

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000487-MR

VIRGIL L. BOWLING

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
INDICTMENT NO. 01-CR-00440

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: On November 8, 2001, Bowling was indicted by a Campbell County grand jury for First Degree Promoting Contraband by smuggling marijuana into a detention center on August 30, 2001. At the time Bowling allegedly committed this offense, he was awaiting trial in Campbell County on indictments of Criminal Possession of a Forged Instrument in the Second Degree and felony Theft by Unlawful Taking.

¹ 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 KRS 21.580.

On October 16, 2001, Bowling was sentenced to concurrent probated five-year sentences on the criminal possession and felony theft counts. On February 21, 2002, Bowling entered a guilty plea to the contraband charge in return for a recommendation of a probated five-year sentence. On April 11, 2002, the trial court accepted that recommendation and granted the probated sentence.

On June 23, 2003, based upon numerous violations of his probation terms, the trial court ordered that Bowling's probation be revoked and that he serve his five-year sentence for his conviction of promoting contraband. On December 31, 2003, Bowling filed a Motion to Amend Judgment Pursuant to CR 60.02(e). The basis for this motion was the fact that Bowling discovered that he was serving ten years: five years for his criminal possession and felony theft convictions plus five additional years for his contraband conviction. Bowling's contention was that he entered into an agreement when pleading guilty to these charges that all of his sentences would run concurrently for a total of five years. In support of his motion, Bowling appended the affidavit that his probation officer had filed with the Commonwealth's motion to revoke probation. In that affidavit, the probation officer apparently wrote that each of Bowling's sentences were concurrent. The

trial court denied Bowling's motion in an order dated February 16, 2004. This appeal followed.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." White v. Commonwealth, 32 S.W.3d 83, 86 (Ky.App. 2000) (citing Brown v. Commonwealth, 932 S.W.2d 359, 361 (Ky. 1996)).

Bowling's general contention on appeal is that all of his sentences should run concurrently pursuant to KRS 532.110, including the sentence for the contraband offense he committed while awaiting trial, and that running the sentences consecutively constitutes an inappropriate alteration of the trial court's judgment. He acknowledges that the judgment entered on the contraband offense is silent as to how it would run with respect to the other sentences, but he argues that his sentences were running concurrently while they were probated. We note that there is nothing from the record before this Court, with the exception of the parole officer's affidavit, that supports Bowling's contention or otherwise speaks to this particular issue.

With this said, we believe that the law as to this matter is clear and agree with the Commonwealth that KRS 533.060(3), not KRS 532.110, is specifically applicable here. KRS 533.060(3) reads: "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." Accordingly, KRS 533.060(3) expressly prohibits Bowling's sentence for the contraband offense, which was committed while he was awaiting trial, from running concurrently with his other sentences. The statute gives trial courts no discretion as to this decision, and there is nothing within the plea offer made by the Commonwealth to Bowling or his entered guilty plea subsequent to that offer that suggests that all sentences are to run concurrently. Moreover, as indicated above and as Bowling acknowledges, there is nothing within the trial court's judgment to suggest that it intended or understood all sentences to run concurrently. Accordingly, we cannot say that running Bowling's contraband sentence consecutively to his other sentences is inappropriate. Indeed, it is mandated by statutory law.

We further note that this Court has previously held that KRS 533.060(3)'s explicit language mandating stricter sentencing for offenses committed while released on bail or otherwise awaiting trial takes precedence over KRS 532.110(1) and 532.110(2), which allow a trial court discretion in the imposition of multiple sentences. See, e.g., Commonwealth v.

Martin, 777 S.W.2d 236, 237-38 (Ky.App. 1989) (citations omitted); Handley v. Commonwealth, 653 S.W.2d 165, 166 (Ky.App. 1983). Accordingly, we must reject Bowling's arguments as there appears to have been no abuse of discretion on the part of the trial court.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Virgil L. Bowling
Pineville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

James Havey
Assistant Attorney General
Frankfort, Kentucky