RENDERED: April 16, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003280-MR

ROY MELANSON — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 89-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

REVERSING AND REMANDING WITH DIRECTIONS

** ** ** ** **

BEFORE: EMBERTON, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Roy Melanson brings this pro se appeal from a July 14, 1997, order of the Meade Circuit Court. We reverse and remand with directions.

On January 21, 1991, Melanson was adjudged a first-degree persistent felony offender (PFO I) (Ky. Rev. Stat. (KRS) 532.080(3)) and sentenced to twenty years' imprisonment. Melanson pursued a direct appeal of the sentence and, at the same time, sought to stay execution of same during pendency of the appeal as authorized under Ky. R. Crim. Proc. (RCr) 12.76(2). He

was granted the stay and remained in the Meade County Jail. Melanson was informed that he would "probably" not receive credit for time served in jail pending the appeal.

Quickly after filing his direct appeal, Melanson, acting pro se, filed a collateral proceeding under RCr 11.42, attacking his conviction. He made no complaint about credit for jail time. The circuit court denied relief, and an appeal was brought to this court, then transferred to the supreme court to be heard with the direct appeal. 92-SC-226-TG.

Still before his direct appeal was decided, Melanson filed yet another pro se motion wherein he raised the question of credit on his sentence then being served in the Meade County Jail. The motion was coupled with numerous other complaints. On March 23, 1992, all complaints were denied, and Special Judge Robert M. Short noted that "many of the motions were so vague and uncertain, and lacking in specificity as to make it difficult to determine just what relief the petitioner seeks." That order was appealed to, and affirmed by, this Court in Appeal No. 1992-CA-000837-MR, rendered December 29, 1993. Affirming the trial court's decision, the appellate court made note of Judge Short's comment concerning the vagueness and uncertainty of Melanson's claims for relief. The appellate opinion also noted that it appeared that Melanson was seeking relief from matters "either raised or should have been raised on direct appeal."

On November 19, 1992, the supreme court affirmed the direct appeal (No. 91-SC-0146-MR) and the RCr 11.42 appeal transferred from the court of appeals (No. 92-SC-226-TG).

On July 9, 1997, Melanson, still acting pro se, filed the subject "Motion for Jail Time Credit." In this motion, Melanson specifically sought credit for the time served in the Meade County Jail from the date of his sentencing as a PFO I offender (January 21, 1991) until the date on which the supreme court affirmed his direct appeal (November 19, 1992). Melanson believed he was entitled to 667 days' credit under the authority of KRS 532.120(3). The motion was denied on July 14, 1997, thus precipitating this appeal.

Melanson is proceeding pro se and without proper legal assistance. His July 9, 1997 "Motion for Jail Time Credit" and his appellate brief herein are both inartfully drawn. Upon review of the record and relevant legal authorities, we are inclined to view his "motion" as a request for relief pursuant to Ky R. Civ. Proc. (CR) 60.02; cf. Wilson v. Commonwealth, Ky., 403 S.W.2d 710 (1966). Our review will proceed accordingly.

As Melanson had previously raised the issue of jail time credit in a prior proceeding, the Commonwealth argues that this issue is barred from consideration by the doctrine of *res judicata*. We disagree. In his prior Motion for Jail Time Credit, Melanson proceeded pro se, and the court was not fully advised upon the law. We observe that by enactment of CR 60.02, the writs of *coram nobis* and *coram vobis* were abolished. However, the **inherent power** of a court to remedy a fundamentally unjust judgment remains. Cf. Robinson v. United States, 264 F. Supp. 146 (W.D. Ky. 1967) (invoking the court's inherent power to satisfy the ends of justice); People v. Geresewitz, 294 NY 163,

61 N.E.2d 427, *cert. dismissed* 326 U.S. 687, 66 S. Ct. 89, 90 L. Ed. 404 (1945) (recognizing the inherent right of the court to correct its own judgment to prevent opression); and 18 Am. Jur. 2d Coram Nobis §5 (1985). We believe the "ends of justice" require and permit this Court to review the issue of Melanson's jail time credit under CR 60.02. We turn now to an examination of this action upon the merits.

