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Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001936-MR

BOBBIE COLLINSWORTH

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN S. LAPE, JUDGE
ACTION NO. 15-CR-00654

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: COMBS, KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Bobbie Collinsworth appeals from the order on revocation of probation in Kenton Circuit Court case number 15-CR-00654 (the Kenton County case) on the basis that this sentence should have been ordered concurrent with her sentences in Campbell Circuit Court case numbers 16-CR-00457 and 16-CR-00458 (the Campbell County cases).

In February 2016, Collinsworth pled guilty in the Kenton County case to criminal possession of a forged instrument, second degree, a class D felony. In March 2016, the court entered a judgment of conviction and she was sentenced to three years of incarceration, probated for five years, and ordered to serve thirty days with no credit for time served.

While on probation, approximately five weeks after completing her thirty-day sanction, Collinsworth committed additional crimes in Campbell County, was arrested and remained in jail. On July 27, 2016, in case number 16-CR-00457, Collinsworth was convicted for possession of a controlled substance, heroin, and in case number 16-CR-00458, she was convicted for tampering with physical evidence and possession of a controlled substance, heroin.¹ These crimes were all Class D felonies. In each case, she was sentenced to serve one year of incarceration, for a total of two years.

On October 19, 2016, Collinsworth's probation officer filed an affidavit and a violation of supervision report in the Kenton County case based on Collinsworth's receiving the two new felony convictions in the Campbell County cases. Collinsworth's probation officer recommended that her probation be revoked. A bench warrant was issued for her arrest.

¹ We rely upon the probation revocation report and the representations made during the probation revocation hearing for the facts regarding the Campbell County cases, as we do not have the records for those cases.

Collinsworth's aggregate sentences as a nonviolent offender for the Campbell County cases qualified her for early consideration of parole pursuant to Kentucky Revised Statutes (KRS) 439.340(3)(a). After being incarcerated for approximately six months, Collinsworth was granted parole effective November 17, 2016, in her Campbell County cases. As part of her parole, she was ordered to complete substance abuse treatment and mental health treatment. Collinsworth continued to be held in custody pursuant to her Kenton County case.

At Collinsworth's revocation of probation hearing held on December 6, 2016, she stipulated to the probation officer's affidavit but explained there was no agreement on her disposition.

The circuit court asked Collinsworth's probation officer why it took so long to file for revocation of Collinsworth's probation after she was arrested on subsequent crimes and then convicted. The probation officer indicated that he inherited her case and it disappeared from his caseload after she was sentenced but reappeared when she was considered for parole. He also testified that it was in Collinsworth's best interest to have her probation revoked because if she later obtained parole on the Kenton County case, she would receive some credit while on parole, but none while on probation.

After the circuit court ruled Collinsworth's probation would be revoked, Collinsworth requested that she be sentenced concurrently with the

Campbell County cases. She argued the Commonwealth's delay in seeking probation revocation required her sentence in the Kenton County case to be ordered concurrent with her Campbell County cases pursuant to KRS 533.040(3). The Commonwealth requested that Collinsworth's sentence in the Kenton County case be ordered to be served consecutively to her sentences in the Campbell County cases. The circuit court stated it would make Collinsworth's sentence in the Kenton case consecutive to those in the Campbell cases, explaining it interpreted KRS 533.040(3) differently than Collinsworth.

In the written order revoking probation, entered on December 12, 2016, the circuit court found based on Collinsworth's stipulations that she violated her probation, she was a significant risk to the community and she could not be appropriately managed in the community. The circuit court ordered Collinsworth incarcerated for three years, with credit for time spent in custody. The written order was silent as to whether Collinsworth's sentence in the Kenton County case was to be concurrent or consecutive to that in the Campbell County cases.

Collinsworth argues that the circuit court erred in ordering her sentence in the Kenton County case be served consecutively to the sentences in the Campbell County cases. She argues that under KRS 533.040(3), the Kenton County case must be ordered to be served concurrently to the Campbell County

cases because her probation was neither revoked prior to her being granted parole, nor within ninety days of her new convictions.

The Commonwealth argues that KRS 533.040(3) does not apply and, instead, KRS 533.060(2) applies as interpreted in *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). Additionally, the Commonwealth argues that because the written judgment was silent, it must be interpreted to run consecutively by operation of law rather than through the court's judgment pursuant to KRS 532.110(2). Moreover, the Commonwealth argues that if the Department of Corrections (DOC) interprets Collinsworth's sentence in this manner and she believes the DOC is incorrect, her remedy is to file an administrative action.

KRS 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.

