

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000919-MR

JAMES ANTHONY HITCHCOCK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
INDICTMENT NO. 02-CR-00132

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: James Anthony Hitchcock appeals from a final judgment and sentence of imprisonment entered March 19, 2002, and a subsequent order denying his motion to reconsider.

The sole issue on appeal is whether the circuit court has discretion to run a sentence of imprisonment for a felony

concurrently with an out-of-state probated sentence which is pending revocation.

Hitchcock was charged in an indictment with forgery in the second degree¹ and with being a persistent felony offender (PFO) in the second degree.² The charges stemmed from the alleged forgery of a \$50.00 check. On February 22, 2002, Hitchcock entered a guilty plea to the charges. In exchange, the Commonwealth recommended a one-year sentence on the forgery charge, enhanced to five years by virtue of the PFO charge.

The circuit court ordered a drug court assessment and presentence investigation (PSI) prior to sentencing. On March 15, 2002, a sentencing hearing was held. The PSI revealed that Hitchcock was on probation in Indiana at the time he committed the forgery. The circuit court denied Hitchcock's request for probation, ruling that because Hitchcock was on probation from a felony sentence in Indiana at the time he committed the forgery, he was ineligible for probation on the Kentucky sentence. Hitchcock then requested that the court run his sentence concurrently with the Indiana sentence. The court indicated that it was inclined to impose concurrent sentencing due to the nature of the Kentucky offense, but interpreted Kentucky Revised Statutes (KRS) 533.060(2) as precluding it from doing so. The

¹ Ky. Rev. Stat. (KRS) 516.030.

² KRS 532.080(2).

court then imposed the recommended sentence of five years and ordered that it run consecutively to the Indiana sentence.

Hitchcock moved for reconsideration and the circuit court conducted a hearing on April 5, 2002. At the hearing, the Commonwealth argued that KRS 533.060 was enacted in 1994, KRS 532.115 was enacted in 1992 so that any conflict should be reconciled in favor of KRS 533.060. Again, the court ruled that it was compelled by KRS 533.060 to impose consecutive sentences.

On appeal, Hitchcock argues that KRS 533.060(2), KRS 532.110(1) and KRS 532.115 are in conflict. The basis of his argument is that because KRS 532.110 and KRS 532.115 give the court discretion in concurrent and consecutive sentencing, 533.060(2) is necessarily in conflict.

KRS 532.110(1) provides in pertinent part, that:

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 sentence³

KRS 532.115, in relevant part, provides that:

³ Emphasis supplied.

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.⁴

that: KRS 533.060(2), in pertinent part, provides

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.⁵

Kentucky case law interpreting the apparent conflict between KRS 532.110(1) and KRS 533.060(2) states that KRS

⁴ Emphasis supplied.

⁵ Emphasis supplied.

533.060 takes precedence. In Riley v. Park,⁶ the Supreme Court affirmed previous interpretations that KRS 533.060 evidenced the clear intent of the General Assembly "to exact a further penalty upon those who, allowed to leave prison early, choose to violate their agreements and commit yet more crimes."⁷

Hitchcock argues that because KRS 532.110 was reenacted after KRS 533.060, it should control over both KRS 532.115 and KRS 533.060. This argument ignores this Court's holding in White v. Commonwealth⁸ where we determined that an identical argument lacked merit. In White, we reasoned that because the only change in KRS 532.110 in 1998 was a provision placing a 70-year limitation on the aggregate of consecutive indeterminate sentences, and because the Kentucky Constitution requires that a entire statute be reenacted, even though only a portion of the statute is amended, the reenactment and amendment of KRS 532.110(1) did not evidence an intent by the General Assembly to have the statute take priority over KRS 533.060(2).⁹ Further, KRS 532.110 was amended effective July 15, 2002. The legislature obviously took note of the apparent conflict and

⁶ Ky., 740 S.W.2d 934 (1987).

