

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000801-MR

BRYAN MACIAG

APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 98-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, McANULTY, AND MINTON JUDGES.

McANULTY, JUDGE: While on probation for a felony conviction in Wolfe County, Appellant, Bryan Maciag (Maciag), was convicted of one unrelated felony offense in Elliot County and another unrelated felony offense in Morgan County. Because Maciag was convicted of two felony offenses committed while on probation, under KRS 533.060(2), the Wolfe Circuit Court revoked Maciag's probation and sentenced him to a term of two years to be served consecutively with the sentences imposed in the Elliot and Morgan Circuit Courts. We must decide whether the reinstated sentence should run consecutively to or concurrently with the

other sentences Maciag is serving. Maciag argues that KRS 533.040(3) controls the disposition of his sentence and under KRS 533.040(3), his sentence should have been ordered to run concurrently with his other two sentences. We rely on Brewer v. Commonwealth, Ky., 922 S.W.2d 380 (1996), and hold that the trial court was correct in applying KRS 533.060(2) to the circumstances of this case. Thus, we affirm the trial court's judgment ordering Maciag's reinstated sentence to run consecutively to his other felony sentences.

On March 5, 1999, Maciag entered a plea of guilty in Wolfe Circuit Court to trafficking in a controlled substance, second degree, a felony. The trial court sentenced him to two years imprisonment, probated for five years. As a condition of Maciag's probation, he was not to commit any other offense. Three years after sentencing and while still on probation, Maciag was convicted of two felony counts of manufacturing methamphetamine -- one in the Morgan Circuit Court and a second in the Elliot Circuit Court. Maciag was sentenced on both counts on September 30, 2002.

On November 21, 2002, Maciag's probation officer filed a special supervision report in the Wolfe Circuit Court requesting that Maciag's probation be revoked because of his two felony convictions for offenses committed while on probation. The trial court held a probation revocation hearing on February

7, 2003. On that date, the trial court revoked Maciag's probation and sentenced him to two years imprisonment to run consecutively to the sentences Maciag was already serving.

Ten days after the trial court revoked Maciag's probation, Maciag filed a pro se CR 60.02 motion asking the court to amend his sentence to run concurrently with his other sentences. After hearing the matter, the trial court denied this motion and Maciag appealed.

Maciag claims that in July, 2002, after he entered a guilty plea to the Elliot Circuit Court charges, he mailed a handwritten letter to his probation officer. In this letter, Maciag informs the probation officer that he may go ahead and revoke his probation so that he can begin serving his sentence. Maciag argues that this letter brought grounds for revocation of his probation to the attention of the Department of Corrections. And under KRS 533.040(3) the trial court should have ordered his sentence post revocation to run concurrently with his other two sentences because his revocation did not occur within 90 days after the grounds for revocation came to the attention of the Department of Corrections. Maciag argues that KRS 533.060(2) controls if the probation is revoked within the 90-day limitation, but KRS 533.040(3) controls if the revocation is outside the 90-day limitation.

We address Maciag's substantive argument despite his lack of proof that the Department of Corrections was aware in July, 2002, of the grounds for revocation.

Maciag cites Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432 (1992) and Sutherland v. Commonwealth, Ky., 910 S.W.2d 235 (1995) in support of his argument. But Maciag disregards the holding of the Brewer case that specifically answers two questions left open in Sutherland: (1) do the sentencing mandates of KRS 533.060(2) and KRS 533.040(3) conflict; and (2) if they do conflict, which controls in sentencing a defendant who commits a felony while on probation when his probation is not revoked until 90 days after the Department of Corrections became aware of the grounds of revocation?

Brewer holds that the two statutory provisions do conflict. See id. at 382. And KRS 533.060(2) controls based on the rule of statutory construction that when applying irreconcilable statutes, the later statute controls. See id. at 381. And since KRS 533.060 was enacted in 1976, and KRS 533.040 was enacted in 1974, KRS 533.060 controls. See id. at 382. "[T]he General Assembly's clear intention in enacting KRS 533.060(2)" is "to provide stiff penalties in the form of consecutive sentences to those who, after having been awarded

parole or probation, violate that trust by the commission of subsequent felonies." Id.

For the reasons provided above, the trial court's judgment that Maciag's reinstated sentence be served consecutive to the felony sentences he is presently serving is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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