

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002043-MR

BENJAMIN PITNEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 08-CR-003248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Benjamin Pitney appeals from the August 28, 2012, order whereby the court revoked his probation and sentenced Pitney to three years' imprisonment to be served consecutively to the five-year sentence imposed in a subsequent felony conviction. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

The facts of this case are not in dispute. On June 25, 2009, Benjamin Pitney was convicted of possession of cocaine and was given a sentence of three years' imprisonment, probated for a period of five years. On May 21, 2010, a special supervision report was filed by the officer assigned to Pitney, advising that he had been arrested on May 6, 2010, and charged with a new drug-related felony offense in 10-CR-1801. The Commonwealth filed a motion to revoke probation on February 29, 2012, after Pitney was convicted of the new felony in 10-CR-1801 on January 5, 2012.

At the revocation hearing conducted on July 30, 2012, Pitney did not contest the ground for revocation, namely the new, subsequent felony conviction. The only question posed to the court was whether the revoked probation sentence *sub judice* had to be served consecutively with the new conviction. After considering the arguments of counsel and having read counsel's briefs, the court concluded that pursuant to *Commonwealth v. Love*, 334 S.W.3d 92 (Ky. 2011), it was obligated to run the revoked probation sentence consecutively to the new felony conviction sentence. It is from this that Pitney now appeals.

On appeal, Pitney presents two arguments, namely: (1) Kentucky Revised Statutes (KRS) 533.060(2) has no application in the circumstances of this case; and (2) revocation of probation took place under circumstances that violated Section 2 of the Kentucky Bill of Rights. In response, the Commonwealth argues: (1) The circuit court properly ordered Pitney's revoked sentence to run consecutively to his subsequent sentence under KRS 533.060(2); (2) KRS

533.040(3) does not apply because both convictions at issue are Kentucky state convictions; (3) the cases cited by Pitney do not require reversal; (4) consecutive sentencing was required and it does not matter which court ordered it; and (5) the Kentucky Constitution was not violated by the Commonwealth Attorney's participation in the revocation proceeding against Pitney, nor was this issue preserved.

First, we note, "In reviewing probation hearings, we review the trial court's findings for abuse of discretion." *Burke v. Commonwealth*, 342 S.W.3d 296, 297 (Ky. App. 2011), citing *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

As this matter involves the trial court's conclusions of law concerning KRS 533.060(2), 533.040(3) and the application of *Love, supra*, such conclusions are subject to independent *de novo* review by this Court. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Additionally, "Because statutory interpretation is a question of law, our review is *de novo*; and the conclusions reached by the lower courts are entitled to no deference." *Love*, 334 S.W.3d at 93. With this in mind we turn to the issues presented on appeal.

As his first basis for appeal, Pitney argues that (1) KRS 533.060(2) has no application in the circumstances of this case. In support thereof, Pitney argues that

KRS 533.060(2) is directed at sentencing concerning the second felony offense and not the revocation of the probation sentence as is the case *sub judice*. Pitney argues that the trial court wrongly relied on footnote 11¹ in *Love, supra*, in concluding otherwise. Instead, Pitney argues that KRS 533.040(3) applies and the ninety-day window mandated by the statute had expired.

At issue, KRS 533.040(3) states:

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.

The Kentucky Supreme Court recently addressed the application of KRS 533.040(3) in *Love, supra*. The *Love* Court was presented a situation where a Kentucky state court probationer incurred a new federal felony conviction. In addressing this matter, the court opined, that when a Kentucky state court

¹ When a Kentucky state court probationer incurs a new Kentucky state court felony sentence while on probation, parole, shock probation or conditional discharge from a Kentucky state court, the ninety-day window of KRS 533.040(3) does not apply. Instead, in those situations, KRS 533.060, which mandates consecutive sentencing for felonies committed while on probation, applies. See *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky.1996). As we specifically noted in *Brewer*, however, *Gavel* [*Gavel v. Commonwealth*, 674 S.W.2d 953 (Ky. 1984)] controls in revocation proceedings when a state probationer incurs a federal sentence while on Kentucky state probation. *Id.* at 382. Since the General Assembly has not seen fit to materially change the relevant portions of KRS 533.040 or KRS 533.060 and since KRS 533.040(3) specifically applies to revocation based upon incurrence of a subsequent federal sentence, we reiterate that our holding in *Gavel* applies to situations like the one at hand involving the proper interplay between state and federal sentences.

Love, 334 S.W.3d at 95 n.11.

probationer incurs a new Kentucky state felony conviction, KRS 533.040(3) and the ninety-day window therein was inapplicable. *Love*, 334 S.W.3d at 95 n.11. The court further stated that “Instead, in those situations, KRS 533.060, which mandates consecutive sentencing for felonies committed while on probation, applies.” *Id.* citing *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996).

