

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky

**FINAL**

2003-SC-0102-MR

DATE 9-16-04 En A. Grawitt, P.C.

CHARLES DANSBY

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS WINE, JUDGE  
96-CR-235, 96-CR-1507, 96-CR-2060,  
AND 96-CR-2572

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Charles Dansby, pled guilty in the Jefferson Circuit Court to four counts of trafficking in a controlled substance in the first degree, KRS 218A.1412 (Class C felony), two counts of possession of drug paraphernalia, KRS 218A.500 (Class A misdemeanor), and one count of receiving stolen property of \$300.00 or more, KRS 514.110(3) (Class D felony). Pursuant to a plea agreement, the trial court imposed a sentence of ten years imprisonment for each trafficking count to run consecutively for a total of forty years, and a term of one year for each of the two remaining convictions to run concurrently with the forty-year sentence. The sentences were probated for five years. Shortly thereafter, Appellant violated the terms of his probation, prompting the trial court to revoke his probation and order him to serve the initial forty-year sentence.

Appellant filed a motion pursuant to RCr 11.42 and CR 60.02, arguing that because KRS 533.040(1) requires probated sentences to run concurrently, the underlying sentences must run concurrently as well; thus, he asserted the trial court violated KRS 533.040(1) by requiring the four ten-year sentences to run consecutively rather than concurrently. Both the trial court and the Court of Appeals rejected Appellant's interpretation of KRS 533.040(1). Appellant's petition for discretionary review by this Court was denied.<sup>1</sup>

Challenging his sentence again, Appellant filed a motion pursuant to CR 60.02(e)-(f), raising the same argument he made in his RCr 11.42 motion. He additionally asserted that his forty-year sentence violated KRS 532.110(1)(c), which provides that consecutive indeterminate sentences, in aggregate, may not exceed the maximum term authorized by KRS 532.080 for the highest class crime for which any sentence was imposed. Because the highest class crime in this case was a Class C felony, the maximum aggregate sentence was a term of twenty years. KRS 532.080(6)(b); Young v. Commonwealth, Ky., 968 S.W.2d 670, 675 (1998). The trial court overruled his motion. However, the Court of Appeals reversed and vacated the sentence, instructing the trial court to re-sentence Appellant to terms that did not exceed a maximum aggregate sentence of twenty years.<sup>2</sup> As a result, the trial court re-

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<sup>1</sup> Although Appellant's sentence exceeded this Court's twenty-year jurisdictional requirement for matter of right appeals, Ky. Const. § 110(2)(b), jurisdiction was appropriate in the Court of Appeals because he was appealing the denial of post-conviction relief, not a judgment imposing a sentence. Williams v. Venters, Ky., 550 S.W.2d 547, 548 (1977).

<sup>2</sup> But see Myers v. Commonwealth, Ky., 42 S.W.3d 594, 597 (2001) (defendant can waive maximum aggregate sentence limitation contained in KRS 532.110(1)(c)). The Court of Appeals opinion reversing and remanding this case was rendered on October 4, 2002, more than twenty months after Myers.

sentenced Appellant to two consecutive ten-year terms, with the remaining sentences to run concurrently.

Appellant now appeals to this court as a matter of right, Ky. Const. § 110(2)(b), on the ground that his sentence violates KRS 533.040(1) because the trial judge re-imposed two of the originally probated ten-year terms to run consecutively, rather than concurrently. His counsel has submitted a brief, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), pointing out that this is the same issue that was raised and correctly decided by the Court of Appeals on Appellant's first appeal and requesting permission to withdraw. She served a copy of the brief on Appellant in July 2003 and Appellant has not provided this Court with any additional points or authority in support of his appeal. Id. at 744, 87 S.Ct. at 1400.

After having conducted a "full examination of all the proceedings" as required by Anders, we agree that the appeal is frivolous. The issue now raised by Appellant was, indeed, raised and decided by the Court of Appeals on his first appeal, and that decision is now "the law of the case." Williamson v. Commonwealth, Ky., 767 S.W.2d 323, 325-26 (1989). Nor was the Court of Appeals' decision on the first appeal "clearly and palpably erroneous" and substantially unjust. Gossett v. Commonwealth, Ky., 441 S.W.2d 117, 118 (1969). KRS 533.040 is titled "Calculation of periods of probation and conditional discharge," not "Calculation of sentence." KRS 533.040(1) states:

A period of probation or conditional discharge commences on the day it is imposed. Multiple periods, whether imposed at the same or different times, run concurrently.

No language in the statute makes any reference to whether the probated sentences ordered served after revocation of probation should run concurrently or consecutively; it only requires that periods of probation must run concurrently. Nor does legislative intent

support Appellant's interpretation. As stated in the 1974 Commentary to this provision, subsection (1) requires periods of probation to run concurrently because "if probation is to work, it will generally do so within a relatively short period of time, long before the maximum of 5 years permitted for felonies." KRS 533.040, cmt. (1974) (quoting drafters of proposed Federal Criminal Code). In other words, a court should be able to tell within a short time frame whether a criminal offender will rehabilitate or continue in a life of crime, obviating the need for consecutive, i.e., longer sentences of probation. This rationale, however, does not apply to a case where the court orders previously probated sentences to be served after a probation violation, because the offender, by recidivating, has already indicated unwillingness or inability to rehabilitate without incarceration.

The legislature has clearly addressed this issue in KRS 532.110(1), which provides:

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

- (a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term;
- (b) The aggregate of consecutive and determinate terms shall not exceed one (1) year; and
- (c) The aggregate of consecutive definite terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 . . . .

(Emphasis added.) This provision permits a trial court, within its discretion, to require sentences for multiple crimes to be served either consecutively or concurrently after a period of probation has been revoked.

Accordingly, the motion of Appellant's counsel to withdraw from the case is granted and the sentences imposed by the Jefferson Circuit Court are affirmed.

All concur.

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