

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000481-MR

CHRISTOPHER COX

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NOS. 00-CR-00172 AND 01-CR-00166

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Appellant Christopher Cox (Cox), *pro se*, brings this appeal from an order of the Bell Circuit Court, entered February 13, 2004, summarily denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Because Cox pled guilty and all of the

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

issues he raised in his post-conviction motion could be determined as meritless from the face of the record, we affirm.

On August 21, 2001, on Bell County Indictment 00-CR-00172, Cox was sentenced to two concurrent five year terms of imprisonment, pursuant to a plea of guilty to first degree fleeing or evading police, a class D felony in violation of Kentucky Revised Statutes (KRS) 520.095; and third offense operating a motor vehicle while license is revoked or suspended for driving under the influence, a class D felony in violation of KRS 189A.090(2)(c). Cox was credited with ninety days in jail, and the sentences were probated for a period of five years, said probation conditioned on no violations of the law during the probationary period.

While on probation, on June 2, 2002, Cox was arrested in Knox County on multiple felony and misdemeanor charges, relating to traffic offenses, including attempted murder, wanton endangerment, theft and reckless driving. Based on the above charges in Knox County, and following a hearing, on February 26, 2003, the Bell Circuit Court entered an order revoking Cox's probation and ordering that Cox serve the balance of the concurrent five year sentences under Bell County Indictment 00-CR-00172.

One month later, on March 18, 2003, on Bell County Indictment 01-CR-00166, Cox was sentenced to seven years,

pursuant to a plea of guilty to an amended charge of second degree assault, a class C felony in violation of KRS 508.020. Important to this discussion is that this felony occurred on June 5, 2001, prior to imposition of the sentence of probation on 00-CR-00172. Pursuant to the terms of the plea, the circuit court further ordered the seven year sentence to run consecutively to the five year sentence imposed by the probation revocation.

On February 12, 2004, Cox filed an RCr 11.42 motion, requesting an evidentiary hearing and alleging that counsel that represented him on both charges was ineffective for failing to argue for concurrent sentences, resulting in involuntary guilty pleas on both charges; and for failing to argue that the probation revocation hearing was held too late, both arguments based on KRS 533.040(3). The circuit court summarily denied the motion and this appeal followed.

Cox's arguments are both based on the application of KRS 533.040(3).<sup>2</sup> Before us he argues that this statute precluded the subsequent seven year sentence on 01-CR-00166 running consecutive with the five year sentence revoked on 00-CR-00172,

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<sup>2</sup> A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation shall take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.

and additionally precluded the probation revocation on 00-CR-00172 as the revocation came more than ninety days following notice of the Knox County charges, and that counsel was ineffective in failing to bring this statute to the attention of the court.

KRS 533.040(3) does not apply. On Indictment 00-CR-00172, Cox was probated. During his probation he picked up charges in Knox County. Because of these charges his probation was revoked and he was sentenced to five years imprisonment. *After* the revocation, Cox pled guilty to Indictment 01-CR-00166, and was sentenced to seven years. Based on the terms of the plea agreement, the seven years ran consecutive to Indictment 00-CR-00172. KRS 533.040(3) does not apply because Cox was not yet subject to a term of imprisonment on Indictment 01-CR-00166 at the time his probation was revoked on Indictment 00-CR-00172.

KRS 533.060(3)<sup>3</sup> is the applicable statute herein. It provides:

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

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<sup>3</sup> The Attorney General's reliance on KRS 533.060(2) is misplaced as the assault in Indictment 01-CR-00166 was committed on June 5, 2001, *prior* to the imposition of the sentence of probation in Indictment 00-CR-00172. As applied to this case, KRS 533.060(2) requires *commission* of the second felony while on probation for the first felony.

the offense for which the person is awaiting trial.

Cox was indicted for multiple traffic offenses occurring on April 5, 2000 (Indictment 00-CR-00172). On June 5, 2001, while awaiting trial on those offenses, he committed an assault (Indictment 01-CR-00166). One month later, on July 1, 2001, Cox pled guilty to the first indictment (00-CR-00712) and was probated for five years. On June 1, 2002, almost a year later while still on probation, Cox was charged with multiple offenses in Knox County. Based on these charges, on February 26, 2003, the probation on 00-CR-00172 was revoked. One month later, on March 17, 2003, Cox pled guilty to the assault (01-CR-00166) and this sentence was run consecutively to the revoked sentence.<sup>4</sup> See Brewer v. Commonwealth, 922 S.W.2d 380 (Ky. 1996), in which an argument similar to Cox's which relied on KRS 533.040(3) was denied based on the clear provision of KRS 533.060(2) and which prevailed as the later enacted statute. Although KRS 533.060(3) is the applicable statute herein, as it relates to the commission of the subsequent offense while awaiting trial, instead of KRS 533.060(2), which relates to the commission of the subsequent offense while on probation, the analysis still holds.

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<sup>4</sup> The record on appeal also contains Cox's signature on the Commonwealth's Offer which specifies that the seven years is to run consecutively to Indictment 00-CR-00172, and the colloquy indicates that Cox was aware of the consecutive nature of the sentences.

The standard of review on appeal in an RCr 11.42 motion where the trial court has denied the request for post-conviction relief without an evidentiary hearing is whether the motion states grounds for relief that could not be conclusively resolved from the face of the record. Baze v. Commonwealth, 23 S.W.3d 619 (Ky. 2000). As Cox's arguments can be resolved by reference to the court records, we hold that the circuit court committed no error in refusing to set aside Cox's conviction, pursuant to RCr 11.42, without holding an evidentiary hearing.

For the foregoing reasons, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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