

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002118-MR

LAVETTE PATTERSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CR-001831

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

BARBER, JUDGE: Appellant, Lavette Patterson (Patterson),
appeals the Jefferson Circuit Court's denial of her motion for
custody time credit for time spent in a rehabilitation facility.
We affirm the court's denial of credit.

In October 2001, Patterson pled guilty to a charge of
second degree robbery and was sentenced to serve five years.
That sentence was probated based on compliance with certain
conditions. These included attendance and completion of the
Jefferson County Drug Court program.

In December 2001, Patterson's probation was revoked. The revocation occurred because Patterson was arrested for violating the conditions of probation, including possession of drug paraphernalia and alcohol and drug intoxication. Patterson stipulated to the parole violations asserted against her. In lieu of revocation of probation, the court ordered Patterson to serve 60 days' home incarceration and to continue to comply with all other terms of probation previously imposed.

In February 2002, the court entered an agreed order which provided that Patterson was released from home incarceration in order to enter the residential Jefferson Alcohol and Drug Abuse Center (JADAC) for treatment. When Patterson appeared at JADAC for admission on February 26, 2002, she was refused admittance because she was intoxicated. Patterson was instructed to report to JADAC the following day. Patterson failed to show up at JADAC on February 27, 2002.

Patterson was incarcerated under a revocation of probation motion in March 2002. She was subsequently released on defense counsel's request in order to attend the inpatient drug treatment program at A New Beginning for Women Cultivating a Rose, Inc., (New Beginnings). She spent 159 days living at New Beginnings during treatment. She was discharged from New Beginnings on August 19, 2002 for failure to complete the program.

In September 2002, Patterson entered an outpatient program, the Second Chance Program. She was terminated from that program in December 2002. The Commonwealth filed another motion to revoke her probation in January 2003. Patterson was given another chance at rehabilitation when she entered the St. Jude Program in spring, 2003. In June 2003, Patterson tested positive for cocaine. Her probation was revoked in July 2003. In the order revoking probation for the final time the court ordered that Patterson "be credited with time spent in custody for this offense." Patterson received credit for all time she served in prison awaiting hearings on motions and time spent incarcerated prior to sentencing.

Patterson contends that the Department of Corrections failed to properly credit her with all time due. Patterson argues that the time she spent in New Beginnings, a residential substance abuse treatment program, should be credited towards the sentence imposed on her. She claims that participation in that residential program was a condition of probation, and therefore, constituted time she was required to serve. Patterson made repeated requests that the Office of Probation and Parole credit her with this time as time served on her sentence. In June 2004, Patterson filed a motion for custody time credit, specifically requesting credit for the time she spent in custody at New Beginnings, (March 13, 2002 - August 19,

2002). The Commonwealth objected to Patterson's motion asserting that time spent in a halfway house was not equal to time spent in jail. The Commonwealth contended that the time in the halfway house was a condition of probation and not time spent incarcerated.

The trial court ruled that time spent in treatment programs was not time spent in custody such that Patterson should be given custody credit for that time. The court found that Patterson did not face escape or other criminal charges if she left the facility, and that she was not confined to the facility against her will. Patterson voluntarily chose to attend the residential treatment program. The court also found that the facility was not run by public servants, but was a private organization.

KRS 520.010(2) defines custody as "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes. . . ." Patterson asserts that because a condition of her probation was that she attend a drug treatment program, the time spent in the residential treatment program should be considered time spent in custody. Patterson contends that KRS 67B.020(3) includes "all rehabilitative facilities of a county" as correctional facilities. She argues that under such a definition, New

Beginnings should properly have been considered a correctional facility by the court.

The Commonwealth argues that New Beginnings is not a halfway house, such that confinement therein can properly be considered custody. A halfway house is a placement designed to assist a prisoner in the adjustment from prison to civilian life. Rosary Catholic Parish of Paducah v. Whitfield, 729 S.W.2d 27, FN 1 (Ky.App. 1987). Such facilities house prisoners, and are operated under the Corrections Cabinet. Id. New Beginnings is not operated by the state or under corrections cabinet purview. Persons residing at New Beginnings are not subject to charges if they leave the facility without consent. The Commonwealth contends that such an environment cannot constitute custody, even where, as here, residents of New Beginnings do have to comply with certain rules and regulations to maintain placement in the program.

The cases relied upon by Patterson as showing that residential placement constitutes custody dealt with environments which were more restrictive than that offered by New Beginnings. Other jurisdictions have found that where the program is not a public facility or under review or control by the corrections cabinet, the program should not be considered equivalent to jail time. See: Maus v. State, 532 A.2d 1066 (Md. 1987); State v. Cobb, 400 N.W.2d 9 (Wisc. 1986). The

Commonwealth urges this Court to look to Commonwealth v. Speight, 794 N.E.2d 600 (Mass.App. 2003), in which the court held that even where time at a rehabilitation center is a condition of probation, credit against the sentence imposed is not given for such inpatient treatment.

A grant of probation is a privilege rather than a right. Tiryung v. Commonwealth, 717 S.W.2d 503, 504 (Ky.App. 1986). The trial court granted Patterson an exception to the sentence imposed on her when it permitted her to remain on probation. The terms and conditions of that probation, even where they included a stay at New Beginnings, did not constitute incarceration. In comparing inpatient treatment with prison, a Kentucky court ruled:

[Inpatient treatment] should not be used by the court as a substitute for prison. Indeed, the decision to place a defendant on probation under any conditions reflects a determination by the sentencing court that the state's penological interests did not require imprisonment.

Keith v. Commonwealth, 689 S.W.2d 613, 615 (Ky.App. 1985). The sentencing court in this case gave Patterson the opportunity to avoid time spent in custody by attending a residential treatment program. That privilege cannot properly be considered equivalent to jail. Persons at New Beginnings can visit with family, shop and cook meals, work, and even go on leave outside the facility. We affirm the trial court's finding that

Patterson is not entitled to custody time credit for her time at New Beginnings.

ALL CONCUR.

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