

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001788-MR

FLAMINTO KENYARDNA THOMAS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00003

NANCY DUNCAN, SENTENCING SPECIALIST,
KENTUCKY DPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This is a *pro se* appeal of an order of the Franklin Circuit Court that denied Flaminto Kenyardna Thomas's petition for writ of mandamus. We affirm.

Following a jury trial, Thomas was found guilty of criminal abuse in the second degree, and being a persistent felony offender (PFO) in the first degree. In an order entered on July 24, 2000, the McCracken Circuit Court imposed a sentence of three

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

years on the abuse charge, enhanced to seventeen years by the PFO charge. Thomas was credited with 271 days for time he had spent in custody prior to the commencement of the sentence.

Approximately five years later, on appeal, this Court determined that the evidence used to support the PFO conviction was insufficient. Thomas's conviction was accordingly reversed in part and remanded solely for retrial on the PFO charge. *See* 2000-CA-001985-MR (Ky.App. Nov. 2, 2001), *aff'd*, *Thomas v. Commonwealth*, 153 S.W.3d 772 (Ky. 2002). Upon remand, Thomas entered a plea of guilty to the PFO charge, and was sentenced to serve ten years. The final judgment of the McCracken Circuit Court entered on April 26, 2005, specified that he was to be credited with time spent in custody prior to the commencement of the sentence, which totaled 2,011 days (approximately five years and six months).

On January 3, 2006, Thomas filed a petition for writ of mandamus, arguing that the Department of Corrections was incorrectly calculating his sentence based on his previous sentencing date of July 21, 2000. He also argued that he was entitled to a hearing before the Parole Board concerning his eligibility for parole on his new sentence.

The Franklin Circuit Court denied Thomas's petition in an order entered on July 13, 2006, and this appeal followed.

Thomas's first argument is that the circuit court erred in denying his petition because his sentence is being calculated based on the "void" judgment of July 21,

2000. He contends that his sentence dating from that judgment has now expired, because he has already served the three years imposed for the second-degree abuse charge.

Thomas appears to have misunderstood the effect of the PFO conviction.

The PFO statute, Kentucky Revised Statutes (KRS) 532.080, merely establishes a status, not a separate criminal offense.

There is no additional punishment imposed by a persistent felony offender conviction, merely a more severe punishment. KRS 532.080 does not create or define a criminal offense. It recognizes a status and, in a proceeding separate and apart from the initial trial, fixes a penalty which is to be imposed rather than the one fixed by the jury on the initial trial.

Hardin v. Commonwealth, 573 S.W.2d 657 (Ky. 1978).

The sentence Thomas is currently serving stems from the conviction for criminal abuse; his PFO status serves only to enhance the sentence on that underlying conviction.

Thomas's "Resident Record Card" indicates that his total time to serve has been altered from seventeen to ten years, starting from the original conviction date of July 21, 2000. The card states that the maximum expiration date of his sentence is now October 20, 2009. A ten-year sentence calculated from the conviction date of July 24, 2000, is the same as a ten-year sentence calculated from the conviction date of April 26, 2005, minus 2,011 credited days. We therefore agree with the circuit court's conclusion that "either method of calculating Petitioner's sentence yields the exact same result" and that the Department of Corrections did not err in calculating Thomas's sentence.

Thomas's next argument concerns six months of good time credit that he lost on November 23, 2004. He argues that because his previous sentence was vacated and a new sentence imposed, the six months of good time credit should be restored since the prior sentence is now void. He contends that the failure to restore the six months of good time credit violates the rule against double jeopardy.

The circuit court correctly observed that Thomas is not alleging a due process violation underlying the revocation of the credit, and that therefore the revocation is not susceptible to review as a violation of the Fourteenth Amendment. Double jeopardy is also not implicated because Thomas is not being punished twice for the same offense. Thomas is being fully credited for all the time he **actually served** (2,011 days) under the earlier sentence. The six months of good time credit was awarded, and then legitimately revoked; the mere fact that Thomas has been resentenced provides no grounds for restoring the credit. The record shows that Thomas has subsequently been credited with two years and six months of statutory good time credit on his current sentence, as well as six months and five days of meritorious good time credit.

His third and final argument is that a serve-out order by the Parole Board regarding his original sentence should have been vacated in light of his new sentence, and a new hearing held before the Board to determine whether he must serve out his current sentence. Although Thomas has received a new sentence, it relates to the original conviction for second-degree criminal abuse. Thomas is not entitled to a new parole

hearing because the Board's serve-out order was issued in regard to his underlying conviction, which has not changed.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Flaminto Kenyardna Thomas, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.