

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002273-MR

NEVADA D. GWYNN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 98-CR-000720

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE. Nevada D. Gwynn was arrested for non-support, a Class A misdemeanor (KRS 530.050). He was subsequently convicted and sentenced to serve twelve months of incarceration in the Jefferson County jail. On September 2, 1997, Gwynn escaped from the River City Correctional Complex jail. On February 28,¹ 1998, Gwynn was arrested for escape. On March 18, 1998, Gwynn was indicted for second-degree escape, a Class D felony (KRS 520.030). Gwynn pleaded guilty to the escape charge, and on May 5, 1998, pursuant to the plea agreement, judgment was entered sentencing him to eighteen months' imprisonment. The judgment

¹ February 23 according to Gwynn.

stated that, "[t]he Defendant shall be entitled to credit for time spent in custody prior to this sentencing. KRS 532.120. The amount of days is to be calculated by the Division of Probation and Parole."

The Division of Probation and Parole calculated that Gwynn was entitled to one day of jail-time credit on his escape conviction. On July 27, 1998, Gwynn filed a motion alleging that he was entitled to seventy-five days of jail-time credit.² At the trial court's request, the Division of Probation and Parole recalculated Gwynn's jail-time credit and again concluded that Gwynn was entitled to only one day of jail-time credit. The jail-time credit calculation sheet prepared by Probation and Parole noted that, "[s]ubject receives no jail time credit for the period from February 28, 1998 to 5/8/98 since he was simultaneously serving a twelve month sentence for Non-Support I[.]" The trial court denied Gwynn's motion for seventy-five days of jail-time credit.

On August 26, 1998, Gwynn filed a motion for a declaration of rights (KRS 418.040), again asserting that he was entitled to seventy-five days of jail-time credit on his escape charge. The motion was "overruled" and this appeal followed.

As a preliminary matter, Gwynn alleges that his eighteen-month escape sentence was to run concurrently with his

² Gwynn was apparently transferred from the Jefferson County jail system to the Department of Corrections on May 9, 1998. Gwynn claims that he was arrested on the escape charge on February 23. February 23 to May 9 is 75 days. Gwynn apparently served out his non-support sentence on May 8, 1998. The one day of credit time calculated by Probation and Parole was apparently for the day of May 9, 1998.

twelve-month non-support sentence. The judgment of sentence on the escape charge is silent as to this issue. In the usual case, if the judgment is silent on whether sentences are to be run consecutively or concurrently, the sentences are deemed to be run concurrently. KRS 532.110(2). Moreover, in the usual case, a definite sentence for a misdemeanor and an indeterminate sentence for a felony must run concurrently. KRS 532.110(1)(a). However, an escape sentence cannot be run concurrently with any other sentence. KRS 532.110(4). Contrary to Gwynn's claim, under our sentencing statutes, his non-support sentence must be run consecutively with his escape conviction.

Gwynn argues that he is entitled to seventy-five days of jail-time credit pursuant to KRS 532.120 and Bailey v. Commonwealth, Ky. App., 598 S.W.2d 472 (1980). We disagree. 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)

KRS 532.120(5) provides as follows:

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.
(emphasis added)

The incarceration time following Gwynn's arrest was credited against his non-support sentence and, in fact, Gwynn apparently served enough time in Jefferson County following his escape arrest to serve-out his non-support sentence. Gwynn is not entitled to credit under KRS 532.120(3) because the time Gwynn spent in custody prior to the commencement of the escape sentence was not "as a result" of the escape. The time in question, from approximately February 28, 1998, until approximately May 8, 1998, was custody "as a result of" the non-support charge, as evidenced by the fact that the time served during that period was credited against Gwynn's non-support sentence.

Similarly, Gwynn is not entitled to credit time under KRS 532.120(5) because custody following his arrest did not rest solely on an arrest for the escape itself. Custody, rather, rested upon the non-support conviction.

While Gwynn's escape from custody did interrupt his non-support sentence, that interruption ended upon his February 1998 arrest because he was returned to the "same institution" from which he escaped. 532.120(5). Gwynn argues that he escaped from River City Correctional Complex and was returned to Jefferson County Corrections Center. However, Gwynn escaped from the Jefferson County jail system and he was returned to the Jefferson County jail system. The interruption of sentence

triggered by his escape ended upon his arrest. See Martin v. Commonwealth, KY. App., 957 S.W.2d 262 (1997); KRS 532.120(5).

Gwynn's reliance on Bailey v. Commonwealth, supra, is misplaced because in that case the escapee, Bailey, was a state prisoner who escaped from Blackburn Correctional Institute, a prison administered by the Department of Corrections. KRS 532.100; KRS 197.010(4). Bailey was captured in Fayette County and held in Fayette County Detention Center, a jail facility administered by the Fayette County jail system. See KRS 441.025. Pursuant to KRS 532.120(5), Bailey's sentence for his underlying felony sentence was interrupted during his incarceration outside a Department of Corrections administrated facility. Bailey at 473. Similarly, since his incarceration in Fayette County was premised exclusively on his escape charge, Bailey was entitled to credit against the escape sentence. KRS 532.120(5). Bailey did not, however, receive credit against both sentences, which is what Gwynn, in effect, seeks to do.

Since Gwynn received credit for the time awaiting sentencing against the underlying misdemeanor sentence, he was not also entitled to credit against his eighteen-month escape sentence. Martin 957 S.W.2d at 264. In fact, since KRS 532.110(4) required that Gwynn's sentence for escape run consecutively with his underlying misdemeanor sentence, he could not receive credit against both sentences. Id.

Accordingly, the order denying Gwynn's motion for a declaration that he is entitled to seventy-five days of jail-time credit is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nevada D. Gwynn, Pro Se
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky