

RNDERED: February 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-000709-MR

MICHAEL LONNIE BURKE

APPELLANT

V. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NOS. 96-CR-000143 & 96-CR-000144

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

*** * * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, JUDGES.

HUDDLESTON, JUDGE. Michael Burke appeals from a Kenton Circuit Court order that denied his motion for additional jail-time credit brought pursuant to Ky. Rev. Stat. (KRS) 532.120. We affirm.

In April 1996, the Kenton County Grand Jury charged Burke in indictments with one count of first-degree stalking (KRS 508.140), and with one count of possession of a handgun by a convicted felon (KRS 527.040). Later that month, Burke pled guilty in both cases pursuant to a plea agreement with the Commonwealth. The Commonwealth moved to amend the Class C felony count of possession of a handgun by a convicted felon to a Class D felony count of possession of a firearm by a convicted felon, and it

recommended concurrent sentences for the two offenses. The circuit court sentenced Burke to serve five years in prison on each of the two offenses to run concurrently for a total of five years. Nine months later, Burke filed a motion for an additional ninety days' jail credit pursuant to KRS 532.120 for the time he served in jail on an earlier misdemeanor conviction. The court summarily denied the motion and this appeal followed.

Burke alleges that on October 31, 1995, he was arrested in Boone County on a felony charge of first-degree wanton endangerment and several misdemeanors involving traffic offenses and shoplifting. On November 1, 1995, a felony bench warrant was issued by the Kenton District Court on a felony charge of possession of a firearm by a convicted felon allegedly committed on August 28, 1995. The Kenton County warrant apparently was served as a detainer while Burke was in the Boone County Detention Center awaiting resolution of the charges in Boone County. On November 9, 1995, Burke pled guilty to the shoplifting offense and was sentenced to thirty days in jail with nine days' credit time. The remaining charges were waived to the grand jury, which returned a no true bill on the felony first-degree wanton endangerment offense, a charge that was later amended to a misdemeanor charge of second-degree wanton endangerment. On December 28, 1995, Burke pled guilty in Boone County District Court to resisting an order to stop a motor vehicle and second-degree wanton endangerment. He was sentenced to twelve months in jail, but nine months of the sentence were suspended, and he received thirty days' credit time with the

remaining sixty days to be served. On January 29, 1996, Burke was released from custody in Boone County after having served the jail sentences imposed. Immediately following Burke's release in Boone County, Kenton County police officers arrested Burke and lodged him in the Kenton County jail. On April 4, 1996, the Kenton County Grand Jury indicted Burke for first-degree stalking committed in April 1995, and for possession of a firearm by a convicted felon committed in August 1995.

On February 20, 1997, Burke filed a motion for additional jail credit seeking credit on his Kenton County felony convictions for the ninety days he served in jail on his Boone County misdemeanor convictions. Burke argues that under KRS 532.110, the misdemeanor sentences must run concurrent with the felony sentences, and under KRS 532.120(3), the time spent in jail on the misdemeanor should be credited toward the felony sentences. We disagree.

KRS 532.120(3) provides that:

Time spent in custody prior to 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.

The time Burke spent in jail between October 31, 1995, and January 29, 1996 was related solely to the Boone County charges. Burke was not taken into custody by the Kenton County officers until January 29, 1995, after he had finished serving his sentence on the misdemeanor offenses in Boone County. He was not indicted on the Kenton County offenses until April 4, 1996. Burke received credit on his Boone County sentence for the pre-conviction time he spent in the Boone County Detention facility. The time spent in custody in Boone County clearly was not "as a result of the charge that culminated in the sentence" in Kenton County. See Handley v. Commonwealth, Ky.App., 653 S.W.2d 165, 166 (1983).

Burke's argument that the time spent in the Boone County jail should be credited toward the Kenton County sentence because a detainer warrant for the Kenton County charge of possession of firearm by a convicted felon was lodged while he was serving his misdemeanor sentence in Boone County is unavailing. KRS 532.120(4) provides:

If a person has been in custody due to a charge that culminated in a dismissal, acquittal, or other disposition not amounting to a conviction, the amount of time that would have been credited under subsection (3) of this section if the defendant had been convicted of that charge shall be credited as provided in subsection (3) of this section against any sentence based on a charge for which a warrant or commitment was lodged during the pendency of that custody.

This provision indicates that a defendant may receive credit for time spent in jail related to charge on which a warrant detainer is lodged only if the original charges are disposed of without a conviction, which prevents persons from receiving double credit. Burke's misdemeanor convictions resulted in a conviction, so he was not entitled to receive credit for time spent in Boone County on the sentence in Kenton County related to the detainer warrant. Burke was never detained in Boone County on the Kenton County charges.

Burke's reliance on KRS 532.110 and Powell v. Payton, Ky., 544 S.W.2d 1 (1976) is misplaced. KRS 532.110(1)(a) provides that multiple sentences for misdemeanor and felony offenses shall run concurrently. In the case at hand, Burke had finished serving his misdemeanor sentence in Boone County before the Kenton County officials ever took custody of him. KRS 532.120 is more specific and more readily applicable to this situation. Similarly, in Powell v. Payton, supra, the court held that KRS 532.110(1)(a) could apply to sentences imposed in two different counties at different times. In Powell, however, the defendant had been convicted of a felony and was serving his sentence at the time a later misdemeanor conviction became final. Unlike the situation in Powell, Burke was never subject to overlapping or multiple sentences to be served at the same time. As a result, the trial court did not err by refusing to give Burke credit on his Kenton County felony convictions for the time spent in jail on the Boone County misdemeanor convictions.

For the foregoing reasons, we affirm the order denying Burke's motion for additional jail credit.

ALL CONCUR.

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