

RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000688-MR

ERIC BADGETT

APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 16-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

ACREE, JUDGE: At issue is whether the Bourbon Circuit Court abused its discretion in ordering appellant Eric Badgett's criminal sentence to run consecutively to a prior federal sentence. We see no abuse and affirm.

Badgett was indicted on two counts of first-degree trafficking in a controlled substance (cocaine), a class D felony.¹ A subsequent indictment charged him with being a second-degree persistent felony offender (PFO). Badgett agreed to plead guilty to one count of first-degree trafficking and, in exchange, the Commonwealth agreed to dismiss the second trafficking count along with the PFO indictment. The Commonwealth recommended a sentence of two years' imprisonment. The plea agreement indicated that "parties to argue whether sentence shall run concurrent or consecutive to federal sentence." Badgett entered his guilty plea on February 9, 2017. The trial court delayed sentencing to allow for the preparation of a Presentence Investigation Report (PSI).

The trial court reconvened for sentencing on March 9, 2017. Badgett and the Commonwealth both acknowledged the trial court retained broad discretion to run a criminal sentence concurrently or consecutively with a federal sentence. Badgett requested a concurrent sentence in light of his perception, based on KRS 532.115 and KRS 533.040, that the Kentucky legislature intended for any state sentence to run concurrently with any federal sentence to shift the burden of incarceration from the state government to the federal government. The Commonwealth requested a consecutive sentence, noting Badgett had been indicted multiple times for trafficking cocaine, including the indictment before the

¹ Kentucky Revised Statute (KRS) 218A.1412.

trial court, and that Badgett's time in federal prison on a similar trafficking charge had failed to curb his criminal behavior.

The trial court sought clarification as to Badgett's federal sentence. Badgett stated he thought he had between eighteen and fifty-one months left on that sentence. The parties clarified that, to their understanding, Badgett had been convicted of trafficking cocaine or conspiracy to commit trafficking, was sentenced to a period of incarceration but subsequently released on conditional discharge, received a new criminal charge, had his conditional discharge revoked, and was now serving the remainder of his federal sentence.

The trial court noted that Badgett's PSI indicated a high risk/needs assessment, suggesting Badgett would likely reoffend if reformatory action was not taken. It also expressed concern that Badgett had already served time in federal custody on a similar drug trafficking charge, yet he engaged in the same criminal behavior upon his release. The trial court was not convinced that Badgett's time in federal custody served its intended purpose of reforming Badgett's behavior.

On March 10, 2017, the trial court entered a judgment and sentence on plea of guilty sentencing Badgett to two years' imprisonment, to run consecutively with his federal sentence. For Badgett, this meant a two-year imprisonment sentence, to be served after and in addition to any time he was currently serving on his federal sentence. Badgett appealed.

Badgett argues the trial court abused its discretion when it ordered that his criminal sentence in this case run consecutively with his federal sentence. While he readily admits Kentucky’s criminal code gives the trial court discretion to a run criminal sentence concurrently or consecutively, he argues, as he did before the trial court, that Kentucky’s sentencing scheme evidences a statutory preference for shifting the burden of incarceration away from the Commonwealth and, therefore, a preference for concurrent state and federal sentences.

Badgett also argues the trial court abused its discretion by running his state sentence consecutively to an uncertain federal sentence. He faults the trial court for failing to ascertain the length of the federal sentence prior to issuing its sentencing decision, noting Badgett could serve in excess of four years on his federal sentence, and then the Commonwealth’s two-year sentence, or it could be much shorter. We are not persuaded.

“Kentucky statutory law affords trial courts immense discretion in setting criminal penalties[,]” including whether a defendant should serve a sentence concurrently or consecutively. *Howard v. Commonwealth*, 496 S.W.3d 471, 475 (Ky. 2016); KRS 532.110; *McBride v. Commonwealth*, 432 S.W.2d 410, 411 (Ky. 1968) (“The question of whether sentences shall run consecutively or concurrently is a matter within the discretion of the trial court.”). We will only disturb the trial court’s sentencing decision if it abused that discretion. *Howard*,

496 S.W.3d at 475. “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).

Despite such broad discretion, trial courts must evaluate certain factors when exercising that discretion. *Howard*, 496 S.W.3d at 475. “For example, the trial court must consider the contents of the written Pre-Sentencing Investigation (PSI) Report and it must also consider the effect of a sentence on a defendant’s potential future criminal behavior.” *Id.*; KRS 532.050; KRS 532.007. Four overarching aims of sentencing, at least at the federal level, include: “just punishment, deterrence, protection of the public, and rehabilitation.” *Dean v. United States*, 137 S. Ct. 1170, 1175, 197 L. Ed. 2d 490 (2017). While Kentucky law does not *require* trial courts to consider these four factors in imposing a sentence, they are certainly informative and provide valuable guidance.

