

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000033-MR

EMANUEL FISHER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 14-CR-00240

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

MAZE, JUDGE: Emanuel Fisher appeals from the Fayette Circuit Court's order entered December 12, 2014 denying his motion to impose concurrent sentencing.

This court reverses the circuit court's denial of the motion and remands for resentencing.

Background

On January 24, 2008, a jury convicted Emanuel Fisher of Sexual Abuse in the First Degree and being a Persistent Felony Offender in the Second Degree, and the jury recommended a sentence of seven years' imprisonment. The Department of Corrections released Fisher on May 10, 2013 after he signed a Department of Corrections form entitled "Five Year Supervised Sex Offender Conditional Discharge (Pursuant to KRS 532.043)." Under the conditions listed on this form, Fisher was required to report to his local Probation and Parole Office. He also signed a form acknowledging that he was required to register as a sex offender for twenty years following discharge. On August 27, 2013, Fisher registered his address, listing the Community Inn on Winchester Road in Lexington as his residence. However, when Sergeant Tim Ryker visited the residence on October 15, 2013 to verify Fisher's presence, management informed him that Fisher had never resided there. Further investigation showed Fisher had not registered a new address with Probation and Parole and his whereabouts were unknown. The subsequent criminal complaint resulted in Fisher's arrest on December 11, 2013.

A Fayette County grand jury indicted Fisher on March 4, 2014 for Failure to Comply with Sex Offender Registration, pursuant to KRS¹ 17.510(11), a Class D felony. On October 17, 2014, Fisher entered a conditional plea of guilty in exchange for a one-year sentence. Fisher also filed a written motion for concurrent

¹ Kentucky Revised Statutes.

sentencing, asking the court to run the one-year sentence concurrently with time he was already serving for violation of the terms of his release. In a hearing held on December 12, 2014, the trial court ruled that she did not have the discretion to consider a concurrent sentence pursuant to KRS 533.060(2). Fisher then requested that he be permitted to enter a conditional plea preserving the concurrent sentencing issue for appeal, and the trial court granted the request. This appeal followed.

Analysis

Fisher and the Commonwealth agree that we should remand this case to the trial court for resentencing. However, the legal reasoning for this is not as straightforward. Under ordinary circumstances, “KRS 532.110 provides trial courts with discretion in determining whether defendants convicted of multiple crimes are to serve their sentences concurrently or consecutively.” *Castle v. Commonwealth*, 411 S.W.3d 754, 756 (Ky. 2013). This discretion is removed under the following circumstances:

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.

KRS 533.060(2) (emphasis added). However, the “conditional discharge” envisioned by this statute and specifically defined in KRS 533.020(3) is not the same as the “conditional discharge” term formerly used by KRS 532.043, a statute that requires a period of supervision for sex offenders after they are released.

The differences between the two were pointed out by the Kentucky Supreme Court in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010):

Conditional discharge, as that term is used apart from KRS 532.043, is a judicial function of the trial court at sentencing. It is similar to probation, with the trial court setting the terms and conditions of release at the time of sentencing. But unlike probation, traditional conditional discharge is unsupervised. Upon breach of a condition, the Commonwealth seeks revocation and the trial court conducts the hearing to determine whether revocation is appropriate. *Although KRS 532.043 speaks in terms of “conditional discharge,” the statutory scheme is more akin to parole or an extension of parole.*

Id. at 297-98 (emphasis added). The *Jones* court held that the provision of KRS 532.043 giving jurisdiction of revocation decisions regarding conditional discharge to the trial courts was unconstitutional on the basis that it violated separation of powers doctrine under Sections 27 and 28 of the Kentucky Constitution. *Id.* at 299-300. To remedy the constitutional issue, the Kentucky Legislature amended the statute to require the parole board to determine revocation questions, and to avoid further confusion they also renamed the type of release particular to KRS 532.043 from “conditional discharge” to “post-incarceration supervision.” 2011 Ky. Acts, ch. 2, § 91. This court later held that the 2011 amendment to the statute was merely procedural and not *ex post facto* law, and therefore current inmates

were subject to the updated statute provisions. *Rider v. Commonwealth*, 460 S.W.3d 909, 912 (Ky. App. 2015).

In the case before us, the problem at hand likely stems from the Department of Corrections form using the term “conditional discharge” as it was used in KRS 532.043 prior to the 2011 amendment. The trial court then cross-referenced this language with KRS 533.060(2) and its restriction on concurrent sentencing. However, the restriction on concurrent sentencing in KRS 533.060(2) applies in two contexts: (1) the felony offender has been released on parole; or (2) the felony offender has been released by the court on probation, shock probation, or conditional discharge. Neither of these is applicable to what is now termed the post-incarceration supervision period in KRS 532.043. While the *Jones* court called it “akin to parole or an extension of parole,” it is not parole. KRS 532.043(1) states that the supervision takes place “following release from: (a) [i]ncarceration upon expiration of sentence; or (b) [c]ompletion of parole.” By definition, the supervision period is separate and distinct from parole, even though both are supervised by the Division of Probation and Parole and are under the authority of the Parole Board. KRS 532.043(4).

In a similar fashion, post-incarceration supervision is comparable or interchangeable with the “conditional discharge” of KRS 533.060(2) as pointed out in *Jones, supra*, even though they once shared the same term. The “conditional discharge” contemplated by KRS 533.060(2) is one where the felony offender is *released by the court*. This does not apply to post-incarceration supervision under

KRS 532.043 as amended. Therefore, the trial court retains discretion to run the sentences concurrently or consecutively.

Conclusion

For the aforementioned reasons, the Fayette Circuit Court's December 12, 2014 is reversed, and the matter is remanded for sentencing where the trial court will have the discretion to run Fisher's sentences concurrently if it so chooses.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

James Havey
Assistant Attorney General
Frankfort, Kentucky