

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001267-MR

SAMUEL RAY PRATHER¹

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL III, JUDGE
ACTION NO. 01-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Samuel Ray Prather II has appealed from the order of the Mason Circuit Court denying his motion for additional jail time credit for the six months he served for his misdemeanor convictions while his felony charge was diverted. Because Prather had already served the six-month sentence by the time he was convicted and sentenced on the felony charge, we hold that he was not entitled to a credit. Therefore, we affirm.

¹ The appellant is listed as Samuel Ray Prather II, throughout the circuit court's record, but the Notice of Appeal lists his name as Samuel Ray Prather.

On August 26, 2001, Prather was arrested in Maysville, Kentucky, and was subsequently indicted by the Mason County grand jury on charges of possession of marijuana, resisting arrest, carrying a concealed deadly weapon, third-degree assault, and possession of a firearm while committing a violation under KRS Chapter 218 (possession of marijuana). The first three charges are classified as Class A Misdemeanors, while the last two are Class D Felonies. Prather and the Commonwealth entered into a plea agreement, which was accepted by the circuit court. Pursuant to the terms of the plea agreement, the Commonwealth amended the assault charge from third-degree to fourth-degree, making it a Class A Misdemeanor. Prather pled guilty to the misdemeanor charges and was sentenced to concurrent six-month jail terms. Prather also pled guilty to the felony possession of a firearm charge, which was subject to a separate pretrial diversion agreement pursuant to KRS 533.260, *et. seq.* By the terms of the pretrial diversion agreement, the circuit court imposed on Prather a five-year period of monthly supervised diversion, for which any violation would require him to serve two years in prison. At the guilty plea hearing, the circuit court made it very clear that Prather would be required to serve two years in prison if he did not successfully complete the diversion period. The circuit court imposed several conditions on Prather, including that Probation and Parole would conduct home visits, that he would not have access to a handgun, that he obey all rules and regulations Probation and Parole imposed, that he would not commit another offense during the diversion period, and that he would remain free of drugs and alcohol and be subject to random drug testing.

Prather began service of his six-month jail term on his misdemeanor convictions at the Mason County Jail on January 18, 2002, and was subsequently released on July 4, 2002. On May 1, 2003, the circuit court issued a bench warrant based upon the Special Supervision Report of Probation and Parole Officer Keith Fetters. In his April 10, 2003, report, Fetters stated that Prather had failed to report to him since October 17, 2002, failed to pay the supervision fee, failed to report arrests in November and December 2002 within 72 hours, used alcohol, and absconded from supervision. Following a hearing, the circuit court revoked Prather's pretrial diversion on June 26, 2003, citing his failure to report the two arrests or to report to his parole officer from October 2002 through June 13, 2003. On June 26, 2003, the circuit court entered a judgment revoking Prather's pre-trial diversion, adjudging him guilty of the felony possession of a firearm charge, and sentencing him to a two-year sentence of imprisonment, probated for five years. The Order of Probation/Conditional Discharge, entered July 25, 2003, imposed several conditions on Prather, including that he not commit another offense and that he pay court costs as well as the previously imposed \$500 fine at a rate of \$50 per month.

The circuit court issued several bench warrants during the ensuing years due to Prather's failure to pay the costs and fines, all of which were apparently resolved. However, in April 2005, the circuit court issued a bench warrant based upon Prather's multiple parole violations. These violations included his failure to report to his Probation and Parole officer as directed and being found in possession of cocaine and a loaded

handgun. Prather was not arrested on the bench warrant until June 10, 2005, and was immediately released on a partially secured bond. Finally, the circuit court issued another bench warrant on September 6, 2005, based upon additional parole violations. Prather had been arrested in April by Maysville police on drug and firearm charges, and had missed his ordered appointment with his Probation and Parole officer.

Following a probation revocation hearing, the circuit court entered an order on September 21, 2005, setting aside the Order of Probation and ordering Prather to serve a two-year term of imprisonment, with no days credited. However, by an order entered March 1, 2006, pursuant to a memorandum from Fetters, the circuit court credited Prather with 16 days of jail credit for time he had been in custody. On May 22, 2006, Prather moved the circuit court to correct the amount of jail time credited to him to include the time he served in the Mason County Detention Center from January 18 through July 4, 2002, when he served the six-month sentence on the misdemeanor conviction. The circuit court denied Prather's motion on June 14, 2006:

The defendant was granted pre-trial diversion for five years on a Class D Felony Charge on January 18, 2002. At the same time, defendant was convicted and sentenced to serve six months on misdemeanor charges. After serving the misdemeanor time, defendant violated the terms of his diversion in July, 2003 and was sentenced to two years, which sentence was immediately probated. The probation was revoked in September, 2005. Defendant seeks jail-time credit for the six months served while his felony charges were diverted. KRS 532.110(1)(a) requires that time served under felony sentences and misdemeanor sentences must be served concurrently. And it is upon this basis that defendant bases his claim.

Nevertheless, he had not been sentenced under the pre-trial felony diversion until after he had completed the service of his misdemeanor sentence. Therefore, he is not entitled to credit for the six months he served.

