

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000475-MR

DENNIS PAUL ALVEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 79-CR-001477

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

GUIDUGLI, JUDGE. Dennis Paul Alvey (hereinafter "Alvey") appeals the opinion and order entered by the Jefferson Circuit Court on January 30, 2003, denying his CR 60.02(f) motion. We affirm.

The circuit court's order provides a succinct summary of the facts and the issue presented by Alvey's CR 60.02(f) motion as follows:

This matter comes before the Court on a motion brought by Dennis Paul Alvey, pursuant to CR 60.02(f), to amend his

thirty-year sentence in this case to run concurrently with the sentence he is serving under No. 156335-2.

BACKGROUND SUMMARY

In 1976, Alvey was convicted in No. 156335-2 and given a total of ten years to serve. In addition, he received a twenty-year sentence on a Robbery charge, but was placed on probation for a period of five years. After serving an undisclosed amount of time, he was paroled. On December 19, 1979, while on parole/probation, Alvey was indicted in this case (No. 79-CR-1477), on the charges of Robbery I, Possession of a Handgun by a Convicted Felon, and Persistent Felony Offender ("PFO") II.

On September 9, 1980, he entered a plea of guilty and was sentenced on October 3, 1980 to ten years on the charge of Robbery I, enhanced to thirty years by the PFO II, and one year on the Possession of a Handgun by a Convicted Felon, to run concurrent for a total of thirty year (sic). Alvey's parole/probation on the earlier 1976 convictions was subsequently revoked.

On January 13, 2003, Alvey filed a CR 60.02(f) motion seeking to have his thirty-year sentence run concurrently with the sentences in his prior convictions.

After reviewing the applicable statutes the Jefferson Circuit Court denied Alvey's motion finding Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984), to be controlling, and that concurrent sentences, as requested by Alvey, are statutorily prohibited. In Devore, the Kentucky Supreme Court addressed the apparent conflict between KRS 532.110(3) and KRS 533.060(2) and determined that KRS 533.060(2) controls

situations such as that presented by Alvey. Specifically, the Court held:

The issue we address on this appeal is whether the maximum sentence length set out in KRS 532.110(1)(c) is applicable when the defendant is on parole (or other forms of early release or probation) when he commits subsequent felonies under the aegis of KRS 533.060(2).

. . .

With respect to KRS 533.060(2), the General Assembly further addresses the problem of the felons who commit subsequent felonies while on parole, when such a circumstance occurs, two things (according to the statute) occur: (1) The defendant shall not (for the subsequent felony) be eligible for probation, shock probation or conditional discharge, and (2) The length of the persons sentence (again, for the subsequent felony conviction) shall not run concurrently with any other sentence. By obvious inference, the General Assembly has said that the prison sentence (for the second felony conviction) shall be run consecutively. The General Assembly has rather clearly shown its intention to provide stiff penalties for convicted and paroled felons who commit subsequent felonies while on parole. Parole is, of course, a very special privilege given to prisoners who have evidenced to the parole board, by their conduct and their verbiage, their reliability to have their sentence served out of prison and to comply with whatever condition the board may attach. The General Assembly obviously felt that those parolees who violate this trust by the commission of a felony shall be forced to suffer penalties. Viz-not being eligible for probation, etc., and not having their subsequent sentences served concurrently. To argue that the maximum sentence provision

of KRS 532.110(1)(c) is applicable to this subsequently enacted, purposeful statute simply is not correct. (Emphasis in original).

Devore, at 829-831.

On appeal Alvey continues to argue that KRS 532.110 is controlling and to find otherwise is contrary to statutory interpretation. He argues that to apply KRS 533.060(2) to his case would be to apply it retrospectively and thus in violation of his constitutional rights. We disagree. We believe the circuit court was correct in its determination that Devore is controlling. More recently, in White v. Commonwealth, Ky.App., 32 S.W.3d 83 (2000), this Court reaffirmed the principle that KRS 533.060 takes precedent over KRS 532.110 under facts similar to those presented herein. In White, the Court stated the following:

White argues on appeal that the trial court erred by failing to hold a hearing on his CR 60.02 motion. He further contends that KRS 532.110(1), which allows for concurrent sentences when multiple sentences of imprisonment are imposed, controls over KRS 533.060(2) because the former was recently amended. He relies on the general rule of statutory construction that the courts must presume that the Legislature intended to effect a change in the law by amending the statute [Sanders v. Pierce, Ky.App., 979 S.W.2d 457, 460 (1998)]. After reviewing the relevant case law and statutes, we conclude that White's argument lacks merit.

Although not clearly articulated, White effectively seeks a retrospective application of KRS 532.110(1). It is undisputed that at the time White was sentenced, the state of the law required the trial court to apply KRS 533.060(2), which prohibits a concurrent sentence for a felony offense committed while the defendant was on probation. In Commonwealth v. Hunt, [Ky.App., 619 S.W.2d 733 (1981)], the Court held that given the direct conflict between KRS 532.110(1) and KRS 533.060(2), the latter took precedence over the former because KRS 533.060(2) was enacted after KRS 532.110(1). [See also, Devore, supra; Riley v. Parke, Ky., 740 S.W.2d 934 (1987); Handley v. Commonwealth, Ky.App., 653 S.W.2d 965 (1983)].

. . .

Long-existing case law interpreting KRS 532.110 and KRS 533.060(2) has clearly established the primacy of the latter statute. The General Assembly has not amended either statute with clear language evidencing an intent to change or overrule the courts' interpretation of these statutes on that issue. White's argument that the re-enactment of KRS 532.110 in 1998 allows the trial court discretion to impose a concurrent sentence for an offense committed while the defendant was on probation in contravention of KRS 533.060(2) is without merit.

We believe, despite Alvey's impassioned arguments to the contrary, that both statutory and case law require that KRS 533.060(2) be applied to his case and thus, his arguments must fail. As such, the order of the Jefferson Circuit Court denying his CR 60.02(f) motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

Dennis P. Alvey
LaGrange, KY

BRIEF FOR APPELLEE:

A. B. Chandler
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, KY