IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0140-MR

DATE 10-13-05 Ella Gravitt, D.C.

GARY HAVEN MILLS | APPELLANT

V.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
99-CR-49

COMMONWEALTH OF KENTUCKY | APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

Appellant, