

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-003103-MR

JAMES E. PORTER

APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE DAVID L. KNOX, JUDGE
ACTION NO. 93-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, GARDNER, and SCHRODER, JUDGES.

EMBERTON, JUDGE. James Porter appeals pro se from an order of the Woodford Circuit Court denying his motion for jail-time credit brought pursuant to Kentucky Revised Statute (KRS) 532.120. We affirm.

On July 7, 1993, Porter was arrested and charged with second-degree assault and on July 12, 1993, was released from jail on a ten percent cash bond. In September 1993, the Woodford County Grand Jury indicted Porter on one felony count of assault under extreme emotional distress (KRS 508.040) and being a persistent felony offender in the first degree (PFO I) (KRS 532.080). On January 5, 1994, pursuant to a plea agreement with the Commonwealth, Porter entered a guilty plea to assault under

extreme emotional distress. Under the plea agreement, the Commonwealth moved to dismiss the PFO I count and recommended a sentence of five years on the assault count. At that time, the trial court allowed Porter to remain free on bond pending final sentencing. On February 2, 1994, the trial court sentenced Porter to serve five years in prison on the offense of assault under extreme emotional distress and denied his motion for probation. The trial court credited Porter with six days jail-time credit for the period he spent in jail between July 7 to July 12, 1993.

On March 2, 1994, Porter filed a motion for shock probation. On May 4, 1994, the trial court granted the motion and placed Porter on supervised probation for a period of five years with conditions that he pay a monthly supervision fee and restitution, and that he receive anger management counseling.

On September 16, 1994, Porter was arrested on a warrant for probation violation. However, following a probation revocation hearing on December 7, 1994, Porter was released from custody and ordered to remain on probation.

On May 9, 1996, the trial court issued a bench warrant for Porter resulting from his failure to appear in court for a scheduled review of his compliance with the conditions of probation. He was arrested and placed in custody on June 27, 1996. In July 1997, Porter's probation officer requested revocation of his probation as a consequence of his having been convicted in district court on November 11, 1995, for the

misdemeanor offense of fourth-degree assault, and on December 18, 1995, for the misdemeanor offense of harassment. On September 4, 1996, the trial court revoked Porter's probation and reinstated the five-year prison sentence. The trial court granted Porter 159 days jail-time credit toward his prison sentence.

In December 1996, Porter filed a motion pursuant to KRS 532.120 for 167 days of jail-time credit for the period between July 4, 1995, and December 18, 1995. In the same motion, he also requested an additional 55 days of jail-time credit for the period between June 15, 1996, and October 16, 1996, for which he alleged he received only 67 days credit while he was entitled to 122 days credit. The record does not reflect a court order ruling on this motion.

In February 1997, Porter filed a second motion for jail-time credit pursuant to KRS 532.120(3)¹. In this motion, Porter sought 344 days credit, but he did not identify the time period covered by the request. On March 17, 1997, Virginia Adkins, a Woodford County Probation and Parole Officer, filed in the record a letter she had prepared in response to a request by

¹KRS 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.

the trial judge explaining how she determined that he was entitled to 159 days jail-time credit at the time he was sentenced. In the letter, she stated Porter was entitled to only partial credit on his felony conviction for the time periods he identified in the December 1996 motions.

In October 1997, Porter filed a third motion for jail-time credit pursuant to KRS 532.120(3) seeking 221 days of credit on his felony conviction. Again he failed to identify the exact period for which he claimed credit, but did dispute the calculations of Probation Officer Adkins. Porter filed a supplemental memorandum to his motion seeking an additional 92 days credit for the period between February 2, 1994, and May 4, 1994. In the supplemental memorandum, Porter stated that he was seeking a total of 258 days of jail-time credit. In addition, Porter attached a verified copy of a jail confinement document prepared by the Woodford County Jailer listing the time periods that Porter was in custody at that facility. On November 5, 1997, the trial court summarily denied the motion for jail-time credit. This appeal followed.

Although in his trial court motions Porter sought various amounts of jail-time credit dealing with several time periods, his brief on appeal asserts a claim of only 92 days for the period of February 2 to May 4, 1994, and a claim of 166 days for the period of July 4 to December 18, 1995. A review of the record indicates that he has not established an entitlement to any additional jail-time credit.

The record contains a letter from a Department of Corrections administrator concerning the credit Porter has received on his felony conviction. The Department of Corrections has given him credit for 159 days jail-time pursuant to the calculations of Probation Officer Adkins and the order of the trial court. During the period of February 2 to May 4, 1994, Porter was incarcerated in a prison facility on the initial five-year sentence on assault under extreme emotional disturbance. He was sentenced and transferred to prison on February 2, 1994, then released on shock probation on May 4, 1994. The Corrections Department gave Porter credit for this time period as institutional time. This period of time Porter was incarcerated is not considered as jail-time under KRS 532.120 because he was incarcerated in a state prison facility. Thus, he has already received credit for this period against his prison sentence.

Porter asserts that he was incarcerated in the Woodford County Jail on July 4, 1995, at the request of his probation officer in order to have Porter placed into a drug treatment center. Porter alleges that the trial judge ordered him released on December 18, 1995, because the probation officer failed to file a proper probation revocation form. There is nothing in the record to substantiate Porter's claim that he was in jail during this period in relation to the felony conviction. The jail confinement document attached to the supplemental memorandum listing the time periods that Porter was incarcerated in the Woodford County Jail does not list this time period. The letter

of Probation Officer Adkins also does not list this period, although she does suggest that Porter may have been in jail based on other misdemeanor charges.

Porter implicitly indicates that he may have been serving time on a misdemeanor conviction during this period by arguing he is entitled to credit for this period because the misdemeanor conviction was used as a basis to revoke his felony probation. In fact, the probation revocation proceeding was initiated because of Porter's failure to appear for a probation review in May 1996. Although the misdemeanor convictions for fourth-degree assault in November 1995 and harassment in December 1995 were added as elements supporting revocation of his probation, Porter was not arrested on the bench warrant for probation violation until June 1996. Any time he spent in jail on the misdemeanor convictions in July and December 1995 was not related to any arrest or warrant issued in connection with the felony conviction. This time spent in jail was not "as a result of the charge that culminated in the [felony] sentence." See Handley v. Commonwealth, Ky. App., 653 S.W.2d 165, 166 (1983). Porter actually received jail-time credit for the period after his June 1996 arrest on probation violation until his probation was revoked in September 1996. The mere use of the misdemeanor convictions as partial grounds for revocation of his probation did not entitle Porter to jail-time credit on the felony sentence for the time served on those misdemeanor convictions. Cf. Snow v. Commonwealth, Ky. App., 927 S.W.2d 841 (1996) (court could

order felony sentence imposed after revocation of probation to run consecutive to sentence on misdemeanor convictions used as grounds for felony probation revocation). As a result, Porter has not established a right to jail-time credit for the period of July 4 to December 18, 1995, based on the current record.

For the foregoing reasons, we affirm the order of the Woodford Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Porter - Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Joseph R. Johnson
Assistant Attorney General
Frankfort, Kentucky