

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001163-MR

GARY BAER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
INDICTMENT NOS. 92-CR-001947 AND 93-CR-001468

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Gary Baer was found guilty of first-degree rape, two counts of first-degree sodomy, and being a second-degree persistent felony offender. These convictions were affirmed on direct appeal to the Supreme Court of Kentucky. Subsequently, this Court affirmed the denial of Baer's Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his sentence based on ineffective assistance of counsel.

On March 20, 2000, Baer filed a motion for jail time credit, alleging that he was not credited with the proper amount of jail time served prior to the commencement of his sentence based on

the above charges. This motion was denied by Jefferson Circuit Court. For reasons to be discussed below, we affirm.

The first issue which must be addressed is whether this motion was made in a timely manner. Upon first glance, it would appear that it was not. Final judgment was entered on September 7, 1993; this motion was filed on March 20, 2000. This delay is significant because ordinarily, motions for jail time credit pursuant to Kentucky Revised Statutes (KRS) 532.120 must be brought within the one-year time limit established by the provisions of Kentucky Rules of Civil Procedure (CR) 60.02(a) dealing with relief from final judgment based on mistake.¹

However, in this case, the analysis is not so clear. Contained in the record is a "Documentation Custody Time Credit" which credits Baer with 313 days served toward the rape, sodomy and PFO charges of which he was convicted. The document recites that it was "submitted to [Jefferson Circuit] Court on 9/29/93," and is stamped² "October 01 1993." On that information alone, it would appear that Baer's calculation of jail time served was submitted contemporaneously with the final judgment in his case, providing him at that time with adequate notice of any irregularities.

However, it is not clear from the record that this document was timely tendered to the circuit court. In fact, the only place in the record where the document appears is in the supplemental volume created upon the filing of instant motion.

¹ See Duncan v. Commonwealth, Ky. App., 614 S.W.2d 701 (1981).

² Presumably upon receipt by the court, though not explicitly clear.

Baer contends that he did not learn of the potential discrepancy in computation of the jail time credit to which he is entitled until early 2000. The record does not clearly refute this assertion. For this reason, the Court will not address the possibility that Baer should have raised this argument in his motion for relief under Ky. R. Crim. Proc. (RCr) 11.42.³

Even if this discrepancy is resolved in Baer's favor, reversal of the denial of Baer's motion is not warranted because his position is unsupported by applicable law.

The alleged discrepancy of approximately 100 days' jail time credit⁴ stems from the fact that at the time of Baer's arrest, which gave rise to the 24-year sentence he is currently serving, he was already serving a DUI sentence on home incarceration.

[T]he home incarceration program that [Appellant] was under was merely an alternative form of custody or detention by the Jefferson County Corrections; and accordingly, upon his arrest for the [later violation], [Appellant] was returned to Jefferson County Corrections. . . . Since [Appellant] received credit for the time awaiting sentencing against the underlying misdemeanor sentence, he was not also entitled to credit against his [later] sentence.⁵

³ See Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

⁴ The time in question is variously estimated as between 98 and 102 days. This *de minimus* variance is irrelevant to determination of the question before the Court.

⁵ Martin v. Commonwealth, Ky. App., 957 S.W.2d 262 (1997). See also Belt v. Commonwealth, Ky. App., 2 S.W.3d 790 (1999); (continued...)

Inasmuch as the circuit court did not err in determining that Baer was not entitled to 100 days' jail time credit against his 24-year rape, sodomy and PFO sentence for time served pursuant to his DUI sentence, the denial of Baer's motion for jail time credit is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Samuel J. Floyd, Jr.
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⁵ (...continued)
Houston v. Commonwealth, Ky. App., 641 S.W.2d 42 (1982).