⁷ Id. at 935, citing Devore v. Commonwealth, Ky., 662 S.W.2d 829, 831 (1984).

⁸ Ky. App., 32 S.W.3d 83 (2000).

⁹ Id. at 86.

clarified the relationship between KRS 532.110 and KRS 533.060(2). KRS 532.110 (2), as amended, provides that:

If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve unless the sentence is required by subsection (3) of this section or KRS 533.060 to run consecutively.¹⁰

Hitchcock also argues that KRS 532.115 should control over KRS 533.060 as the statutes are in apparent conflict and KRS 532.115 more specifically deals with sentencing as it applies to out-of-state sentences. We find this argument convincing for several reasons.

There is no doubt that the statutes are in conflict. KRS 532.115 gives the circuit court discretion in sentencing, whereas KRS 533.060 specifically precludes the exercise of that discretion. In resolving the apparent conflict, we are required to give both statutes effect if possible.¹¹ Hitchcock argues that KRS 532.115 should take precedence because it is the more specific statute. Previous cases holding that KRS 533.060 controls over conflicting sentencing and probation statutes did

¹⁰ Emphasis supplied.

¹¹ Cawood v. Coleman, 294 Ky. 858, 172 S.W.2d 548 (1943).

so primarily on the basis that KRS 533.060 was the more specific statute.¹² However, here, both statutes are equally specific. While KRS 533.060 speaks to sentencing for individuals who commit a subsequent felony while on probation or parole, KRS 532.115 speaks to sentencing for individuals who commit felonies in Kentucky while under a sentence of another state. Obviously, Hitchcock falls under the specific conditions of each statute. He was on probation when he committed the subsequent felony and that probation was from an out-of-state sentence. In order to give both statutes effect, we must look at the legislative history and attempt to determine the intent of the General Assembly.

Two principles of statutory construction guide our inquiry. First, the General Assembly is presumed to be aware of the existing law at the time of enactment of a later statute.¹³ Second, "when a later-enacted and more specific statute conflicts with an earlier-enacted and more general statute, the subsequent and specific statute will control."¹⁴ KRS 532.115

¹² Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994); Williams v. Commonwealth, Ky. App., 829 S.W.2d 942 (1992); Commonwealth v. Martin, Ky. App. 777 S.W.2d 236 (1989).

¹³ Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., Ky., 690 S.W.2d 393, 395 (1985).

¹⁴Commonwealth v. Brasher, Ky. App., 842 S.W.2d 535, 536 (1992).

was enacted in 1978 and amended in 1992. The 1992 amendment gave the trial court discretion to run a defendant's Kentucky sentence concurrent with an out-of-state sentence. There can be no doubt that the General Assembly was aware of KRS 532.060 when it amended KRS 532.115, since KRS 532.060 was originally enacted in 1976 and the provision addressing concurrent and consecutive sentencing has remained unchanged since that time. We believe this evidences legislative intent to treat individuals under an out-of-state sentence differently than those under a Kentucky sentence. Further, KRS 532.115 necessarily considers that the subsequent felony would have been committed while a defendant was on parole or probation from a sentence from another state, otherwise there would be no need to address concurrent or consecutive sentencing in that context. Logically, if there is no previous sentence, there is nothing to which the court could attach the concurrent or consecutive sentence.

In the 2002 amendment to KRS 532.110, discussed previously, the General Assembly clearly provided that KRS 532.110 is subject to KRS 533.060(2). Had the legislature intended to make KRS 532.115 subject to the same provision, it could have done so. We interpret this silence in support of our view that the General Assembly intended to give the circuit court discretion in running a defendant's subsequent Kentucky

sentence consecutively to or concurrently with a previous sentence from another state.

For the foregoing reasons, we reverse the sentencing portion of the judgment and remand this case to Fayette Circuit Court for a new sentencing hearing. The balance of the judgment is affirmed.

ALL CONCUR.

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