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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002212-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 11-CR-000597

TERRENCE HINES

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Commonwealth of Kentucky brings this appeal from a December 4, 2012, order of the Jefferson Circuit Court granting the Commonwealth's motion to revoke the probation of Terrance Hines but denying the Commonwealth's request to run his sentences consecutively. We reverse and remand.

In early 2011, Hines pleaded guilty in Jefferson Circuit Court, Division Eleven, (Action No. 2011-CR-000597) to one count of possession of a controlled substance. On April 20, 2011, Hines was sentenced to a term of one-year imprisonment probated for a period of three years in Action No. 2011-CR-000597. Then, on September 13, 2011, Hines was again arrested and subsequently indicted in the Jefferson Circuit Court, Division Eight, (Action No. 2012-CR-000293) upon trafficking in a controlled substance. Hines pleaded guilty and, on May 30, 2012, was sentenced to two-year's imprisonment in Action No. 2012-CR-000293.

Thereafter, the Commonwealth filed a motion to revoke Hines' probation in Action No. 2011-CR-0597 based upon his conviction in Action No. 2012-CR-000293 for trafficking while on probation. The circuit court granted the Commonwealth's motion to revoke Hines' probation but denied the Commonwealth's request to run Hines' sentence in Action No. 2011-CR-000597 consecutive to the sentence in Action No. 2012-CR-000293. This appeal follows.

The Commonwealth contends that the circuit court erred by relying upon Kentucky Revised Statutes (KRS) 533.040(3) as authority for concluding that Hines' sentence of imprisonment in Action No. 2011-CR-000597 should run concurrently with his sentence of imprisonment in Action No. 2012-CR-000293. Rather, the Commonwealth believes that KRS 533.060 controls, and thereunder, the sentences must run consecutively. Hines counters that the Commonwealth did

not seek revocation within 90 days as required by KRS 533.040; and, thus, the circuit court properly ordered the sentences to run concurrently.

The interplay between KRS 533.040 and KRS 533.060 has been the subject of much controversy. *See Com. v. Love*, 334 S.W.3d 92 (Ky. 2011); *Ware v. Com.*, 326 S.W.3d 464 (Ky. App. 2010); *Wilson v. Com.*, 78 S.W.3d 137 (Ky. 2002); *Brewer v. Com.*, 922 S.W.2d 380 (Ky. 1996); *Riley v. Parke*, 740 S.W.2d 934 (Ky. 1987). Both statutes are seemingly contradictory upon the issue of whether the separate sentences of imprisonment in Action Nos. 2011-CA-000597 and 2012-CA-000293 should run concurrently or consecutively:

KRS 533.040 provides, in relevant part:

(3) 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.

And, KRS 533.060 provides, in relevant part:

(2) 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.

The apparent conflict between the above statutes was squarely addressed by the Kentucky Supreme Court in *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). Brewer was convicted of a felony, and his sentence of imprisonment was probated. *Id.* While on probation, Brewer was convicted of another felony. *Id.* Brewer argued that the sentence on the new felony charge should run concurrently with the previously probated sentence per KRS 533.040. Conversely, the Commonwealth argued that Brewer's sentences of imprisonment should run consecutively under KRS 533.060. Regarding the apparent conflict between KRS 533.040 and KRS 533.060, the *Brewer* Court held:

The two statutes clearly contradict if read in conjunction and according to the appellant's position. 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. Thus, the Supreme Court determined that when a conflict arises, KRS 533.060 controls as the later enacted statute. Under KRS 533.060, the Court held that Brewer's sentences were to run consecutively:

The statute [KRS 433.060] clearly and unambiguously requires that the appellant's second sentence . . . not run concurrently with his first sentence *See [Commonwealth v. Hunt, Ky. App., 619 S.W.2d 733 \(1981\)](#).*

Brewer, 922 S.W.2d at 381. The Supreme Court recently reaffirmed the *Brewer* holding in *Commonwealth v. Love*, 334 S.W.3d 92 (Ky. 2011). In *Commonwealth v. Love*, 334 S.W.3d 92 (Ky. 2011), the Court noted:

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.

Love, 334 S.W.3d at 95 n. 11. In accordance with *Brewer*, 922 S.W.2d 380 and *Love*, 334 S.W.3d 92, we believe the law is clear that when a defendant receives a probated sentence in state court and is subsequently convicted of another felony, KRS 533.060 is applicable and mandates consecutive sentences.

In this case, Hines' sentences of imprisonment in Action Nos. 2011-CA-000597 and 2012-CA-000293 should run consecutively under KRS 533.060. *See Brewer*, 922 S.W.2d 380; *Love*, 334 S.W.3d 92. Accordingly, we reverse the decision of the Jefferson Circuit Court and remand for the circuit court to order Hines' sentences of imprisonment in Action Nos. 2011-CA-000597 and 2012-CA-000293 to be served consecutively.

For the foregoing reasons, the Order of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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