

RENDERED: JANUARY 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002246-MR

TERRY G. MASSEY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 02-CR-00446

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Terry G. Massey appeals from an order of the Warren Circuit Court denying his motion for additional jail-time credit. Massey contends that the trial court erred by denying him credit toward his felony sentence for time spent in an alcoholism recovery program. Finding no error, we affirm.

While driving under the influence of alcohol, Massey ignored a traffic signal. He was travelling at an excessive speed when his car struck another vehicle entering the intersection. The passengers riding in the other vehicle were gravely injured. As a consequence, a Warren County Grand Jury returned a ten-count indictment against Massey on June 26, 2002. He was lodged in the Warren County Jail under a cash bond of \$250,000.00.

On July 29, 2002, Massey filed a motion to modify his bond. The trial court granted his request. The record indicates that he was released from custody on July 31, 2002, upon the condition that he enter Fresh Start, an alcoholism treatment facility. There is no record of Massey's participation in treatment, and he has freely admitted that he did not complete the program.

On January 29, 2003, Massey entered a plea of guilty to all of the charges against him except one. On March 11, 2003, Massey was sentenced by the Warren Circuit Court to ten-years' imprisonment, the minimum possible term. Pursuant to the provisions of Kentucky Revised Statute(s)(KRS) 532.120(3), Massey was awarded a credit of 48 days toward the service of his sentence based on the time that he had spent in custody at the county jail before he was remanded to the custody of the Department of Corrections.

On May 15, 2006, Massey filed a motion requesting that the court revise its computation of jail-time credit. He argued that he had been committed to Fresh Start by the court and that he remained in the state's custody throughout his stay at the rehabilitation facility.

On November 12, 2009, Massey renewed his motion and asked that the court credit him with an additional total of 224 days based on the time that he supposedly spent at Fresh Start. In support of his motion, Massey claimed that he had been in custody at the facility from July 31, 2002, until February 14, 2003. The circuit court denied his motion.

On appeal, Massey contends that the circuit court erred by denying his motion for additional jail-time credit. We disagree.

Massey's appeal is without merit for two reasons. First, his motion was filed out of time. In *Duncan v. Commonwealth*, 614 S.W.2d 701, 702 (Ky.App. 1980), we noted that a motion for additional jail-time credit under the provisions of KRS 532.120(3) is essentially a motion to be relieved from the trial court's final judgment on the basis of mistake. Therefore, such a motion must be made within one year after the date of the final judgment. CR 60.02. Since Massey's initial motion was filed nearly three years after the final judgment, it was properly denied as untimely.

Second, there is nothing in the record to indicate or to confirm that Massey remained "in custody" as a result of his commitment to the rehabilitation facility.

At the time of Massey's incarceration, KRS 532.120(3) provided as follows:¹

¹ Although it is irrelevant here, for the sake of completeness, we note that the General Assembly amended KRS 532.120 in 2009 – years after Massey's custodial issue – to add the following provision:

(6) As used in subsections (3) and (4) of this section, time spent in custody shall include time spent in the intensive secured substance abuse recovery program developed under KRS 196.285 and may include, at the discretion of the sentencing court, time spent in a different residential substance abuse treatment or recovery facility pursuant to KRS 431.518 or 533.251, if under each option

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 term *custody* has various meanings depending on the context in which it is used. KRS Chapter 520 (“Escape and Other Offenses Relating to Custody”) defines *custody* as “restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or constraint incidental to release on bail.” KRS 520.010(2). *See also Prewitt v. Wilkinson*, 843 S.W.2d 335 (Ky.App.1992). In fact, the Supreme Court of Kentucky has recognized that “custody” must be read broadly when it relates to a charge of escape but interpreted more narrowly when a prisoner is requesting jail-time credit. *Stroud v. Commonwealth* 58 S.W.3d 490(Ky.App. 2001).

Massey admitted that he failed to complete the program. In addition, the record contains no information related to the nature of Massey’s participation in Fresh Start’s treatment system. We have no documentation concerning Fresh Start’s relationship to the state, its level of security, and the degree (if any) of Massey’s confinement at the facility.

allowed by this subsection, the person has successfully completed the program offered by the intensive secured substance abuse recovery program or the residential substance abuse treatment or recovery facility. If the defendant fails to complete a program, the court may still award full or partial sentence credit if the defendant demonstrates that good cause existed for the failure to complete the program.

Massey now argues that his commitment to Fresh Start was just another form of pre-sentence incarceration and not a condition of his release from custody. However, he has contended contradictorily in other proceedings that he participated in Fresh Start's rehabilitation program as a result of the trial court's decision to release him on conditions. Based upon the record before us, we are not persuaded that Massey's participation in Fresh Start amounted to anything other than a condition of his pretrial release. The trial court was not required to award jail-time credit for time spent at a rehabilitation facility prior to the commencement of Massey's sentence. Consequently, the trial court did not err by denying Massey's motion.

The order of the Warren Circuit Court is affirmed.

ALL CONCUR.

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