

RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001783-MR

THOMAS STEPHENS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CR-00206

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Thomas Stephens, proceeding *pro se*, appeals the Fayette Circuit Court's order denying his motion to correct his sentence. After a careful review of the record, we affirm because Stephens's sentences are required to be run consecutively.

Stephens entered a guilty plea to the charges of manufacturing methamphetamine, first offense, and of being a second-degree persistent felony offender (PFO). He was sentenced to serve ten years of imprisonment for the manufacturing methamphetamine conviction, but that sentence was enhanced to twenty years of imprisonment due to the PFO-2nd conviction. At the time of these convictions, Stephens was on probation for prior felony convictions, and that probation was revoked after he committed the offenses in this case.

Stephens filed an RCr¹ 11.42 motion to vacate, set aside, or correct his sentence. In that motion, Stephens alleged that, pursuant to KRS² 533.040(3), his new sentence should run concurrently with his prior sentences because his probation on his prior sentences was not revoked within ninety days of the date that the Department of Corrections became aware that he had violated his probation.

The circuit court denied his motion. In doing so, the court acknowledged that, based on the plain language of the statute (*i.e.*, KRS 533.040(3)), Stephens was correct in his assertion. However, the court found that KRS 533.060(2) directed a different result because that statute provides that “sentences may not run concurrently for any sentence received on a subsequent felony offense while an individual is released on parole, probation, shock probation, or conditional discharge pursuant to a prior felony conviction.” The

¹ Kentucky Rule of Criminal Procedure.

² Kentucky Revised Statute.

court also noted that, even though it seems that the two statutes conflict with each other, the Kentucky Supreme Court addressed this issue in *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). The circuit court stated that, in *Brewer*, the Supreme Court held that because “KRS 533.060(2) was enacted after KRS 533.040, ‘the law of statutory construction mandates that KRS 533.060 control.’” Therefore, the circuit court held that in Stephens’s case, “KRS 533.060 mandates that the felony sentence [Stephens] received must be consecutive to other felony sentences, despite the fact that [Stephens’s] probation was not revoked within the statutory period.”

Approximately seven months later, Stephens filed a motion in the circuit court that he titled: “Ky. R. Civ. P. (CR) 60.02 Motion to Correct Sentence.” In that motion, he again argued that, pursuant to KRS 533.040(3), his sentences should run concurrently rather than consecutively. He asked the circuit court to set a hearing date on the matter or to send him notice that the court denied his motion so that he could appeal it.

The circuit court entered another order stating that Stephens had filed the exact same motion previously and the court had denied that motion. The court then held that because it was not presented with any additional information to support the present motion, the motion was again denied.

Stephens now appeals, contending that he did not receive the circuit court’s order on his first motion to correct his sentence until after he filed his notice of appeal in this case. Stephens continues to allege that, pursuant to KRS

533.040(3) and *Gavel v. Commonwealth*, 674 S.W.2d 953 (Ky. 1984), his sentences may be run concurrently.

The Commonwealth argues, *inter alia*, that Stephens's second motion to correct his sentence, which was filed after the circuit court initially denied his RCr 11.42 motion to correct his sentence, was a CR 60.02 motion that was properly denied because CR 60.02 relief cannot be granted for a claim that could have been presented by direct appeal or in RCr 11.42 proceedings. The Commonwealth also argues that, pursuant to KRS 533.060(2) and *Brewer*, Stephens's sentences were required to be run consecutively, and that Stephens's reliance on *Gavel* is misplaced.

As an initial matter, we note that although Stephens's second motion to correct his sentence was brought under CR 60.02, it appears from a review of the circuit court record that he was not notified of the court's order denying his first motion to correct his sentence under RCr 11.42 before he filed his CR 60.02 motion. Specifically, the court's docket sheet does not state that the parties were notified of the entry of the court's order denying Stephens's first motion to correct his sentence before he filed his second motion more than seven months later. Further, Stephens filed both of those motions *pro se*, and in his second motion, he asked for "a court date to settle this matter, or a notice of overruling so he may address this issue to the Kentucky Court of Appeals." (Capitalization changed). Therefore, although his second motion was styled as a CR 60.02 motion, because it appears he was not notified of a ruling on his first motion before filing his second

motion, we will treat the current appeal as an appeal from an order denying his RCr 11.42 motion.

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

Stephens contends that, pursuant to KRS 533.040(3) and *Gavel*, his sentences may be run concurrently. Kentucky Revised Statute 533.040(3) provides as follows:

A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation shall take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.

However, another statute, KRS 533.060(2), states:

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.

As the Kentucky Supreme Court noted in *Brewer*, “[t]he two statutes clearly contradict if read in conjunction. . . . Since KRS 533.060 was enacted in 1976, and KRS 533.040 was enacted in 1974, the former controls.” *Brewer*, 922 S.W.2d at 382. Therefore, KRS 533.060 is the controlling statute and, according to that statute, Stephens’s sentences were not permitted to be run concurrently.

As for Stephens’s argument that his sentences also should have been run concurrently pursuant to *Gavel*, in *Gavel*, the Kentucky Supreme Court held that KRS 533.060(2) was inapplicable to that case, which involved the issue of whether federal and state sentences should be run concurrently or consecutively. However, the present case does not involve a federal sentence and, therefore, *Gavel* is distinguishable from the present case. *See also Brewer*, 922 S.W.2d at 382 (holding that *Gavel* was distinguishable from the facts of *Brewer* because *Gavel* “involved the interplay between federal and state jurisdiction.”). Consequently, pursuant to *Brewer* and KRS 533.060(2), Stephens’s argument that his sentences should have been run concurrently, rather than consecutively, lacks merit, and the circuit court did not err in denying Stephens’s motion to correct his sentence under RCr 11.42.

Alternatively, even if we were to analyze the present appeal as an appeal from an order denying a CR 60.02 motion, Stephens's claim would fail. On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

"Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id.*

Thus, if we were to analyze the present appeal as an appeal from the denial of a CR 60.02 motion, because Stephens could have and, in fact, did raise his CR 60.02 claim in a prior RCr 11.42 motion, the circuit court did not abuse its discretion in denying his CR 60.02 motion.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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