

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000912-MR

RICHARD LEE JOHNSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 99-CI-01472

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Richard Lee Johnson (Johnson) brings this appeal from a March 14, 2000, order of the Franklin Circuit Court. We affirm.

On May 6, 1977, Johnson was sentenced to six years' imprisonment on federal criminal charges. His sentence was probated. On July 23, 1979, Johnson's probation was revoked. He was paroled on the federal charges July 23, 1980. On January 7, 1983, Johnson pled guilty to state charges, and was sentenced to twenty-eight years to run concurrently with his federal sentence. On May 6, 1983, Johnson's federal sentence expired.

Johnson was credited with one year, three months and twenty-nine days against his state sentence for time served on the federal charge. The credit of one year is for the period from July 23, 1979, when his probation was revoked until July 23, 1980, when he was paroled on the federal charges. The CREDIT of three months and twenty-nine days is for the time between January 7, 1983 when he pled guilty to state charges until his federal sentence expired May 6, 1983.

On December 28, 1999, Johnson filed a petition for a writ of mandamus in the Franklin Circuit Court. Cf. Lemon v. Corrections Cabinet, Ky. App., 712 S.W.2d 370 (1986). On March 14, 2000, Johnson's writ was denied. Johnson's motion for reconsideration was denied by the Franklin Circuit Court March 30, 2000. This appeal followed.

Johnson maintains the circuit court erred in denying his petition for a writ of mandamus. Therein, he sought to order the Department of Corrections to recalculate his credit for federal jail time served. Specifically, Johnson contends he should have been credited for time spent during his federal sentence on probation and parole as well as time actually confined. Johnson admits that probation and parole are not considered custody under the current version of Kentucky Revised Statutes (KRS) 532.115, which reads in part:

The Court in sentencing a person convicted of a felony, shall be authorized to run the sentence concurrent with any federal sentence received by that defendant for a federal crime and any sentence received by that defendant in another state for a felony offense. The time spent in federal custody and the time spent in custody in another

state under the concurrent sentencing shall count as time spent in state custody; but the federal custody and custody in another state shall not include time spent on probation or parole or constraint incidental to release on bail.

He points out, however, that at the time of his state conviction an earlier version of KRS 532.115 was in effect, which read:

The court, in sentencing a person convicted of a felony, shall be authorized to run such sentence concurrent with any federal sentence received by that same defendant for a federal crime. The time spent in federal custody under such concurrent sentencing shall count as time spent in state custody.

We observe the statute does not expressly mandate probation and parole to be considered custody for the purpose of calculation of concurrent sentencing. Johnson directs us to no case law or other authority that so indicates. As such, we are of the opinion that probation and parole did not constitute custody for the purpose of calculating concurrent sentences. Upon the whole, we perceive no error by the Franklin Circuit Court.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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