

RENDERED: September 18, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

No. 1997-CA-002245-MR

KEVIN NOBLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 96-CR-1934

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*\*

BEFORE: ABRAMSON, BUCKINGHAM, and COMBS, Judges.

ABRAMSON, JUDGE: Kevin Noble (Noble) brings this pro se appeal from an order of Jefferson Circuit Court entered on August 18, 1997, denying his motion for jail-time credit brought pursuant to Kentucky Revised Statute (KRS) 532.120(3). After review of the record, we affirm.

In November 1995, Noble was serving a one-year jail sentence on two misdemeanor offenses at River City Corrections in Louisville, Kentucky. While on work release, Noble failed to return to the jail facility, which resulted in his being charged

with and later indicted on second-degree escape in Case No. 96-CR-1752. In July 1996, the police arrested Noble on the second-degree escape charge. In August 1996, the Jefferson County Grand Jury indicted Noble in Case No. 96-CR-1934 on five felony counts of theft by failure to make required disposition of property over \$300.00 (KRS 514.070) related to his failure to perform roofing work after obtaining payment for the work. In September 1996, Noble pled guilty to the five counts of theft by failure to make required disposition pursuant to a plea agreement with the Commonwealth. Under the agreement, the Commonwealth recommended a sentence of two years on each count to run concurrently with each other for a total of two years, but this sentence was to run consecutively to a one-year sentence Noble received on the second-degree escape charge in Case No. 96-CR-1752. In October 1996, the trial court sentenced Noble consistent with the Commonwealth's recommendation to two years to run consecutive to the one-year escape sentence.<sup>1</sup>

At the sentencing hearing, the trial court indicated that Noble would be entitled to receive jail-time credit pursuant to KRS 532.120 as calculated by the Division of Probation and Parole. Upon entering prison, the Department of Corrections credited Noble with two days' jail-time, one day on each of the two convictions in Case Nos. 96-CR-1752 and 96-CR-1934, based on

---

<sup>1</sup>The judgment was later amended to reflect the dismissal of one count of the theft offenses because Noble had already pled guilty to the offense as amended to a misdemeanor in district court.

the report of Probation and Parole Officer Karen Adamczak. In January 1997, Noble filed a "Motion for Clarification of Sentence" seeking 129 days of jail-time credit. The trial judge ordered the Department of Corrections to review Noble's record and file a written report on the calculation of the jail-time credit due Noble. In response, a Corrections Department records custodian submitted documents to the court on the Department's sentence calculation (Resident Record Card) and Adamczak's custody time credit form. These documents credited Noble with two days' jail-time on the two felony convictions. The Commonwealth also filed a response to the motion and included a letter from Adamczak to the prosecutor explaining her calculation. On April 1, 1997, the trial judge summarily denied the motion.

On August 14, 1997, Noble filed a motion for reconsideration of his jail-time credit. Noble again requested an award of 129 days of jail-time credit. In this motion, Noble contested the grounds for the probation and parole officer's calculation. The trial judge noted Noble's prior motion and his failure to appeal from the court's order denying the first motion, and then denied the motion for reconsideration. This appeal followed.

As an initial matter, Noble appears to be procedurally barred from raising the issue of his jail-time credit. He failed to appeal the April 1997 order denying his motion and the August 1997 motion for reconsideration was untimely. See Commonwealth

v. Newsome, Ky., 296 S.W.2d 703, 705 (1956) (motion for reconsideration of order is considered equivalent to CR 59.05 motion and must be filed within ten days). Consequently, Noble has voluntarily waived any right to raise the exact same issue again in a subsequent motion. Once the trial court's April 1997 denial of the motion for jail-time on the merits became final, it was binding as to the same parties under the doctrine of res judicata. See generally Barnett v. Commonwealth, Ky., 348 S.W.2d 834 (1961).

Nevertheless, Noble's substantive complaint has no merit. Noble contends that he is entitled to jail-time credit from the date of his arrest in June 1996 until his sentencing in October 1996. He argues that this period should be credited toward his prison sentence on the felony conviction because the district court had issued a \$250,000.00 cash bond prior to referring the theft charges to the grand jury. Noble maintains that the award of jail-time credit is mandatory under KRS 532.120(3). See, e.g., Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977); Bartrug v. Commonwealth, Ky. App., 582 S.W.2d 61 (1979).

