

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001209-MR

CURTIS LEE BROWN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 02-CR-000787

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Curtis Lee Brown brings this *pro se* appeal from a March 29, 2007, Opinion and Order of the Jefferson Circuit Court denying his Ky. R. Civ. P. (CR) 60.02 motion to set aside his sentence. We affirm.

On December 13, 2004, appellant entered a guilty plea to twenty-two counts of theft by deception over \$300.00, four counts of criminal possession of a forged instrument, possession of a controlled substance, three counts of criminal attempt, theft

by deception over \$300.00, five counts of theft by deception over \$300.00, possession of drug paraphernalia, and for being a first-degree persistent felony offender. By judgment entered on December 29, 2004, appellant was ultimately sentenced to a total of twenty-years' imprisonment, and the sentence was probated for a period of five years.¹ While on probation, on January 17, 2006, appellant was indicted upon the offenses of second-degree escape and receiving stolen property over \$300.00. He ultimately pleaded guilty to the charges and was sentenced to a total of four-years' imprisonment on March 16, 2006.

Subsequently, on April 18, 2006, the Commonwealth filed a motion to revoke appellant's probation because of his guilty plea and sentence upon second-degree escape and receiving stolen property. Thereafter, by order entered June 6, 2006, the circuit court entered an order revoking appellant's probation and ordered all sentences to run consecutively.

On December 5, 2006, appellant filed the instant CR 60.02 motion to vacate the circuit court's order revoking his probation. Appellant argued that revocation did not occur within the ninety-day time limit of Kentucky Revised Statutes (KRS) 533.040(3) and thus, his sentences should run concurrently. In support thereof, appellant cited to *Myers v. Commonwealth*, 836 S.W.2d 431 (Ky.App. 1992).² By order entered March 29, 2007, the circuit court denied appellant's CR 60.02 motion. This appeal follows.

¹ While on probation, appellant was also serving a sentence of imprisonment upon an unrelated charge at a halfway house.

² *Myers v. Commonwealth*, 836 S.W.2d 431 (Ky.App. 1992) was overruled on other grounds by *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995).

Appellant contends the circuit court committed error by denying his CR 60.02 motion to vacate the circuit court's June 6, 2006, order revoking probation. For the reasons hereinafter elucidated, we disagree.

It is well-established that relief under CR 60.02 is an extraordinary remedy, and appellant must sufficiently demonstrate entitlement thereto. *Greene v. Com.*, 309 S.W.2d 178 (Ky. 1958); *Gross v. Com.*, 648 S.W.2d 853 (Ky.1983). In denying appellant's CR 60.02 motion, the circuit court rendered a succinct and well-reasoned opinion:

KRS 533.040(3) provides as follows:

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 Defendant argues that, pursuant to KRS 533.040(3), the Court must run his sentences concurrently because the revocation of his probation occurred more than ninety (90) days after the grounds for the revocation came to the attention of the Department of Corrections. [Appellant] relies on *Myers v. Commonwealth*, 836 S.W.2d 431 (Ky.App. 1992)[overruled on other grounds by *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky.1995)] in support of his position. The Court finds that *Myers* does not support [appellant's] position.

The *Myers* court specifically found that the Department of Corrections may treat the mere allegation of a new offense as grounds for revocation or it may, in its discretion, wait for the conviction of a new offense. In the

case before this Court, [appellant] pled [sic] guilty to new charges on February 6, 2006. On March 14, 2006[,] [appellant] was sentenced under that plea. The revocation hearing occurred on June 6, 2006[,] which was less than 90 days after his final sentencing on the new charges. The Court finds that [appellant's] Motion should be denied. (Footnotes omitted.)

We agree with the circuit court's analysis.³ As appellant's probation was revoked within ninety days of appellant's final sentencing upon the charges supporting revocation, we conclude that KRS 533.040(3) was not violated and that the circuit court properly denied appellant's CR 60.02 motion.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Curtis Lee Brown, *Pro Se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky

³ In his brief, appellant additionally alleges that in Action No. 06-CR-000234 an arrest warrant and detainer were “issued” in December 2005. Thus, appellant argues the ninety-day time limit of Kentucky Revised Statutes 533.040(3) was triggered in December 2005. Appellant, however, failed to cite to the record. Ky. R. Civ. P. 76.12. Additionally, appellant did not make this argument before the circuit court; therefore, it is unpreserved for our review. *See Fischer v. Fischer*, 197 S.W.3d 98 (Ky. 2006).