

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-002261-MR

GARY L. SEARCY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 95-CR-003217

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

* * *

BEFORE: BUCKINGHAM, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Gary L. Searcy appeals from the order of the Jefferson Circuit Court denying his motion for jail time credit.

On September 4, 1995, appellant was arrested and charged with the offenses of first-degree wanton endangerment, first-degree criminal mischief, second-degree persistent felony offender, and various misdemeanors, all arising out of an incident involving his ex-wife. In December 1995, appellant was indicted on those charges by way of Jefferson Circuit Court indictment 95-CR-3217. On August 8, 1996, appellant entered

pleas of guilty to the felonies and certain of the misdemeanors and was sentenced to a total of five (5) years. The trial court's judgment reflects that appellant waived the filing of the pre-sentence report required by KRS 532.050. The trial court's judgment also recites that appellant "shall be given credit for time spent in custody prior to sentencing. KRS 532.120. The amount of days to be calculated by the Division of Probation and Parole."

Subsequently, in December 1996, Joyce Aldrich (Aldrich), of the Division of Probation and Parole, submitted documentation that appellant was entitled to sixty-nine (69) days as jail time credit against his five (5) year sentence. In June 1997, appellant filed a motion before the trial court taking exception to Aldrich's calculation of the sixty-nine (69) day jail time credit, taking the position that he was entitled to an additional credit of two hundred thirty-one (231) days.¹ The trial court denied appellant's motion by order entered June 20, 1997.

The record reflects and the parties agree that appellant previously had been convicted of certain misdemeanors in Jefferson Circuit Court by way of District Court case 94-F-01213A, and had received a sentence of two hundred seventy (270) days (misdemeanor sentence). The record reflects that on November 10, 1995, while he was still incarcerated as a result of

¹Here, appellant seeks jail time credit of two hundred thirty-four (234) days.

his arrest on September 4, 1995, on the charges resulting in indictment 95-CR-3217, appellant was ordered to serve his 270-day sentence.

Aldrich, in calculating the sixty-nine (69) days of jail time credit, took the position that appellant was not entitled to any jail time credit against indictment 95-CR-3217 from November 10, 1995, to August 8, 1996, the date he entered his pleas to the charges in indictment 95-CR-3217. Aldrich reasoned that appellant was not so entitled because he was serving his misdemeanor sentence during that period. She calculated the sixty-nine (69) days of jail time credit as beginning on September 4, 1995 (the date of appellant's arrest on the charges resulting in indictment 95-CR-3217), to November 10, 1995 (the date appellant began serving his misdemeanor sentence of two hundred seventy (270) days).

There appears to be no dispute but that appellant was directed to serve his 270-day misdemeanor sentence on November 10, 1995. However, appellant contends that he was entitled to two hundred thirty-four (234) days of additional jail time credit toward the five (5) year sentence resulting from indictment 95-CR-3217 since he had already served that number of days toward his 270-day misdemeanor sentence. He contends that the trial court did not consider jail time he had served toward his misdemeanor sentence, i.e. from the time of his arrest for those misdemeanor offenses until the time he was released on probation

from that sentence, and between the time that his probation was revoked and he was "shock-probated."

Appellant appears to concede, and we agree, that if he is not entitled to jail time credit against the misdemeanor sentence, the trial judge's calculation of jail time credit of sixty-nine (69) days against his felony sentence is correct. The record on review, however, contains no information concerning the jail time appellant served on his misdemeanor sentence prior to November 10, 1995. Appellant claims, and the Commonwealth does not dispute, that the clerk's office, in preparing this record on appeal, failed to make the records concerning the jail time appellant claims he served on his misdemeanor sentence a part of the trial record in this case. The Commonwealth urges us, since the record on appeal, as constructed, does not support appellant's position, to presume the correctness of the trial court's order.

However, we consider that this case should be resolved by resorting to the use of mathematics rather than legal procedure. We cannot tell, considering the state of the record, whether appellant's position is correct or incorrect. However, it would seem to us to be a simple matter to: (1) count the number of days appellant has served on his misdemeanor sentence, prior to his felony arrest on September 4, 1995, if any; (2) credit those number of days, if any, against his misdemeanor sentence; and then, (3) credit those same number of days against his felony sentence on indictment 95-CR-3217. Rather than

following appellant's suggestion that this Court, pursuant to CR 75.08, direct further supplementation of the court record in this case, we believe that, in the interest of justice, this matter should be remanded to the trial court, with instructions to use all available records and resources to determine if appellant is entitled to jail time credit against the misdemeanor sentence, and from that, whether the appellant is entitled to additional jail time credit against his felony sentence over and above that calculated by Aldrich. If the record reflects that appellant indeed is not entitled to any further jail time credit, then the trial court's order of June 20, 1997, denying appellant's motion for jail time credit shall stand.

Accordingly, the order of the Jefferson Circuit Court denying appellant's motion for jail credit time is vacated, and this matter is remanded to that court for compliance with the instructions set forth herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Thomas Ruff
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BRIEF FOR APPELLEE:

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