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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000647-MR

RICHARD VERNON MCKINZIE — APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 08-CR-00129

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Richard Vernon McKinzie appeals from an order of the Trigg Circuit Court denying him jail-time credit for 701 days he was on pretrial home incarceration without bail bond posted. We conclude that McKinzie was not

"in custody" while on home incarceration and, therefore, is not entitled to credit on his sentence entered in September 2011.

In January 2009, McKinzie was indicted on several counts of sexual abuse and criminal abuse against his daughters and his paramour's daughters. The circuit court entered an order setting out bond conditions. Pursuant to those conditions, Edmond and Diane Burks posted a 10% cash deposit and served as surety for the remainder of the bond. McKinzie was required to remain on the base at Fort Campbell or the Burks' home unless working or traveling to and from his job, or attending medical treatment, an approved educational program, regularly scheduled services at a place of worship, or a meeting with his attorney.

In September 2009, the Burks made a motion to be removed as surety and for their bond to be returned. The circuit court granted the Burks' motion and ordered McKinzie to remain on pretrial release without posting bond, subject to all of the conditions of home incarceration previously set. McKinzie remained on home incarceration at Fort Campbell until September 14, 2011, when he was sentenced pursuant to a plea agreement to nine years for three counts of sexual abuse, first degree.

On November 29, 2016, McKinzie filed a Kentucky Department of Corrections Policy and Procedure (CPP) 17.4 request for time spent on pretrial

home incarceration.[1] Ultimately, that request was denied and, on February 16, 2017, McKinzie filed a motion for sentencing credit in the Trigg Circuit Court.

The Trigg Circuit Court denied the motion. It ruled the statutory law in effect when McKinzie was sentenced did not allow credit for pretrial home incarceration. The trial court denied McKinzie's motion for reconsideration, and this appeal followed.[2]

Prior to 2011, the award of sentencing credit for time spent in custody was in the exclusive power of the sentencing court. *Bowling v. White*, 480 S.W.3d 911, 915 (Ky. 2015). However, KRS 532.120(3) was amended in 2011, to provide 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 Department of Corrections toward service of the maximum term of imprisonment in cases involving a felony sentence and by the sentencing court in all other cases.

[1] In *Thrasher v. Commonwealth*, 386 S.W.3d 132, 134 (Ky.App. 2012), it was explained:

> CPP 17.4 outlines the proper procedure an inmate must follow to request a review or explanation of the method of sentence calculation[.] This procedure commences with a request to the Offender Information Services office at the institution where the inmate is presently confined. CPP 17.4(1)(A). An appeal from such a written review or explanation is to be directed to the Offender Information Services Branch in Frankfort, Kentucky. CPP 17.4(1)(C).

[2] Although the Commonwealth and McKinzie raise numerous procedural arguments, we decline to address those arguments because McKinzie's substantive claim is without merit.

As noted in *Caraway v. Commonwealth*, 459 S.W.3d 849, 855 (Ky. 2015), "[t]his change to the statutory language divested the trial court of its prior duty and authority to ensure proper application of the presentencing custody credit in felony cases and, instead, placed it solely under the purview of the Department of Corrections." In *Bowling*, the Court held that the DOC's "power is not limited to convictions obtained after the statute was amended." *Bowling*, 480 S.W.3d at 917. Although the DOC cannot unilaterally reduce an award made by the trial court under the prior version of the statute, the DOC has the "power (indeed, the responsibility) to credit '[t]ime spent in custody' toward an inmate's sentence." *Id.*

Under the current version of KRS 532.120(9), an "inmate may challenge a failure of the Department of Corrections to award a sentencing credit under this section or the amount of credit awarded by motion made in the sentencing court no later than thirty (30) days after the inmate has exhausted his or her administrative remedies." However, "the defendant must first pursue his administrative remedies with Corrections before this matter may be addressed by a court." *Caraway*, 459 S.W.3d at 855.

In 2012, the legislature made substantive changes to the law regarding sentencing credit for pretrial home incarceration. KRS 431.517(1) provides that "[h]ome incarceration may be ordered as a form of pretrial release, subject to the conditions imposed by the provisions of KRS 532.200 to 532.250." KRS

532.120(7) and KRS 532.245 now expressly provide for sentencing credit for time spent on pretrial home incarceration. KRS 532.120(7) grants sentencing credit for "pretrial home incarceration pursuant to KRS 431.517, subject to the conditions imposed by KRS 532.245." KRS 532.245(1) provides: "Time spent in pretrial home incarceration pursuant to KRS 431.517 shall be credited against the maximum term of imprisonment assessed to the defendant upon conviction." However, the statute expressly states: "This section shall apply to defendants sentenced on or after July 12, 2012." KRS 532.245(3). McKinzie concedes that KRS 532.120(7) and KRS 532.245(1) do not apply to his claim for sentencing credit.

