

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001200-MR

WILLIAM CASHWELL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PARTICIA M. SUMME, JUDGE
ACTION NO. 00-CR-00570

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: William Cashwell appeals from an order of the Kenton Circuit Court of May 2, 2005, revoking his probation and ordering that he serve his prison sentence consecutively as to two concurrent sentences that had been imposed by the Campbell Circuit Court. Cashwell argues that under the terms of

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

KRS² 533.040(3), the Kenton and Campbell sentences must be served concurrently because the revocation of his probation occurred more than ninety (90) days after the Department of Corrections became aware of the grounds for revocation. Cashwell is correct in arguing that the revocation of probation by the Kenton Circuit Court was indeed untimely for the purposes of KRS 533.040(3). However, that statute does not apply because a previous order of the Campbell Circuit Court had already directed that the sentences were to be served consecutively as mandated under KRS 533.060(3). Accordingly, we affirm the order of the Kenton Circuit Court.

On October 20, 2000, Cashwell was indicted in Kenton County on a charge of first-degree fleeing or evading police, a class D felony. Approximately two months later, on December 9, 2000, Cashwell committed the offenses of fraudulent use of a credit card and of being a persistent felony offender in the second degree in Campbell County.

On November 7, 2001, Cashwell entered a plea of guilty in Kenton Circuit Court to the charge of fleeing or evading police for which he received a five-year sentence -- probated for five years. On April 1, 2002, he entered a guilty plea in Campbell Circuit Court on charges of fraudulent use of a credit card and PFO second. Ten days later, again in Campbell Circuit

² Kentucky Revised Statutes.

Court, he received another five-year probated sentence after entering a plea of guilty to flagrant non-support and to being a persistent felony offender in the second degree. The Campbell Circuit Court ordered that these two sentences run concurrently with each other but consecutively as to the Kenton County sentence.

On June 25, 2002, Cashwell was reported by a probation officer as having violated the terms of his probation in Kenton County. He was arrested on June 29, 2002. On July 17, 2002, he was placed on active supervision and was given additional terms of probation.

On October 22, 2002, another affidavit was filed by Cashwell's probation officer in the Kenton Circuit Court stating that Cashwell had again violated the terms of his probation. A warrant for his arrest was issued on the same day. The Commonwealth filed a motion to revoke probation on December 18, 2002. As of a hearing date of January 13, 2003, the Kenton Circuit Court was informed that Cashwell had not yet been picked up.

On November 12, 2003, Cashwell appeared before the Campbell Circuit Court for a probation revocation hearing for fraudulent use of credit. His probation was revoked, and he was sentenced to serve five years on both of his earlier offenses --

to run concurrently with one another but consecutively to the Kenton Circuit Court sentence.

Nearly 120 days later, on March 15, 2004, the Green River Correctional Complex sent a Detainer Acknowledgment notifying the Kenton Circuit Court that Cashwell was in custody at the complex. On November 8, 2004, Cashwell filed a motion in Kenton Circuit Court seeking concurrent sentencing pursuant to KRS 533.040(3). After conducting a hearing, the Kenton Circuit Court revoked his probation and ordered that his sentences were to run consecutively on the grounds that KRS 533.060(3) was the controlling statute. This appeal followed.

Cashwell argues that the Kenton Circuit Court erred in ruling that his Kenton County sentence must run consecutively to his Campbell County sentences because his probation in Kenton County was not revoked within ninety days as required by KRS 533.040(3), which 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.

The Commonwealth argues correctly that the original order of the Campbell Circuit Court (entered in April 2002) specifically mandated that his Campbell County sentences were to run consecutively to his previous (then probated) Kenton County sentence.

KRS 533.060(3) provides as follows:

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. (Emphasis added.)

There is no dispute that Cashwell committed the offense of fraudulent use of a credit card in Campbell County **after** his indictment in Kenton County on the fleeing and evading charge. He committed that offense while awaiting trial for another offense. Thus, KRS 533.060(3) immediately came into play, and the Campbell Circuit Court properly ordered that the sentences had to run consecutively.

Our case law requires consecutive running of these sentences.

There is no doubt that, with regard to KRS 533.060(3), it was the General Assembly's intent 'to punish persons who were convicted of committing a subsequent crime or crimes while awaiting trial more severely by **eliminating the possibility of concurrent sentences.**'

Cosby v. Commonwealth, 147 S.W.3d 56, 59 (Ky. 2004) citing Moore v. Commonwealth, 990 S.W.2d 618, 621 (Ky. 1999)(emphasis added).

The precise issue of which statute should take precedence in case of a conflict was addressed by the Kentucky Supreme Court in Brewer v. Commonwealth, 922 S.W.2d 380 (1996), with the Court ruling that since KRS 533.060(2) was the more recently enacted of the two statutes, it should prevail over KRS 533.040(3). See also Adams v. Commonwealth, 46 S.W.3d 572, 576 (Ky.App. 2000), citing Brewer.

The order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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