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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000020-MR

BENJAMIN S. MEADE — APPELLANT

v. — APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,[1] SPECIAL JUDGE.

WINE, JUDGE: Benjamin S. Meade, *pro se*, appeals from an order of the Bell Circuit Court that denied his motion to modify his sentence made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Specifically, Appellant contends that the trial court improperly directed a subsequent sentence to run consecutively, rather than concurrently, with a previously probated sentence.

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[1] Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Appellant has no small history in the criminal justice system throughout this Commonwealth. The basis for this motion arises from the Appellant's conviction in Bell County on August 4, 2003, on a charge of theft by unlawful taking over three-hundred dollars under Kentucky Revised Statutes (KRS) 514.030. The second count of the indictment charging Appellant as a persistent felony offender in the first degree was dismissed pursuant to Appellant's guilty plea in Bell County. At the time of this conviction, Appellant had already been probated for a sentence on a charge of possession of a controlled substance from 2000. Appellant violated the terms of his probation committing subsequent felonies in a span from 2000 to 2003 in Bell County, Fayette County, and Pulaski County along with misdemeanors in Laurel County. At the sentencing hearing on August 4, 2003, Appellant made no request for probation, and a direct appeal was never filed in this matter. On November 28, 2005, two years after his conviction, Appellant tendered a motion for relief pursuant to CR 60.02. On December 1, 2005, the Bell Circuit Court entered an order denying Appellant's 60.02 relief. Appellant's motion to proceed on appeal in *forma pauperis* was granted December 22, 2005, and this appeal follows. We now affirm.

After his sentencing on August 4, 2003, Appellant had ten days after the final judgment to file a motion to alter or

amend the judgment, or to vacate the judgment and enter a new one pursuant to RCr 59.05. The rules are clear that review of a criminal case by the Court of Appeals may be obtained by statutory or direct appeal or by motion under the civil rules to set aside the judgment on grounds of newly-discovered evidence, fraud, or other unusual situations which may arise after the expiration of the normal period of appeal. *Meredith v. Commonwealth*, 296 S.W.2d 705 (Ky. 1956).

A motion for relief from judgment under CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies in criminal cases, but is available only to raise issues which cannot be raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). The relief afforded an appellant under this rule is properly brought for "any other reason of an extraordinary nature justifying relief," and may be invoked only under the most unusual circumstances. *Brown v. Commonwealth*, 932 S.W.2d 359 (Ky. 1996); *Harris v. Commonwealth*, 296 S.W.2d 700 (Ky. 1956). Such relief should not be granted pursuant to CR 60.02(f) unless new evidence, if presented originally, would have, with reasonable certainty, changed the result. *Id.* The rule further states that a motion under 60.02(f) "shall be made within a reasonable time." In *Duncan v. Commonwealth*, 614 S.W.2d 701 (Ky.App. 1980), the Court articulated that the defendant's failure to timely file the

60.02 motion for relief not only estopped him from seeking such relief, but that the defendant had also failed to demonstrate the extraordinary nature of a request for relief under the rule. *Id.*

In this case, Appellant has simply disregarded the very rules that are in place to protect his right to seek relief. Appellant did not request probation at the sentencing hearing. Appellant did not file a CR 59.05 motion to amend, alter, or vacate the judgment, and he did not directly appeal. Instead, Appellant has brought a motion for extraordinary relief under CR 60.02 nearly two years after he was sentenced in Bell County. There is no new discovery to justify the extraordinary and unusual circumstances for relief under this rule.

The relevant statute in Appellant's case is KRS 533.060(2) and (3) which clearly and unambiguously states the law in the Commonwealth relative to Appellant's case:

> When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

> 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).

The Courts of this Commonwealth have clearly applied this statute to similar circumstances mandating a consecutive sentence. In *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996), Brewer appealed from a judgment of the Warren Circuit Court revoking his probation after he was indicted by a grand jury in Barren County. *Id.* Brewer conceded that his probation should be revoked but asserted that the Warren Circuit Court was required to run the reinstated sentence concurrently with the sentence imposed by the Barren Circuit Court. *Id.* at 381. The court found the statute "clearly and unambiguously requires that the appellant's second sentence . . . not run concurrently with his first sentence . . . ." *Id.* (Emphasis added).

Appellant contends that the silence of the circuit court regarding whether the sentences would run consecutively or concurrently mandates that the sentences run concurrently in accordance with the statute. The Court has clearly articulated that the sentencing limitations of KRS 532.110 are simply inapplicable to felons who met the requirements of KRS 532.060,

and KRS 533.060 is the controlling statute. *Devore v. Commonwealth*, 662 S.W.2d 829 (Ky. 1984). The Court has further stated that "[t]he application of KRS 533.060 is essentially administrative in nature, and is certainly properly included in the duties of the Corrections Cabinet." *Riley v. Parke*, 740 S.W.2d 934, 936 (Ky. 1987). Under the *Riley* decision, the statute controls over the written judgment. *Cardwell v. Commonwealth*, 12 S.W.3d 672, 677-78 (Ky. 2000).

Appellant further contends that a statutory conflict exists among KRS 533.060 and KRS 532.110 that should afford him the relief he requests through CR 60.02. This argument is neither persuasive to the Court nor supported by the law. The apparent statutory conflict was addressed in *Riley*, 740 S.W.2d at 935, where the Court stated that despite the seemingly facial conflict among the statutes, KRS 533.060 was held to control over KRS 521.110. In *White v. Commonwealth*, 5 S.W.3d 140, 142 (Ky. 1999), the Court expressly prohibited two felony sentences from running concurrently and reiterated the firmly-established law that KRS 533.060 controls over KRS 532.110. *See Devore,* 662 S.W.2d at 829.

Prior cases have noted that the 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. *Brewer*, 922 S.W.2d at 382. *See Riley*, 740 S.W.2d at 934; *Devore*, 662 S.W.2d at 829. The series of subsequent offenses committed by the Appellant while he was already on probation only demonstrate to this Court an indifference to the privilege of probation, and continuous disregard for the laws of the Commonwealth.

For the foregoing reasons, we affirm the denial of relief under CR 60.02.

JOHNSON, JUDGE, CONCURS.

MILLER, SPECIAL JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Benjamin S. Meade, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky