

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002726-MR

MUHAMMAD T. RASHAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 98-CR-000564

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART - REVERSING IN PART AND REMANDING
** **

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Muhammad T. Rashad (Rashad) brings this appeal from an order of the Jefferson Circuit Court denying his motion for credit of 293 days spent in jail prior to final sentencing on several felony charges. Having reviewed the record, including the video recordings of the motion hearings, the parties' arguments, and the law, we affirm in part and reverse in part, and remand with directions.

In this case, Rashad was charged with five counts of criminal possession of a forged instrument II (KRS 516.060), theft by deception over \$300 (KRS 514.040(1)(a)), and with being a persistent felony offender I (PFO) (KRS 532.080). After his

initial arrest he was released from jail but failed to appear at his next court hearing. A bench warrant was issued for his arrest and Rashad was arrested on the above charges on November 30, 1997. Bond was set at \$5000 full cash. Rashad was unable to post the bond and was held in jail until September 18, 1998, when he was sentenced to two years imprisonment based upon a negotiated plea agreement with the Commonwealth. To complicate the matter, at the time of his arrest on the felony charges, Rashad also had an outstanding district court arrest warrant for misdemeanor non-support.

While being held on the felony charges, Rashad entered a guilty plea to the misdemeanor non-support charge on March 16, 1998, and was sentenced to one year in jail. Thereafter, on September 18, 1998, when he was sentenced on the felony charges¹, he sought credit for the entire 293 days he was held in jail (December 30, 1997 to September 18, 1998). The trial court in its judgment of conviction stated "[Rashad] shall be entitled to credit for time spent in custody prior to sentencing, said time to be calculated by the Division of Probation and Parole. KRS 532.120." (Emphasis original). Probation and Parole had determined that Rashad was entitled to credit of only 4 days on his felony conviction. The remaining days, according to Probation and Parole, were to be credited towards his misdemeanor sentence. Rashad argued that the trial court had not followed

¹As a result of the plea agreement Rashad pled guilty to the five counts of criminal possession of a forged instrument II and one count of theft by deception over \$300. He was sentenced to two (2) years on each offense, with the time to run concurrent. The PFO I was dismissed.

the proper law in this matter. Based upon this argument the trial court requested the Division of Probation and Parole to check the records again to determine the amount of time which Rashad should receive as credit towards his felony sentence. After further review and after a hearing on the matter, the trial court made a final determination that Rashad should have received credit for ten (10) days on the felony conviction. This appeal followed.

Originally Rashad argued that he was entitled to credit for the entire 293 days held prior to sentencing. However, in his reply brief he concedes that possibly he should only be credited for the time from arrest (November 30, 1997) until the time of the plea to the misdemeanor charge (March 16, 1998). Having thoroughly reviewed this matter and the applicable law, we believe this position to be accurate. We agree with Rashad that both KRS 532.110(1)(a) and KRS 532.120(3) apply to this case. However, we do not concede that either would require the outcome Rashad originally sought. KRS 532.110(1)(a) requires that when multiple sentences are imposed, a definite sentence must run concurrently with an indeterminate term and that both sentences shall be satisfied by service of the indeterminate term. Thus, once Rashad was sentenced on the felony charges his misdemeanor charge began to run concurrently with his felony conviction. However, prior to sentencing on the felony charges, Rashad was serving time only on the misdemeanor non-support conviction. Thus, his argument that the trial court must run the time for the

misdemeanor concurrent with the felony time prior to his plea and sentence is simply inaccurate.

KRS 532.120(3) requires that:

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 commentary to this subsection indicates that "an offender be given credit for all time spent in custody prior to the commencement of his term of imprisonment. The provision imposes a duty upon the trial judge to see that the credit is properly given." Again, we agree with Rashad's contention that it is the duty of the trial judge to give him credit for the time he served in jail prior to sentencing on the charges for which he is sentenced.

Obviously the question becomes how much time served should be credited to the misdemeanor conviction and how much time to the felony conviction. He is entitled to credit only for the time spent in custody during that period related to each conviction. He is not entitled to credit for time spent in custody if that period was related to a separate conviction. See Martin v. Commonwealth, Ky. App., 957 S.W.2d 262 (1997); Belt v. Commonwealth, Ky. App., 2 S.W.3d 790 (1999); Handley v. Commonwealth, Ky. App., 653 S.W.2d 165 (1985); Houston v. Commonwealth, Ky. App., 641 S.W.2d 42 (1982).

In this case, Rashad was arrested and held on a \$5000 cash bond on the felony charges. Although he was also served with the misdemeanor warrant at that time, no one can seriously argue that he was being held solely because of the misdemeanor offense. As such, Rashad should have been credited with the time served between November 30, 1997 and March 16, 1998, towards his felony conviction. However, once Rashad pled guilty to the non-support charge on March 16, 1998, and was sentenced to one year, he began serving the misdemeanor sentence and no additional credit should be assigned to his felony charges. See, Houston, supra; Martin, supra; and Belt, supra.

On appeal Rashad also contends that the trial court violated the separation of powers provisions of the Kentucky Constitution by improperly delegating judicial authority to the department of probation and parole. Rashad admits that this issue was never presented to the trial court and not preserved. We agree. However, even if it had been preserved, we can hardly agree that by requesting the Department of Probation and Parole to prepare a pre-sentence investigation report or by asking the Department to recalculate Rashad's credit time spent in custody amounts to the improper delegation of judicial power alleged.

For the foregoing reasons, we affirm in part that portion of the Jefferson Circuit Court order denying Rashad credit for time served after his March 16, 1998, plea and sentence on the misdemeanor charge, and reverse and remand with directions that Rashad receive credit towards his felony sentence for the days served from November 30, 1997 to March 16, 1998.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank W. Heft, Jr.
Chief Appellate Defender

Kathleen A. Pakes
Assistant District Defender
Louisville, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

William L. Daniel, II
Assistant Attorney General
Frankfort, KY