IT IS THEREFORE ORDERED AND ADJUDGED by the court that the motion of the defendant be, and hereby is, overruled.

It is from this order that Prather has taken the present appeal.

In support of his appeal, Prather argues that he was entitled to a six-month credit based upon the plain language of KRS 532.110(1)(a), in that he was charged in the same indictment with the misdemeanors and the felony and was sentenced on all of the charges on the same day. Therefore, he submits that the misdemeanor time he served was subsumed within the felony time. On the other hand, the Commonwealth asserts that Prather waived the terms of KRS 532.110 when he entered his guilty plea, in which he agreed to the benefit of a separate diversion agreement of the felony charge. Furthermore, the Commonwealth points out that Prather was not sentenced to serve the prison sentence until after he violated the terms of his diversion and probation.

Our review of this case turns on a question of law. Hence, we shall review the issue before us *de novo*. *Western Ky. Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky.App. 2001).

The General Assembly addressed the issue of concurrent and consecutive terms of imprisonment in KRS 532.110:

(1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional

discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term[.]

A definite, or determinate, sentence is defined as “[a] sentence for a fixed length of time rather than for an unspecified duration.” Black's Law Dictionary (8th ed. 2004). In Kentucky, a sentence for a misdemeanor is a definite term, as it must be fixed within listed maximum limitations. KRS 532.090. An indeterminate sentence is defined as “[a] sentence of an unspecified duration, such as one for a term of 10 to 20 years.” A second definition is listed as “[a] maximum prison term that the parole board can reduce, through statutory authorization, after the inmate has served the minimum time required by law.” Black's Law Dictionary (8th ed. 2004). In Kentucky, a sentence for a felony is considered to be an indeterminate sentence, as the maximum term is to be fixed within the listed limits, but is subject to modification by the trial judge. KRS 532.060(1).

Commentary to KRS 532.110 provides guidance as to the exceptions to the right of the trial judge to order consecutive sentences, and specifically addresses the exception Prather raises:

The first exception requires that an indeterminate sentence and a definite sentence run concurrently. This means that service of sentence for a felony satisfies the services of sentence for a misdemeanor. The reasoning behind this exception is as follows: because of the nature of available facilities for imprisonment of misdemeanants, the sole objective of such a sanction is deterrence. On the other hand, imprisonment of felons has as its principal objective the

rehabilitation of offenders. When an offender is both a convicted felon and a convicted misdemeanor, the objective of rehabilitation should be paramount and would likely be frustrated if an offender, after service of his indeterminate term of imprisonment, could be then incarcerated under circumstances having no rehabilitative potential. An additional reason for this exception is the disadvantage that would accompany a change of imprisonment facilities.

Prather relies upon statutory construction to argue that the misdemeanor time he served was subsumed within his felony time. The Commonwealth argues, instead, that Prather waived application of KRS 532.110(1)(a) by entering his guilty plea and agreeing that the felony charge would be diverted. In support, the Commonwealth relies upon *Myers v. Commonwealth*, 42 S.W.3d 594, 597 (Ky. 2001), in which the Supreme Court held that “a defendant may validly waive the maximum aggregate sentence limitation in KRS 532.110(1)(c) that otherwise would operate to his benefit.” However, Prather aptly pointed out that Myers specifically waived the application of the statute in the written plea agreement, while he did not. Therefore, we agree with Prather that he did not waive application of KRS 532.110(1)(a).

Nevertheless, we hold that the sentencing protections afforded by KRS 532.110(1)(a) do not apply to Prather in this specific case. When Prather was serving his six-month jail term for the misdemeanor convictions, he had not yet been convicted of the felony possession of a handgun charge. Rather, that charge had been diverted. By the terms of the Pretrial Diversion Program, a defendant must enter either an *Alford* plea or plead guilty as a condition of pretrial diversion. KRS 533.250(1)(f). Upon the successful completion of the pretrial diversion agreement, “the charges against the

defendant shall be listed as 'dismissed-diverted' and shall not constitute a criminal conviction.” KRS 533.258(1). Based upon the statutory language, a conviction and sentence would not attach to the guilty plea unless the defendant violated the terms of the diversion agreement.

In the present case, Prather had served out the six-month misdemeanor sentence years before he was ever convicted of the felony charge and sentenced first to probation and then later to a term of imprisonment for this felony conviction. By the plain language of KRS 532.110(1)(a), the General Assembly provided that a misdemeanor sentence would be subsumed by the service of a felony sentence, but did not provide for the opposite result. The Commentary to KRS 532.110 makes it clear that when a defendant is convicted of both a felony and a misdemeanor, the paramount objective is rehabilitation, which is not the objective of the sanction for a misdemeanor. Therefore, the rehabilitative purpose of Prather's felony sentence would be cut short if he were to be credited for the time he spent in the detention center, and the objective of the statute would thus be thwarted. Because Prather was not actually incarcerated for the felony conviction until after he had served out the misdemeanor sentence, the six months cannot be credited against his felony sentence. For these reasons, the provisions of KRS 532.110(1)(a) do not apply to Prather, and the circuit court properly denied his motion for a six-month credit to his two-year felony sentence.

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

ALL CONCUR.

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