As explained by the 1974 Kentucky Crime Commission/LRC Commentary to this provision, KRS 533.040(3) was enacted for the following reason:

Subsection (3) is designed to eliminate a problem that could exist with probation or conditional discharge sentences which are followed by a subsequent conviction

for a separate offense. When this situation arises, authorities could wait until the defendant has served his prison sentence for the subsequent offense and then seek revocation of his prior sentence of probation or conditional discharge and reinstate his prior sentence of imprisonment. It is the purpose of this subsection . . . to prohibit such a practice unless the authorities act to revoke the prior sentence of probation or conditional discharge before the defendant has completed his imprisonment under the subsequent sentence. This provision would seem to be especially important in the event of a release of the defendant from prison on parole. Such a release contemplates a rehabilitation of the defendant or at least a chance to live a non-deviant existence. It also contemplates supervision of the defendant by the department of corrections. With such a release, a clean slate for the offender should serve a useful rehabilitative function.

KRS 533.060(2) provides in relevant part as follows:

When a person has been convicted of a felony and is committed to a correctional detention facility and . . . released by the court on probation . . . and is convicted or enters a plea of guilty to a felony committed while on . . . probation . . . the period of confinement for that felony shall not run concurrently with any other sentence.

We interpret these statutes as not conflicting because they do not both apply to Collinsworth's reimposed sentence on revocation of probation. KRS 533.040(3) applies to sentences that are probated and then either continue to be probated or revoked upon the commission of additional crimes and, therefore, applies to the first case sentenced, the Kenton County case. KRS 533.040(3) provides limitations on whether a sentence when reimposed following revocation

of probation can be consecutive or concurrent to a sentence imposed while the defendant was serving probation.

In contrast, KRS 533.060(2) applies to subsequent felonies committed while on probation. In *Peyton v. Commonwealth*, 253 S.W.3d 504, 511 (Ky. 2008), the Kentucky Supreme Court held that the phrase in KRS 533.060(2) “shall not run concurrently with any other sentence” means “any other sentence previously imposed.” This is consistent with *Brewer*, 922 S.W.2d at 381, which stated that KRS 533.060(2) “clearly and unambiguously requires that the appellant’s second sentence . . . not run concurrently with his first sentence[.]”²

Thus, it becomes quite clear in the context of KRS 533.060(2), that the language, “the period of confinement for that felony shall not run concurrently with any other sentence,” should be construed as meaning that subsequent felony offense(s) committed while on probation or parole may not be run concurrently with the sentence for which the individual is on probation or parole.

² We note that in *Brewer*, 922 S.W.2d at 382, the Kentucky Supreme Court adopted the Court of Appeals holding that “[t]he two statutes [KRS 533.040(3) and KRS 533.060(2)] clearly contradict if read in conjunction[.]” and resolved this perceived conflict by determining KRS 533.060(2) should control as the later enacted statute. We acknowledge that we have no authority to displace the Kentucky Supreme Court’s ruling that where KRS 533.040(3) and KRS 533.060(2) conflict, KRS 533.060(2) controls; however, in the case before us we determine that KRS 533.060(2) is inapplicable so there is no conflict between these statutes. In *Ware v. Commonwealth*, 326 S.W.3d 464, 467 (Ky.App. 2010), our Court criticized the *Brewer* opinion because its holding could not be reconciled to the facts before it insofar as it was ruling on an appeal from the revocation of probation which merely reinstated the defendant’s first sentence which the defendant received prior to being placed on probation, rather ruling on the second sentence which was imposed for a subsequent crime committed while the defendant was on probation.

Peyton, 253 S.W.3d at 511. The *Peyton* Court’s interpretation of KRS 533.060(2) is entirely consistent with how KRS 533.060(2) was previously interpreted in *Gavel v. Commonwealth*, 674 S.W.2d 953, 954 (Ky. 1984).³ See *Ware v. Commonwealth*, 326 S.W.3d 464, 467 (Ky.App. 2010) (interpreting KRS 533.060(2) based upon *Peyton*). Here, the subsequent felonies that could not be sentenced concurrently were the Campbell County cases.

In *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995), the Kentucky Supreme Court did not find any conflict between KRS 533.040(3) and KRS 533.060(2). In *Sutherland* the Court discussed that KRS 533.040(3) applied to a sentence reimposed upon revocation of probation and that the failure to timely revoke did not deprive the court of jurisdiction but did mandate concurrent sentencing. *Sutherland*, 910 S.W.2d at 236-37. It noted that pursuant to KRS 533.060(2) “probationers who commit *other crimes* are to be dealt with severely.” *Id.* at 237 (emphasis added). We believe this is further evidence that we are correct that these two statutes were meant to apply to different cases, the former to the first

³ We acknowledge that the Kentucky Supreme Court in *Brewer* limited the application of *Gavel* because it “involved the interplay between federal and state jurisdiction.” *Brewer*, 922 S.W.2d at 382. In *Gavel* the Kentucky Supreme Court explained that while KRS 533.060(2) applies to the second conviction, it cannot be used to force the federal government to sentence a defendant consecutively to a Kentucky sentence. *Gavel*, 674 S.W.2d at 954. However, the Court further explained that under KRS 533.040(3) a Kentucky court can sentence a defendant consecutively or concurrently to a federal sentence upon revocation of probation in the first conviction and imposition of a penitentiary sentence so long as there is compliance with the time limitations for consecutive sentencing under KRS 533.040(3). *Gavel*, 674 S.W.2d at 954.

conviction and sentence, and the later to a subsequent conviction and sentence imposed while the defendant was on probation.