McKinzie relies on that portion of KRS 532.120(3) in effect on the date of his sentencing, which provides sentencing credit for "[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence[.]" Therefore, to claim credit for his time spent on home incarceration, McKinzie must have been "in custody" as used in KRS 532.120(3).

Our Supreme Court and this Court have previously addressed whether a defendant is in custody while on home incarceration. In *Stroud v. Commonwealth*, 922 S.W.2d 382 (Ky. 1996), the Court held that a defendant on home incarceration was in custody for purposes of escape. The Kentucky Supreme

Court affirmed Stroud's escape conviction holding that "custody as it relates to escape, must be interpreted more broadly than in other situations . . . where the prisoner is requesting jail-time credit." *Id*. at 385.

This Court later held that under the law then in effect, while a defendant on home incarceration may be subject to escape charges, he is not entitled to sentencing credit. *Buford v. Commonwealth*, 58 S.W.3d 490 (Ky.App. 2001). In *Buford*, the appellants, Lively and Buford, were released on their own recognizance to the home incarceration program in lieu of bond by the district court. After their cases were transferred to the circuit court, Buford continued to remain free under the same conditions of release but Lively was required to post a $15,000 bond to be secured by a 10% cash deposit. Noting the distinction made by the Supreme Court in the meaning of "in custody" for purposes of escape and sentencing credit, this Court concluded there is no "inconsistency in denying one jail-time credit for time spent in home incarceration prior to conviction and convicting one who violates home incarceration of escape." *Id*. at 492.

In *Weaver v. Commonwealth*, 156 S.W.3d 270 (Ky. 2005) our Supreme Court held a defendant on home incarceration without bond posted who absconds may be subject to escape charges under KRS 520.030, while a defendant released on home incarceration with bond posted "is subject to having his bail bond forfeited." *Id*. at 272. The Court expressly reaffirmed its holding in *Stroud.*

Although it noted that *Stroud* did not state whether the defendant was on pretrial release or whether his home incarceration was part of his sentence, it concluded that "this distinction [is] of no consequence, as the Court's underlying reasoning is relevant to the present matter: 'a narrow technical reading of the term "custody" is not appropriate for the purposes of determining escape.'" *Weaver*, 156 S.W.3d at 272 (quoting *Stroud*, 922 S.W.2d at 384).

Despite the holdings in *Stroud*, *Buford* and *Weaver* that the meaning of "in custody" for escape and sentencing credit is different, McKinzie relies on language in *Tindell v. Commonwealth*, 244 S.W.3d 126 (Ky.App. 2008), questioning whether the holdings in *Weaver* and *Buford* can be reconciled. This Court echoed the observation of the dissent in *Weaver*, where Justice Keller wrote:

> [T]he *Buford* Court determined that a defendant, like Appellant here, who had been released to Jefferson County's home incarceration program in lieu of bond, could not receive jail-time credit for the time he spent on home incarceration because he was not in "custody" at that time. There is no reason why this Court should take a different view when addressing home incarceration in the context of an escape charge. It is inconsistent and illogical to deny a defendant jail-time credit for time spent in home incarceration prior to conviction because he or she is not in custody, and yet hold as the majority opinion does that a defendant in pretrial home incarceration is in custody for purposes of a conviction for escape from custody. In such circumstances, a defendant is either in custody or not; logically it cannot be both.

Weaver, 156 S.W.3d at 273 (Keller, J., dissenting) (footnotes omitted).

Ultimately, the *Tindell* Court concluded Tindell was released on bail and, therefore, the inconsistency between *Weaver* and *Buford* did not matter. In Tindell's case, home incarceration was an additional condition of his release and he was not entitled to sentencing credit for time spent on home incarceration. *Tindell*, 244 S.W.3d at 128. Consequently, this Court's disgruntlement in *Tindell* with the *Buford* decision after *Weaver* is nothing more than dictum.

As did the appellants in *Buford*, McKinzie argues that the narrow meaning applied to "in custody" when considering sentencing credit and the broad meaning applied when considering escape, is logically unsound. His argument has proven unavailing in this Court and in the Supreme Court.

KRS 532.120(7) and KRS 532.245 now expressly provide sentencing credit for time spent on pretrial home incarceration. However, such credit is available to defendants sentenced on or after July 12, 2012. McKinzie was sentenced in 2011 and is not entitled to sentencing credit for time spent on home incarceration.

The order of the Trigg Circuit Court is affirmed.

ALL CONCUR.

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