucky Supreme Court noted the legislative intent to impose “stricter sentencing policies for offenses committed while released on bail” under KRS 533.060. *Id.* at 621. In *Moore*, the Court stated:

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.

Id. Additionally, this court has confirmed that “where either KRS 532.110(1)(a) or KRS 533.060(3) may apply to direct sentencing, KRS 533.060(3) shall control.” *Brown v. Commonwealth*, 295 S.W.3d 854, 856 (Ky.App. 2009) (citing *Handley v. Commonwealth*, 653 S.W.2d 165, 166 (Ky.App. 1983)).

In this case, Wilson was arrested on April 26, 2006 for burglary in the second degree. While “awaiting trial” Wilson was arrested for another offense that ultimately resulted in a reckless homicide conviction, which the court properly ordered to run consecutively with any prior sentence. When Wilson’s conviction and sentence for burglary in the second degree was reversed, and she pled guilty to, and was sentenced for the offense of trespass in the first degree, that offense had not been committed while awaiting trial. However, Wilson still committed an offense while “awaiting trial,” even though the judgment sentencing her for her actions on April 26, 2006, occurred after the judgment sentencing her for her actions on May 26, 2006. Based upon the legislative intent to apply stricter sentencing policies to persons who commit an offense while “awaiting trial” for a previous offense, KRS 533.060(3) controls in this case, and the trial court did not err by ordering the sentence for trespass in the first degree to run consecutively with any prior sentences.⁴

⁴ Since we find the trial court properly denied Wilson’s CR 60.02 motion requesting the court order her twelve-month sentence to run concurrently with her five-year sentence, her argument that she be given jail custody credit towards the five-year sentence is now moot. Accordingly, we decline to address this argument.

The order of the Breckenridge Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gene Lewter
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky