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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002272-MR

DAVID INGRAM

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 02-CR-00293

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

VANMETER, JUDGE: David Ingram appeals pro se from an order of the Boone Circuit Court denying his motion seeking RCr 11.42 relief. For the reasons stated hereafter, we affirm.

In August 2002, the Boone Circuit Court entered a judgment sentencing Ingram to five years' imprisonment, probated for five years, after he pled guilty to a felony theft charge.

In May 2003, a warrant was issued for Ingram's arrest based on

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his violation of probation, including the fact that a felony charge had been filed against him in Ohio. Ingram was returned to Kentucky from Ohio in December 2003, after he served time for the Ohio felony, and a revocation hearing was scheduled. In February 2004, the Boone Circuit Court revoked Ingram's probation.

Ingram subsequently filed a motion seeking RCr 11.42 relief. In essence he claimed that his probation should be reinstated, or that his revoked sentence should be run concurrently with the Ohio sentence, because his probation was not revoked within ninety days of the time when the Department of Corrections became aware of the probation violation. The court denied Ingram's motion, and this appeal followed.

KRS 533.020(1) permits a trial court to revoke a sentence of probation "at any time prior to" its expiration or termination if the defendant commits an additional offense. KRS 533.060(2) provides in part:

When a person has been convicted of a felony and . . . has been released by the court on probation, . . . and is convicted or enters a plea of guilty to a felony committed while on . . . probation, . . . the period of confinement for that felony shall not run concurrently with any other sentence.

(Emphasis added.) However, KRS 533.040(3) provides:

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.

(Emphasis added.)

Ingram relies on KRS 533.040(3) in asserting that the trial court lacked authority to run his sentences consecutively when it revoked his probation more than ninety days after the date when the Department of Corrections became aware of the grounds for revocation. However, the Kentucky Supreme Court previously has concluded otherwise.

In *Sutherland v. Commonwealth*,² the supreme court examined KRS 533.040(3) "within the context of the statutory scheme as a whole, as it relates to probation and parole."³ The court rejected the defense argument that the trial court could not revoke probation after ninety days, concluding instead that once the ninety-day period expired, any revoked term of probation simply must run concurrently with, rather than consecutively to, imprisonment for any other offense.

² 910 S.W.2d 235 (Ky. 1995).

³ *Id.* at 236.

Some six months later, in *Brewer v. Commonwealth*,⁴ the supreme court revisited *Sutherland* and concluded that if a defendant commits a felony while on parole, the apparent conflict between KRS 533.040 and KRS 533.060 must be resolved in favor of applying the later-enacted KRS 533.060. Thus, if as here a probated sentence for a felony is revoked after the commission of another felony, KRS 533.060 requires the sentences for the two felonies to run consecutively even if the probation revocation occurs after the passage of the ninety-day period described in KRS 533.040.

It follows, therefore, that the trial court did not err by failing either to run the sentences concurrently, to give Ingram credit for the time spent in jail in Ohio, or to reinstate Ingram's probation. Further, having reviewed the record, we are not persuaded that Ingram is entitled to relief relating to any of the remaining issues raised in his motion seeking RCr 11.42 relief, as his probation officer's alleged failure to comply with applicable policies and procedures, even if true, was irrelevant to the revocation of Ingram's probation due to the commission of another felony offense. Hence, Ingram was not entitled to the appointment of counsel or to an evidentiary hearing, and the trial court did not err by failing to grant relief below.

⁴ 922 S.W.2d 380 (Ky. 1996).

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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