Furthermore, when the defendant has committed a felony offense, trial courts may, and should, consider sentences imposed in other jurisdictions, whether a federal sentence or a sentence of another state, when imposing a sentence for the felony offense in Kentucky. *See* KRS 532.115.

Badgett first argues Kentucky’s statutory sentencing scheme suggests a preference for running a state sentence concurrently with a federal sentence. He points to KRS 532.115 and KRS 533.040(3) in support of his position. A careful

reading of these statutes reveals quite the opposite: the default position in Kentucky is that a state sentence shall run *consecutively* with any federal sentence or sentence of another state, unless the trial judge specifically states otherwise.

KRS 532.115 provides:

The court in sentencing a person convicted of a felony, shall be authorized to run the sentence concurrent with any federal sentence received by that defendant for a federal crime and any sentence received by that defendant in another state for a felony offense. The time spent in federal custody and the time spent in custody in another state under the concurrent sentencing shall count as time spent in state custody; but the federal custody and custody in another state shall not include time spent on probation or parole or constraint incidental to release on bail. ***If the court does not specify that its sentence is to run concurrent with a specific federal sentence or sentence of another state, the sentence shall not run concurrent with any federal sentence or sentence of another state.***

(Emphasis added). The first sentence of KRS 532.115 affords the trial court broad discretion to run a state sentence concurrently with a federal sentence. More interestingly, however, is the last sentence. It makes *consecutive* sentences the default position. Unless the trial court specifically indicates that the state sentence is to run concurrently with a federal sentence, by default, the sentences shall run consecutively. A plain reading of KRS 532.115 undercuts Badgett's argument that Kentucky's statutory sentencing scheme indicates a preference for concurrent, rather than consecutive, sentences. If the Kentucky legislature had intended to

establish a blanket preference for concurrent sentencing, it would have established concurrent sentencing as the default rather than the exception. It did not.

Badgett also relies on KRS 533.040(3) to support his argument. That statute provides, in relevant part: “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.” *Id.* The statute has no bearing on this case because the trial court did *not* grant Badgett with a “sentence of probation or conditional discharge.” KRS 533.040(3) is simply irrelevant.

In any event, the statute does not establish a “preference” for concurrent sentencing, as suggested by Badgett. Instead, the Kentucky legislature enacted KRS 533.040(3) “to eliminate a problem that could exist with probation or conditional discharge sentences which are followed by a subsequent conviction for a separate offense.” *Id.*, 1974 Kentucky Crime Commission/LRC Commentary. It is designed to prohibit the practice of waiting “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.” *Id.* Again, we see nothing in KRS 533.040(3) establishing a preference for concurrent sentences.

Badgett also faults the trial court for running his sentence in this case consecutively with an unknown federal sentence. He argues the trial court had an obligation to ascertain the length of the federal sentence prior to issuing its decision to run the sentences consecutively. To do otherwise, Badgett asserts, constitutes a clear abuse of the trial court's discretion.

The trial court took steps to clarify Badgett's federal sentence. It asked for clarification at sentencing, and the parties responded. Badgett merely informed the trial court he had between eighteen and fifty-one months left on his federal sentence. It was Badgett's responsibility to ensure the trial court was provided with all necessary and vital information before it made its sentencing decision.

We know of no principle in Kentucky law requiring the trial court to ascertain every detail of a defendant's federal sentence prior to sentencing. The trial court in this case appropriately evaluated the factors described previously in exercising its discretion. It considered the contents of Badgett's PSI report, including Badgett's high risk/needs assessment, which suggested he was likely to commit more crime if punitive action was not taken.

The trial court also considered the effect of a sentence on Badgett's potential future criminal behavior. It concerned the trial court that Badgett had already served significant time in the federal system for trafficking cocaine and,

despite being afforded the leniency of conditional discharge, Badgett had not reformed, but engaged in the same criminal conduct upon his release from federal custody. *See, e.g., Howard*, 496 S.W.3d at 476 (“In making its sentencing decision, the trial court also pointed to Howard’s criminal history for the exact same offense. Howard had a previous felony conviction for this exact same charge—first-degree trafficking in a controlled substance.”).

In all, the trial court found a two-year sentence just punishment for Badgett’s crime; that a prior imprisonment sentence had failed to rehabilitate Badgett or curb his criminal behavior; that Badgett’s propensity for re-offending bolstered its determination that Badgett presented a danger to himself and the community; and that consecutive jail time was warranted to deter him from continuing to engage in similar criminal conduct, and to protect the public from those possible crimes. The trial court did not abuse its discretion in ordering Badgett’s two-year sentence in this case run consecutively with his federal sentence.

We affirm the Bourbon Circuit Court’s March 1, 2017 judgment and sentence on plea of guilty.

ALL CONCUR.

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