KRS 532.120(3) provides as follows:

Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of

the sentence shall be considered for all purposes as time served in prison.

(Emphasis added.)

The time Noble served in jail between June and October 1996 was not "as a result of the charge that culminated in the sentence" in Case No. 96-CR-1934 involving the felony theft offenses. When Noble was arrested after improperly leaving River City Corrections, he still had 238 days to serve on his misdemeanor conviction. Noble was not credited on his felony sentence because he was serving out the remainder of his misdemeanor sentence of the felony indictments. Thus, he was not being held in jail solely on the felony charges or due to his inability to make bond on the theft charges.

In addition, Noble's reliance on KRS 532.120(5) and Bailey v. Commonwealth, Ky. App., 598 S.W.2d 472 (1980) is misplaced. KRS 532.120(5) states:

If a person serving a sentence of imprisonment escapes from custody, the escape shall interrupt the sentence. The interruption shall continue until the person is returned to the institution from which he escaped or to an institution administered by the Department of Corrections. Time spent in actual custody prior to return under this subsection shall be credited against the sentence if custody rested solely on an arrest or surrender for the escape itself.

In Bailey v. Commonwealth, supra, the appellant had escaped from a state prison facility and was arrested on an escape warrant the next day. Bailey was indicted subsequently for the offense of second-degree escape. He spent 72 days in

custody in a local jail following his arrest before he was returned to a state prison facility to complete service of his original sentence. The court held that under KRS 532.120(5) and 532.120(3), the 72 days should be credited against the sentence on the second-degree escape offense, rather than the sentence of the offense that he was serving when he escaped. The court's decision was based on the fact that "the 72 days spent at the Metro Detention Center was the result of the indictment for the second-degree escape. . ." Id. at 473.

Similarly, the Commentary to KRS 532.120 explains the purpose of Subsection 5.

Subsection (5) established a standard to govern the calculation of terms of imprisonment following an escape. Generally, the escape interrupts the sentence until the offender is back in the institution from which he escaped or another institution selected by the department of corrections. The last part of the subsection seeks to provide credit to the offender for time spent in custody prior to his return to the institution. This part applies only if that custody resulted *solely* because of the escape. If another offense was committed during the period of absence and this led to the defendant's arrest, no credit is given on the balance of his unserved term.

In the case at bar, the record reveals that there were numerous charges pending against Noble at the time of his arrest. As stated above, Noble was not being held in custody at the jail solely because of the escape or theft indictments. Unlike Bailey, Noble was actually returned to the same jurisdictional

facility upon arrest and remained there until his transfer to a state corrections facility to begin serving his felony sentences.

The facts in Martin v. Commonwealth, Ky. App., 957 S.W.2d 262 (1997) are very similar to those in the case at bar. While Martin was serving a misdemeanor sentence under the home incarceration program in Jefferson County, he made an unauthorized departure from his home. He was arrested and returned to the custody of Jefferson County Corrections six days later. Martin was indicted for and pled guilty to second-degree escape, and received a one year prison sentence. The trial court denied Martin's motion for jail-time credit on his felony sentence for the period of time he spent in jail unable to make bond between his arrest and sentencing. Martin relied on Bailey and KRS 532.120(5). In affirming the denial of jail-time credit, this Court distinguished Bailey and noted that Martin was returned to the custody of the same jurisdictional entity, Jefferson County Corrections.

Since Martin received credit for the time awaiting sentencing against the underlying misdemeanor sentence, he was not entitled to credit against his one-year escape sentence. In fact, since KRS 532.110(4) required that Martin's sentence for the escape run consecutively with Martin's underlying misdemeanor sentence, he could not receive credit against both sentences. The holding in Bailey avoided the inequity of Bailey not receiving credit against either sentence. Here, since Martin received credit against the misdemeanor sentence, to also give him credit against the escape sentence would constitute an inequity in his favor.

Id. at 264. As in Martin, Noble received credit on the time spent in jail between his arrest and sentencing on his underlying misdemeanor sentence. He was not entitled to double credit by also receiving credit on the felony theft sentence.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin Noble, Pro Se  
Burgin, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III  
Attorney General

Michael L. Harned  
Assistant Attorney General  
Frankfort, Kentucky