

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001035-MR

GREGORY HILL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 95-CR-00060

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, EMBERTON AND SCHRODER, JUDGES.

EMBERTON, JUDGE: The sole issue in this appeal is whether the trial court erred in denying appellant's motion for sixty-eight days' jail time credit, stemming from his incarceration pending trial on an escape charge. We affirm.

Appellant was convicted of second-degree robbery on December 12, 1993, and sentenced to eight years' imprisonment. While serving that sentence, he escaped from Transitions, Inc., a detention center in Ashland, Kentucky, and was apprehended eight days later, on June 26, 1996, pursuant to a "Notice of Interruption of Sentence" issued by the Kentucky Department of Corrections. According to his resident record card with the

Department of Corrections, upon his apprehension on June 26, 1996, appellant's time on his original robbery sentence began to run again.

On August 11, 1995, appellant pled guilty to the charge of second-degree escape, and on September 1, 1995, was sentenced to one year of imprisonment to run consecutively to the six years remaining on his robbery conviction. The sentencing order clearly reflects the opinion of the Boyd Circuit Court that appellant was considered to be a state prisoner during his pre-trial incarceration as it specifically denies any credit for time spent in custody prior to commencement of the new sentence.

Appellant filed a motion on May 16, 1996, requesting jail time credit pursuant to Kentucky Revised Statutes (KRS) 532.120(3). Although this motion was denied on May 21, 1996, no appeal was taken from the trial court's decision. Almost three years later, on April 16, 1999, appellant again sought identical relief under KRS 532.120(3). After reviewing appellant's resident record card, the trial court again denied the motion for jail time credit. This appeal followed.

As a preliminary matter, the appellant is procedurally barred from relitigating the issue of his entitlement to jail time credit because he failed to appeal the denial of his May 1996, motion. Consequently, appellant has voluntarily relinquished any right to raise the exact issue again in a subsequent motion. Under the doctrine of res judicata, once the

trial court's May 1996, denial of the motion for jail-time credit became final, it was, and is, binding as to the same parties.<sup>1</sup>

Nevertheless, it is clear that appellant's substantive complaint is without merit. He is, in reality, requesting double credit and his reliance upon KRS 532.120(5), and Bailey v. Commonwealth,<sup>2</sup> is therefore misplaced. The plain language of KRS 532.120(5), provides:

If a person serving a sentence of imprisonment escapes from custody, the escape shall interrupt the sentence. The interruption shall continue until the person is returned to the institution from which he escaped or to an institution administered by the Department of Corrections. Time spent in actual custody prior to return under this section shall be credited against the sentence if custody rested solely on an arrest or surrender for the escape itself. (Emphasis added).

The situation in this case is very like the one addressed by this court in Martin v. Commonwealth,<sup>3</sup> which also provides some guidance as to the rationale at work in Bailey:

Since Martin received credit for the time awaiting sentence against the underlying misdemeanor sentence, he was not entitled to credit against his one-year escape sentence. In fact, since KRS 532.110(4) required that Martin's sentence for the escape run consecutively with Martin's underlying misdemeanor sentence, he could not receive credit against both sentences. The holding in Bailey avoided the inequity of Bailey not receiving credit against either sentence. Here, since Martin received credit against the misdemeanor sentence, to also give him

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<sup>1</sup> See generally, Barnett V. Commonwealth, Ky., 348 S.W.2d 834 (1961).

<sup>2</sup> Ky. App., 598 S.W.2d 472 (1980).

<sup>3</sup> Ky. App., 957 S.W.2d 262 (1997).

credit against the escape sentence would constitute an inequity in his favor.<sup>4</sup>

The critical factor in these cases is not where a prisoner is serving his sentence, but whether he is receiving appropriate credit. Like Martin, appellant has received credit on the sentence he was serving prior to escape. He is entitled to nothing more.

The judgment of the Boyd Circuit Court is affirmed.

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<sup>4</sup> 957 S.W.2d at 264.

ALL CONCUR.

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