

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002589-MR

KEVIN J. LITTON

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NOS. 95-CR-00033 AND 95-CR-00210

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BUCKINGHAM, JUDGE: Kevin J. Litton appeals from order of the Nelson Circuit Court denying his motion to have his sentences run concurrently rather than consecutively. We affirm.

In Indictment No. 95-CR-00033 in the Nelson Circuit Court, Litton was charged with the crime of second-degree possession of a forged instrument. He pled guilty to the crime and was sentenced to two years in prison on July 5, 1996. The circuit court ordered that sentence to run concurrently with

sentences in two prior indictments, for a total sentence of seven years on the three indictments.

In Indictment No. 98-CR-00210 in the Nelson Circuit Court, Litton was charged with the crime of flagrant nonsupport. After entering into a plea agreement with the Commonwealth and entering a guilty plea, Litton was sentenced to five years in prison on October 6, 1999. Because this offense occurred while Litton was on parole from the prior offenses, KRS¹ 533.060(2) required that this sentence not be probated. Nevertheless, pursuant to Litton's plea agreement with the Commonwealth, the circuit court probated the five-year sentence for a five-year period on various conditions. On July 18, 2002, Litton's probation was revoked for violation of its conditions, and his five-year sentence was reinstated. Both this order and the prior judgment sentencing Litton to five years with probation were silent concerning whether the sentence would run concurrently or consecutively with the prior seven-year sentence.

Pursuant to KRS 533.060(2), the Corrections Cabinet ran the five-year sentence consecutively with the prior seven-year sentence for a total sentence of twelve years. On September 30, 2002, Litton filed a motion in Indictment No. 95-CR-00033(second-degree possession of a forged instrument - two-

¹ Kentucky Revised Statutes.

year sentence) and in Indictment No. 95-CR-00210 (flagrant nonsupport - five-year sentence) wherein he moved the court to run his sentences concurrently. In essence, Litton moved the court to run the five-year flagrant nonsupport sentence concurrently with the seven-year sentence already in place. On October 17, 2002, the circuit court entered an order denying the motions on the ground that it lacked jurisdiction over the cases since more than ten days had elapsed since the entry of the final judgments. This appeal by Litton in both cases followed.

Litton argues that during the sentencing phase on the flagrant nonsupport charge, the circuit judge told him that the Corrections Cabinet would automatically run the sentences concurrently and that if it did not, Litton should contact him so that an order could be entered directing that the sentences be served in that manner. He asserts that this proceeding took place on July 22, 2002. This was not the date Litton was initially sentenced to five years in prison for flagrant nonsupport. Rather, this was the date that his probation was revoked and his sentence reinstated.

Citing cases such as Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), overruled on other grounds by Morton v. Commonwealth, Ky., 817 S.W.2d 218, 222 (1991), Litton argues that the circuit court breached its promise to him that his sentences would run concurrently rather than consecutively.

Litton's argument is without merit for three reasons. First, Litton failed to provide this court with a videotape or transcript of the July 2002 hearing. Therefore, we are unable to ascertain from the record whether the judge did, in fact, represent to Litton that his sentence would run concurrently with the other sentence. In the absence of the portion of the record needed for our review of this issue, we must assume that the omitted record supports the decision of the circuit court. See Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985). Further, "[a] claim which is unsupported by the record cannot be considered on appellate review." Copley v. Commonwealth, Ky., 854 S.W.2d 748, 750 (1993).

Second, the mere fact that the order sentencing Litton to five years with probation and the order revoking his probation were silent concerning concurrent or consecutive sentencing is irrelevant. KRS 533.060(2) required that the sentence run consecutively with the prior sentence, and the Corrections Cabinet had the authority to run the sentence in that manner despite the silence on that issue in the judgment rendered by the circuit court. See Riley v. Parke, Ky., 740 S.W.2d 934, 935-36 (1987).

Third, since Litton alleges the circuit judge made the promise at the hearing on July 22, 2002, then such a promise could not have been made at the time Litton entered his plea or

was initially sentenced to five years in prison. The July 22, 2002, hearing was merely a probation revocation hearing. Regardless of any statements made by the court concerning concurrent sentencing at the probation revocation hearing, it is clear that Litton's probation was going to be revoked at any rate and that his five-year sentence was going to be reinstated. In other words, the fact that the court may have told Litton that his sentence would run concurrently with the prior seven-year sentence was irrelevant and not grounds for relief.

The orders of the Nelson Circuit Court are affirmed.

ALL CONCUR.

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