

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000211-MR

JAMES POWELL

APPELLANT

v.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: James Powell appeals from an order of the McLean Circuit Court denying his CR 60.02 motion for relief from a prior order revoking his probation and reinstating a five-year prison sentence. Powell asserts that his probation was revoked in violation of Kentucky Revised Statutes (KRS) 533.040(3) because it occurred over 90 days after the motion to revoke was filed. We affirm.

¹ Senior Judge David C. Buckingham 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 July 24, 2002, the McLean Circuit Court sentenced Powell to five years in prison on each of two Class D felony charges (criminal facilitation to manufacture methamphetamine and possession of anhydrous ammonia in an unapproved container). The court ordered the sentences to run concurrently. On September 30, 2002, the court ordered Powell to be released on shock probation for a five-year period. On October 21, 2002, the court entered a supplemental order setting forth the conditions of Powell's probation.

On November 15, 2004, Powell's probation officer filed an affidavit stating that Powell had violated the terms of his probation by using marijuana and methamphetamine. The court issued a bench warrant for Powell's arrest, and Powell was arrested on December 8, 2004. On December 13, 2004, the Commonwealth filed a motion to revoke Powell's probation.

On December 20, 2004, Powell came before the court with an attorney, and the court was advised that he and the Commonwealth had reached an agreement whereby his probation would not be revoked but that he would serve an additional 60 days in jail and the prior terms of his probation would remain in effect. The court entered an order to that effect on January 5, 2005.

On March 30, 2005, the Commonwealth filed another motion to revoke Powell's probation. The motion stated that on February 21, 2005, Powell had been sentenced to 15 years in prison for manufacturing methamphetamine, trafficking in a controlled substance, possession of drug paraphernalia, and possession of marijuana. The court held a probation revocation hearing on April 11, 2005, and it entered an order on April 13, 2005, revoking Powell's probation because he had violated its terms by

committing another offense while on probation. Although the record does not indicate, it is safe to assume that the prison authorities are running this five-year sentence consecutively with the 15-year sentence Powell was given on February 21, 2005. *See* KRS 533.040(3). No appeal was taken from the court's order.

On November 30, 2006, Powell filed a motion to vacate the order revoking his probation. As grounds for the motion, Powell cited KRS 533.040(3), which required that “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 court denied Powell's motion, and his appeal herein followed.

Powell argues on appeal that his probation was wrongly revoked because KRS 533.040(3) was violated in that the motion to revoke his probation was filed on December 13, 2004, and the hearing and revocation did not take place until April 11, 2005, 119 days later. He contends that this violated the 90-day rule of the statute and that his probation should either be reinstated or ordered to be run concurrently with other sentences he is serving.

We reject Powell's argument for two reasons. First, Powell could have sought relief by directly appealing from the order revoking his probation, and he may not now seek relief by way of a CR 60.02 motion. CR 60.02 is for relief that is not available by way of direct appeal or by RCr 11.42 motion. *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Second, Powell's argument is not factually correct. He states that the motion to revoke was filed on December 13, 2004, and that the hearing and revocation of

his probation occurred on April 11, 2005. Powell overlooks the fact that the motion filed on December 13, 2004, was disposed of by the order of January 5, 2005, not revoking his probation but only ordering him to serve an additional 60 days in jail for the violation.

The second motion to revoke was filed on March 30, 2005, and it stated new grounds for revocation that had arisen since the January order. The hearing on that motion was held and Powell's probation revoked on April 11, 2005, less than two weeks later. Therefore, there was clearly no violation of the 90-day rule of KRS 533.040(3).

The order of the McLean Circuit Court is affirmed.

ALL CONCUR.

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