

RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000317-MR

ROBERT W. MCKINNEY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CI-00485

COMMONWEALTH OF KENTUCKY,
KENTUCKY CORRECTIONS CABINET

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.
BUCKINGHAM, JUDGE. Robert W. McKinney, a prison inmate in
Muhlenberg County, appeals from an order of the Muhlenberg
Circuit Court dismissing his petition for declaration of rights.
We affirm.

McKinney was convicted of multiple felony theft by
deception charges under Indictment Nos. 88-CR-055 and 88-CR-103
in Barren County, Kentucky, on September 13, 1988; under
Indictment No. 88-CR-008 in Metcalfe County, Kentucky, on

September 15, 1988; and under Indictment No. 88-CR-061 in Bullitt County, Kentucky, on February 14, 1990. The sentences from Barren County were ordered to run concurrently with each other but consecutively with the sentences from Metcalfe and Bullitt counties, for a total sentence of eight years (1988/1990 sentence). McKinney began serving this sentence on September 12, 1988, and was paroled on January 29, 1991.

He subsequently committed additional crimes in Kentucky and Texas.¹ In November 1991, McKinney was arrested in Texas for forgery and charged under Indictment No. 613269. Thereafter, on December 19, 1991, McKinney's parole was revoked on his eight-year Kentucky sentence. He was finally sentenced in Texas on July 23, 1992, to ten years for forgery.

On May 19, 1993, McKinney entered a guilty plea to multiple theft by deception charges under Indictment Nos. 91-CR-1297, 91-CR-2457, 92-CR-0482, and 92-CR-1546 in Jefferson County, Kentucky. The court sentenced him, pursuant to a plea agreement with the Commonwealth, to five years on each indictment, enhanced to ten years due to persistent felony offender status (1993 sentence). The court ordered the sentences to run concurrently with each other and concurrently with the Texas sentence pursuant to the plea agreement. The

¹ The exact sequence of events is unclear from the record but is not pertinent to the resolution of this case.

sentencing order did not specifically state how this sentence was to run in relation to the 1988/1990 sentence. However, the order did state that "the sentence shall run pursuant to KRS 533.060, if applicable."

McKinney's parole was reinstated in November 1994 and revoked again in May 1997. In July 1997, by counsel, McKinney filed a motion for habeas corpus relief in the Jefferson Circuit Court, claiming the warrant issued on April 1, 1997, was invalid, in that he was not on parole at the time of the alleged parole violation. McKinney argued that he had served the Texas sentence and had, therefore, completed the ten-year Kentucky sentence. The Jefferson Circuit Court entered an order on August 14, 1997 (1997 order), stating that "if the Defendant has completed service of his sentence in the Texas case, then he has completed service of his sentence in this case and is entitled to be discharged." This order only referred to Indictment No. 92-CR-0482.² McKinney was paroled again in 1999, but his parole was later revoked.

On October 24, 2001, McKinney filed a petition for declaration of rights, claiming that he was entitled to be released on all of his Kentucky sentences at the expiration of his Texas sentence on November 4, 2001. The Commonwealth argued

² McKinney claims that his attorney mistakenly only listed 92-CR-0482 in his motion for habeas corpus relief and that, therefore, the court entered an order pertaining only to that indictment.

that, pursuant to KRS 533.060(2), when McKinney was sentenced in 1993, his 1993 convictions were required to run consecutively to his 1988/1990 sentence and, as such, the Corrections Cabinet had correctly calculated that McKinney had a total of 18 years to serve, with a current minimum expiration date of August 16, 2004.

The Muhlenberg Circuit Court entered an order dismissing McKinney's petition on January 22, 2002, finding that McKinney's due process rights had not been violated and that the Corrections Cabinet had "applied the applicable statute and the Judgment as written by the sentencing courts." On appeal, McKinney argues that he is being held beyond the term authorized by the order of commitment from the Jefferson Circuit Court and that he is entitled to be released from custody pursuant to KRS 197.035 and KRS 532.120.

In the order of judgment sentencing McKinney in 1993, the Jefferson Circuit Court specifically stated that KRS 533.060 was to apply, if applicable. KRS 533.060(2) was clearly applicable to McKinney. The statute states, in pertinent part, as follows:

(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.

KRS 533.060(2).

Pursuant to the statute, McKinney's 1993 Kentucky sentence was required to run consecutively with his 1988/1990 sentence because he was on parole from the 1988/1990 sentence when he committed the crimes. Thus, McKinney was required to serve a total of 18 years for his Kentucky convictions.³ McKinney argues that the 1997 order in response to his habeas corpus motion evidences the intent of the trial court that all of his Kentucky sentences were to run concurrently and, therefore, at the expiration of the Texas sentence, he would have completed the service of all his Kentucky sentences.

The 1997 order did not show an intent by the trial court that McKinney's 1988/1990 sentence run concurrently with his 1993 sentence. First, pursuant to KRS 533.060(2), the 1988/1990 sentence was required to run consecutively because McKinney was on parole when he committed the subsequent offenses. Further, the 1993 sentencing order specifically stated that KRS 533.060 was to apply, if applicable. We also

³ McKinney has presented no evidence that, as part of the 1993 plea agreement, the 1988/1990 sentence was to be run concurrently with the 1993 and Texas sentences. There is no reference to the 1988/1990 sentence in either the plea agreement or the judgment.

note that McKinney's motion for habeas corpus relief failed to discuss the 1988/1990 sentence, which was required to run consecutively to the 1993 sentence. The only argument made by McKinney was that he had served the Texas sentence and that, therefore, he was entitled to be released from prison on the 1993 sentence.⁴ Under the circumstances, we cannot say the trial court intended to bypass the mandatory provisions of KRS 533.060, requiring consecutive sentencing.

KRS 532.120(1)(b) states, "[i]f the sentences run consecutively, the maximum terms are added to arrive at an aggregate maximum term equal to the sum of all the maximum terms." As such, the aggregate of McKinney's Kentucky sentences was 18 years.

Merely because McKinney was paroled on the ten-year Texas sentence does not mean that he should be deemed to have served the ten-year 1993 Kentucky sentence. See Rodgers v. Wingo, Ky., 467 S.W.2d 369, 370 (1971). Furthermore, the ten-year sentences of Texas and Kentucky became part of the aggregate sentence of 18 years when combined with the eight-year 1988/1990 sentence. See KRS 532.120(1)(b). Therefore, while McKinney is entitled to receive credit for time served on the Texas sentence toward the service of the 18-year aggregate

⁴ McKinney had not actually finished serving the Texas sentence at the time he filed the motion for habeas corpus relief.

sentence, he was not entitled to automatic release due to satisfaction of the sentence.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert W. McKinney, *Pro Se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Rebecca Baylous
Frankfort, Kentucky