Thus, we must disagree with Pitney that KRS 533.040(3) applies *sub judice* and that KRS 533.060(2) does not. As this matter concerned a Kentucky state probationer incurring a subsequent Kentucky state felony, the trial court was not bound by the ninety-day window imposed by KRS 533.040(3) in regards to sentencing.²

We now turn to KRS 533.060(2), which 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.

(Emphasis added.)

² This Court in *Warren v. Commonwealth*, 981 S.W.2d 134, 137 (Ky. App. 1998), addressed the time limit imposed by KRS 533.040(3):

In *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995), the Supreme Court held that while a defendant's probation could be revoked at any time prior to termination of the probationary period, the 90-day requirement in KRS 533.040(3) must be complied with before the revoked sentence may be ordered to be served consecutively to another sentence.

Gavel v. Commonwealth, 674 S.W.2d at 954, interpreted “that felony” to mean the subsequent felony:

We hold that the trial court may run the state sentence concurrently or consecutively with the federal sentence because KRS 533.060(2) is not applicable to the facts in the present case. The conviction referred to in that section is the subsequent one, not the first. That section provides that when a person while on probation is “convicted or enters a plea of guilty to a felony ... the period of confinement for that felony shall not run concurrently with any other sentence.” In the present case “that” felony would be the federal conviction, which the state court has no control over.

Gavel at 954.

In *Brewer v. Commonwealth*, 922 S.W.2d at 382, the Kentucky Supreme Court reiterated that KRS 533.060(2), “clearly and unambiguously requires that the appellant's second sentence, the Barren County sentence, not run concurrently with his first sentence, the Warren County sentence.” *Brewer* at 381 citing *Commonwealth v. Hunt*, 619 S.W.2d 733 (Ky. App. 1981). Moreover, if the conflict between KRS 533.060³ and 533.040 cannot be resolved, “Since KRS 533.060 was enacted in 1976, and KRS 533.040 was enacted in 1974, the former controls.” *Brewer* at 382.

In *Brewer*, the court was presented a factual situation similar to that *sub judice*, i.e., the revocation of the first state felony being run consecutively to the second, subsequent state felony. *The Brewer* Court, relying on Kentucky Rules

³ Our courts have also interpreted KRS 533.060 as controlling KRS 532.110 when conflict between the two arises. *See Riley v. Parke*, 740 S.W.2d 934, 935-36 (Ky. 1987). The legislature amended KRS 532.110(2) to include language specifically requiring consecutive sentences in situations governed by KRS 533.060(2).

of Criminal Procedure (RCr) 9.24, noted that, “the judgment of the Warren Circuit Court cannot have prejudiced the appellant even if it were held to be technically incorrect.” *Id.* at 382. We believe this to be the case *sub judice*.

While the trial court below was technically incorrect that our statutory scheme mandated the first sentence to be consecutive to the second felony sentence, no prejudice has occurred to Pitney, because KRS 533.060 requires the second court to run the second felony sentence consecutive to the first sentence. Ergo, it does not matter how the first court elects to style the sentence, the second court must run the sentence consecutive to the first. Thus, we must conclude that the trial court’s error below in running the sentence consecutive to the second sentence does not result in reversible error. *See Brewer* at 382.⁴

⁴ Certainly a situation may exist where a court proceeds with revocation after the court sentencing the second felony has completed sentencing. It would appear that the ninety day rule contained in KRS 533.040(3) would likely have prevented this in most, if not all, instances by mandating that revocation occur within ninety days of the event triggering the revocation. Thus, the court sentencing the first felony may order concurrent sentences but the court sentencing the second felony would necessarily pursuant to KRS 533.060 order consecutive sentences. However in *Love, supra*, footnote 11 addresses the application of the ninety day rule:

When a Kentucky state court probationer incurs a new Kentucky state court felony sentence while on probation, parole, shock probation or conditional discharge from a Kentucky state court, the ninety-day window of KRS 533.040(3) does not apply. Instead, in those situations, KRS 533.060, which mandates consecutive sentencing for felonies committed while on probation, applies. *See Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996).

Love at 95 n.11.

Regardless, in practice it would be harmless error for the court sentencing the first felony to order either consecutive or concurrent sentences because the court sentencing the second felony would order consecutive sentences pursuant to KRS 533.060. In KRS 532.110, the legislature appears to have remedied this perceived conflict between the two statutes with section two:

(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.

This language in KRS 532.110(2) makes clear that KRS 533.060 controls in situation where it is applicable regardless of the dictates of KRS 532.110(1).

We now turn to Pitney’s second basis for appeal, that the revocation of probation took place under circumstances that violated Section 2 of the Kentucky Bill of Rights, because the attorney for the Commonwealth initiated the motion to revoke probation and participated in the proceedings. We agree with the Commonwealth that this argument was not preserved and shall not be considered for the first time on appeal.⁵ *See Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998) (“An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.”) Accordingly, we decline to reverse on this ground.

Finding no reversible error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. David Niehaus
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⁵ Nor has Pitney requested a palpable error review concerning the cumulative nature, if any, of the evidence. “Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.” *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) (internal citations omitted).