We are of the opinion that Melanson is entitled to credit upon his sentence for time spent in the Meade County Jail during pendency of his direct appeal. Our ratiocination revolves around the proper interpretation of KRS 532.120(3) and that statute's effect upon RCr 12.76(2).

The supreme court promulgated RCr 12.76(2), which became effective January 1, 1963, and which currently states as follows:

> **Imprisonment.** The execution of a sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

Upon adoption, RCr 12.76(2)'s intent was clear: A defendant who elected not to commence service of sentence and to remain in jail would not receive credit for such time served. See Blanton v. Commonwealth, Ky., 690 S.W.2d 128 (1985). Thereafter, in 1974, our legislature enacted KRS 532.120(3), which currently 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**. [Emphases added.]

The statute's unambiguous language requires that all time spent in custody prior to the commencement of sentence be credited toward the maximum term of imprisonment. KRS 532.120(1) provides that a sentence commences "when the prisoner is received in an institution under the jurisdiction of the Department of Corrections."

KRS 532.120(3)'s effect is clear. By enactment of the statute, the legislature of this Commonwealth clearly signaled a shift in policy and mandated that any time spent in custody, prior to commencement of sentence, be credited. This, we believe, necessarily includes time spent in custody for whatever reason, including time spent while an appeal is pending. We recognize that such interpretation of KRS 532.120(3) will have the practical consequence of nullifying the underlying intent of RCr 12.76(2). Nevertheless, we firmly believe the result is mandated and justified.

We are fortified in our opinion by reference to the historical progression of Federal Rule of Criminal Procedure 38(a)(2), a counterpart of RCr 12.76(2):

> . . . Until 1966 Rule 38(a)(2) provided that a defendant might elect not to commence service of his sentence. [Footnote omitted.] If he did so, he could not be confined in a penitentiary [footnote omitted] and his sentence was considered stayed. He was, however, in custody. . . .

> Unless the defendant affirmatively elected not to commence service of his sentence, the sentence began to run automatically. [Footnote omitted.] This was an improvement over the former Criminal Appeals Rule, which had provided for an automatic stay unless the defendant made an affirmative election to enter upon the service of the sentence. [Footnote omitted.] The importance of all this is that, as the law stood until recently, a prisoner did not receive credit for time served against his sentence unless he was serving the sentence. Merely being in custody in a jail entitled him to no credit. . . . **Two developments in 1966 cured what had been an undesirable situation**. Rule 38(a)(2) was amended by eliminating the election not to commence service. [Footnote omitted.] Thus if a defendant is not released, on bail or otherwise, there is no stay and the sentence begins to run automatically. . . .
>
> Nine days before the 1966 amendment of Rule 38(a)(2) took effect, Congress adopted a statute, effective ninety days later, that made a more sweeping revision. **As a part of the Bail Reform Act of 1966, Congress amended the statute on computation of time under sentences to require that credit be given for any days spent in custody in connection with the offense or acts for which sentence was imposed**. [Citation omitted.] **This** . . . **make[s] it clear that a prisoner in custody pending appeal receives credit for that time no matter where it is served**. [Emphases added.]

3 Wright, Federal Practice and Procedure, Rule 38, § 632 (2d ed. 1982). We construe the Bail Reform Act of 1966 as substantially similar in purpose and effect to KRS 532.120(3). We see no reason why they should not be given a concomitant interpretation relative to jail time credit.

Upon the foregoing, we are of the opinion that Melanson is entitled to relief under CR 60.02(e) and/or (f). We therefore

hold that Melanson is due credit for time served in the Meade County Jail from the date of his sentencing (January 21, 1991) until the date his direct appeal was affirmed by the supreme court (November 19, 1992). We invite the supreme court's further examination of this vexing issue.

For the foregoing reasons, the order of the Meade Circuit Court is reversed. This cause is remanded with directions that an amended judgment of sentence be entered giving Melanson appropriate credit for time served in the Meade County Jail during pendency of his direct appeal.

ALL CONCUR.

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