

RENDERED: March 26, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001418-MR

DAVID EARL BRYANT

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 00-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. David Earl Bryant (Bryant) appeals the Todd Circuit Court's denial of jail credit for time that Bryant served on a charge that was ultimately dismissed and on the underlying charge prior to entering a plea of guilty; and further, that the Court erred by raising Defendant's bond on the underlying charge without proper notice. Because we believe the trial court improperly denied Bryant credit for time he served

in custody prior to the commencement of his sentence, we vacate and remand in part. Further, we affirm the conviction as it pertains to the issue of bail.

On December 17, 1999, officers of the Pennyrile Narcotics Task Force arrested Bryant after he ran from the officers when they attempted to serve a bench warrant on him. Eventually, the officers were able to catch Bryant and place him under arrest. After apprehending Bryant, the officers conducted a search and located marijuana and methamphetamine in the pocket of Bryant's pants. The officers also found a tube with residue and burnt aluminum foil in Bryant's jacket pocket along with several 20-gauge shotgun shells.

Bryant's arraignment was held on December 20, 1999, and Bryant entered a plea of "not guilty." The trial court set Bryant's bail bond at \$1,500 cash. Bryant made bail on January 4, 2000, and he was released from custody on bond.

On May 1, 2000, the Todd County Grand Jury returned an indictment charging Bryant with the following offenses stemming from the arrest on December 17, 1999: (1) first-degree possession of a controlled substance -- firearm enhancement; (2) possession of marijuana -- firearm enhancement; (3) possession of drug paraphernalia -- firearm enhancement; (4) possession of a firearm by convicted felon; and (5) being a persistent felony

offender in the second degree. Apparently, Bryant remained out of custody on bond.

On December 12, 2000, Bryant was arrested on different charges resulting from his actions on October 27, 2000. The charges were first-degree manufacturing methamphetamine and being a second-degree persistent felony offender. On January 10, 2001, the trial court ruled that KRS 218A.1432, the manufacturing methamphetamine statute, was unconstitutional. Subsequently, the trial court dismissed the manufacturing and PFO charges against Bryant. However, Bryant remained in jail because after the trial court dismissed these charges, it raised the bond on the initial charges of May 1, 2000, from \$1,500 cash to \$15,000 cash.

On March 24, 2001, Bryant entered a guilty plea to the single count of possession of methamphetamine (no firearm enhancement) from the initial indictment of May 1, 2000. In the Final Judgment Sentence of Imprisonment issued May 16, 2001, (final judgment) and entered May 30, 2001, the trial court sentenced Bryant to five years imprisonment. In the final judgment, the trial court specified that Bryant was to be credited with twenty-one (21) days spent in custody prior to the commencement of his sentence toward the maximum term of imprisonment. Bryant appeals from the trial court's determination of this credit.

Bryant argues that he is entitled to a credit of 202 days for time that he spent in jail on the manufacturing methamphetamine charge that was ultimately dismissed. Notwithstanding the fact that Bryant did not properly preserve his argument for our review because he raises a different argument on appeal than he did at the trial court level, we will consider the issue on the merits as we determine that manifest injustice has resulted from errors in calculating Bryant's jail credit. See RCr 10.26. Our task in considering this matter is further complicated by the fact that, in his brief, Bryant does not specify the time period that comprises the 202 days for which he is entitled to jail credit. We agree that Bryant was entitled to jail credit in excess of the 21 days given by the trial court in its final judgment, however, we do not agree that Bryant is entitled to credit for 202 days. Our review of the record reveals that Bryant was in custody on the manufacturing charge that was ultimately dismissed from December 5, 2000, to January 10, 2001, for a total of 37 days. After the trial court dismissed the manufacturing charges, Bryant remained in custody on the initial charges because he could not make bail after the trial court increased his bond to \$15,000 cash. Prior to final sentencing on the initial charges, Bryant remained in custody from January 10, 2001, to May 16, 2001, for a total of 127 days.

KRS 532.120(3) states:

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.

Accordingly, under KRS 532.120(3) Bryant shall be credited for the time he spent in custody on the possession charge prior to the commencement of his five-year sentence. However, Bryant shall not receive credit on his five-year sentence for time he spent in custody on the manufacturing methamphetamine charge that was ultimately dismissed (37 days by our calculation). In this case, Bryant was out of custody on bond when he was arrested on a new set of charges, therefore, he does not fall under the provisions of KRS 532.120(4), and we decline to extend the application of KRS 532.120(4) to encompass the circumstances of this case.

In summary, we vacate so much of the trial court's final judgment as it pertains to the calculation of Bryant's jail credit and remand this case for the purpose of determining the number of days that Bryant spent in custody on the possession charges prior to the commencement of his sentence (Case Number 00-CR-00038). We are unable to calculate the jail credit because there are no records from probation and parole included in the record on appeal. While we have attempted to

make that calculation in the preceding paragraphs, we do not believe we have all the information necessary to finally determine the matter.

In this appeal, Bryant further argues that the trial court erred when it failed to give Bryant notice and a hearing when it increased Bryant's bond on the initial charges from \$1,500 cash to \$15,000 cash. At the conclusion of the hearing on January 10, 2001, during which the trial court dismissed the manufacturing charges against Bryant, the trial court raised the bond on the initial charges to \$15,000 cash. In so doing, the trial court reasoned that although it was dismissing the charges, it recognized that Bryant was "running around with a bunch of stuff that can be used to make methamphetamine." Bryant contends this action was in contravention of RCr 4.42, which specifies the procedure the trial court must follow in changing the conditions of a defendant's release on bail. Bryant concludes that the trial court committed reversible error by increasing Bryant's bond without adhering to the due process procedures set forth in RCr 4.42 and without a material change in circumstances.

While Bryant did argue against the bond increase at the conclusion of the January 10, 2001, hearing, Bryant did not adhere to RCr 4.43 in seeking appellate review of the action of the trial court respecting bail. Moreover, Bryant ultimately

entered a voluntary guilty plea, thereby constituting a break in the chain of events. See Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990). Because Bryant entered a guilty plea, he is prohibited from raising independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea. See id.

For the foregoing reasons, the order of judgment as it pertains to jail credit is vacated and this matter is remanded for proceedings consistent with this opinion. Moreover, the issue of the change of conditions of bail is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Clare
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky