

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001841-MR

CARLOS E. JOHNSON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN P. RYAN, JUDGE
INDICTMENT NO. 94-CR-000840

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

BAKER, JUDGE: Carlos E. Johnson ("Johnson") appeals from an order of the Jefferson Circuit Court denying his petition for declaratory judgment. Johnson filed his petition against Karen D. Cronen, Branch Manager of Offender Records for the Kentucky Department of Corrections¹ (the "Department"). We affirm.

In August 1993, Johnson was indicted in Warren County for first-degree assault. In February 1994, while released on

¹ Despite naming Cronen as the respondent in his petition for declaratory judgment, Johnson designated the Commonwealth as appellee in this appeal.

his own recognizance and awaiting trial in Warren County, Johnson committed a robbery in Jefferson County. In July 1994, a jury found Johnson guilty of the assault charge and Johnson was sentenced to ten years imprisonment. On October 21, 1994, Johnson pled guilty in Jefferson County to an amended charge of robbery in the second degree and was sentenced to five years imprisonment. The Jefferson Circuit Court, however, failed to state whether the five-year prison sentence would run consecutively or concurrently with the sentence imposed by the Warren Circuit Court.

On June 19, 2002, Johnson filed a pro se motion for declaratory judgment pursuant to Kentucky Revised Statute (KRS) Chapter 418 in Jefferson Circuit Court. In his motion, Johnson argued that, since the Jefferson Circuit Court's judgment was silent concerning whether his sentence was to run consecutively or concurrently with the Warren Circuit Court sentence, KRS 532.110(2) mandates that the sentences must be served concurrently. Johnson further requested an order requiring the Department of Corrections to recalculate his sentences as running concurrently. On August 14, 2002, the Jefferson Circuit Court denied Johnson's motion for declaratory relief.² This appeal follows.

² The Jefferson Circuit Court treated Johnson's motion as a motion to modify his sentence filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

On appeal, Johnson argues that the trial court erred in denying his motion for a declaratory judgment. In support of his argument, Johnson again asserts that KRS 532.110(2) requires his two prison sentences to be served concurrently since the Jefferson Circuit Court's judgment failed to dictate the manner in which the sentences should be served. Johnson also argues that the Department of Corrections acted improperly and without authority when it determined that the sentences should be served consecutively. We find these assertions to be without merit.

KRS 533.060(3) provides as follows:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

In this matter before us, it is undisputed that Johnson committed a robbery in Jefferson County while he was awaiting trial on the assault charge in Warren County. Further, it is undisputed that Johnson entered a plea of guilty to the robbery charge after being convicted of the Warren County assault charge. Finally, it is undisputed that the judgments entered by the trial court sentencing Johnson to five years in prison failed to dictate how that sentence should run in relation to his ten-year sentence.

Johnson relies on KRS 532.110(2) in support of his argument that these prison sentences must run concurrently. The version of KRS 532.110(2) that was in effect at the time Johnson submitted his motion provides:

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.

Our research reveals that the Kentucky Supreme Court has previously addressed this issue. In White v. Commonwealth, Ky., 5 S.W.3d 140, 142 (1999) the Supreme Court determined that KRS 533.060(3) prohibits a sentence imposed on a defendant for an offense committed while awaiting trial on other charges from being served concurrently with any sentence ordered as a result of the other charges. The Supreme Court's decision in White is consistent with Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984). In Devore, the Supreme Court held that the provisions contained within KRS 533.060(3) control over those contained in KRS 532.110. Moreover, this Court has further reaffirmed the primacy of KRS 533.060 over KRS 532.110. See White v. Commonwealth, Ky. App., 32 S.W.3d 83, 86 (2000). Accordingly, we believe the trial court properly dismissed Johnson's contention that his sentences should be served concurrently.

Johnson also asserts that the Department of Corrections exceeded its authority in determining the length of

time he must serve because such a determination is within the exclusive purview of the trial court. We reject this argument.

The Kentucky Supreme Court addressed this issue in Cardwell v. Commonwealth, Ky., 12 S.W.3d 672 (2000). In Cardwell, the defendant was involved in an automobile accident, killing one person and seriously injuring another. Id. at 673. Based upon tests measuring Cardwell's blood alcohol content to be .31, Cardwell was charged with murder and first-degree assault. Id. At the time of the accident, Cardwell had two separate charges for operating a motor vehicle under a revoked or a suspended license pending against him. Id. In December 1993, Cardwell entered guilty pleas to the two pending charges and received a prison sentence totaling five years. Id. In 1994, a jury convicted Cardwell of second-degree manslaughter and fourth-degree assault. Id. The trial court, in open court, sentenced Cardwell to ten years' imprisonment, but ordered this sentence to be served consecutively with his five-year sentence for a total of fifteen years' imprisonment. Id. Unfortunately, the trial court's written judgment was silent as to the manner in which the sentences were to run, causing the Department to calculate Cardwell's sentence at ten years in accordance with KRS 532.110(2). Id. at 674. Later, the trial court became aware of the error in its written judgment and entered an amended order reflecting the consecutive sentencing originally

imposed in open court. Id. The Department then adjusted Cardwell's records to show a fifteen-year prison sentence. Id.

On appeal, the Supreme Court recognized that the relevant question was whether the Department appropriately calculated Caldwell's sentences to run consecutively. In providing the answer to this question, the Court stated:

As Cardwell eventually pled guilty to these charges, straightforward application of the [KRS 533.060] mandates that Cardwell's sentences be run consecutively. In other words, the statute deprived the trial court of the discretion to run Cardwell's sentences concurrently. See Riley v. Parke, Ky., 740 S.W.2d 934, 935 (1987).

In Riley, as in the case at bar, the written judgment was silent as to whether the appellants' sentences were to be run concurrently or consecutively. Id. at 935. However, unlike the case at bar, the Corrections Cabinet set the sentences to run consecutively pursuant to the dictates of KRS 533.060. Id. The issue addressed on appeal was whether the Corrections Cabinet exceeded its authority in setting the appellants' sentences to run consecutively. Id. We reasoned that KRS 533.060 controls over KRS 532.110(2) . . .

On appeal, the appellants argued that the power to determine the length of their sentences belonged exclusively to the purview of the trial court. Id. at 936. We disagreed and held that the "application of KRS 533.060(2) is essentially administrative in nature, and is certainly properly included in the duties of the Corrections Cabinet." Id. Thus, under Riley, the statute controls over the written judgment.

Cardwell, 12 S.W.3d at 677-678.

Pursuant to the precedent established in Cardwell, Riley and the clear language of KRS 533.060(3), there is no question that the sentence Johnson received from the Jefferson Circuit Court in connection with a robbery committed while awaiting adjudication of the charges pending in Warren County must run consecutively with the sentence he received from the Warren Circuit Court. The law is clear that a judgment's "silence" concerning how sentences should run fails to change the Department's administrative calculation of a defendant's sentence as consecutive under KRS 533.060(3). Hence, the trial court properly denied Johnson's motion for declaratory judgment.

For the aforementioned reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carlos E. Johnson, pro se
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Natalie L. Lewellen
Assistant Attorney General
Frankfort, Kentucky