Based on *Peyton*, there is no basis for applying KRS 533.060(2) to require that the reimposed sentence in Collinsworth's Kenton County case following revocation of probation be made consecutive to her Campbell County cases. KRS 533.060(2) is not applicable to the reimposed sentencing in Collinsworth's Kenton County case. Therefore, in her Kenton County case we must follow KRS 533.040(3), which requires concurrent sentencing under the undisputed facts before us that the revocation of Collinsworth's probation did not "take place prior to parole . . . or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first." While KRS 533.060(2) and *Brewer* did apply to Collinsworth's Campbell County cases, her sentences for those cases are not before us on appeal.

Pursuant to KRS 533.040(3), because the Department of Corrections knew of Collinsworth's subsequent Campbell County convictions more than ninety days prior to when her Kenton County case probation was revoked and her revocation took place after she was paroled on her Campbell County cases, her sentence on the Kenton County cases had to be imposed concurrently with the sentences on her Campbell County cases. *Sutherland*, 910 S.W.2d at 237.

It is important that we strictly interpret KRS 533.040(3) to further the rehabilitative purposes of probation and parole. While the delay in moving to revoke Collinsworth's probation may not have stemmed from any nefarious motives, such an action has long term consequences for her, and to wrongly attempt to shoehorn KRS 533.060(2) to apply and require that she serve consecutive sentences even after such a delay only compounds the problem. It is likely that if Collinsworth's probation had been promptly revoked in a timely manner that she could have been paroled for both the Kenton County and Campbell County cases simultaneously and begun receiving her drug treatment. However, even with our enforcement of KRS 533.040(3) to make her sentences concurrent, she may have stayed incarcerated for far longer than she should have and still be waiting for parole consideration. As the commentary for KRS 533.040(3) points out, waiting to revoke probation stifles the rehabilitative purposes of parole. We believe doing so is antithetical to the purposes of House Bill 463 and the policies favoring probation and parole for low-level non-violent offenders.

Accordingly, we reverse and remand the Kenton Circuit Court's order on revocation of probation for the court to impose concurrent sentencing.

COMBS, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

KRAMER, JUDGE, DISSENTING: The case of *Brewer v. Commonwealth*, 922 S.W.2d 3808 (Ky. 1996), as recently reaffirmed in *Commonwealth v. Love*, 334 S.W.3d 92 (Ky. 2011), squarely addresses the primary issue raised in this appeal. Accordingly, I respectfully dissent from the majority opinion because it deviates from these binding Supreme Court cases applying KRS 533.060(2) under similar circumstances and also deviates from prior cases from this Court applying that binding precedent. Although *Brewer* is clear on the issue, the Court in *Love*, 334 S.W.3d at 95, n. 11, further clarified that KRS 533.060 applies to cases such as the present one by noting that:

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.

This Court has previously applied KRS 533.060(2) in accord on several occasions, specifically quoting footnote 11 in *Love*, 334 S.W.3d at 95. *See McMichael v. Commonwealth*, No. 2011-CA-001758-MR, 2014 WL 29012 (Ky. App. Jan. 3, 2014); *Commonwealth v. Hines*, No. 2012-CA-00212-MR, 2014 WL 631689 (Ky. App. Feb. 14, 2014); *Pitney v. Commonwealth*, No. 2012-CA-

002043-MR, 2013 WL 6046073 (Ky. App. Nov. 15, 2013).⁴ There have been no other intervening binding cases that would interfere with the precedential impact of *Brewer* and *Love* over this case. In regard to this, the Court in *McMichael* stated that “our Supreme Court has held in definite terms that when a person serving probation or parole commits a felony (as did McMichael), KRS 533.060(2) shall control sentencing.” *McMichael*, No. 2011-CA-001758-MR, 2014 WL 29012 at *2. Thereafter, the Court in *McMichael* quoted footnote 11 from *Love*, and then noted that “[w]e are unaware of any legal authority which contradicts this holding. We are bound by the decisions of the Supreme Court. See Rule[s] of the Supreme Court of Kentucky (SCR) 1.030(8)(a).” *Id.* Nothing in the law has changed since the Court made these statements in *McMichael*. This Court is bound to apply the law as interpreted by the Supreme Court; consequently, *Brewer* and *Love* apply to Collinsworth’s case, mandating that the Court apply KRS 533.060(2). Accordingly, I dissent and would affirm the circuit court, as it reached the correct conclusion in this case.

⁴ I cite to these unpublished cases for the purposes of illustrating that this Court followed *Brewer* and *Love* in previous similar cases, applying KRS 533.060(2) to them. These cases were likely unpublished because they simply followed the well-defined law as set forth in Kentucky Supreme Court case law. Hence, there was no basis for publication for them. In the absence of a statutory change, the Supreme Court is the only body that can make changes to its prior case law.

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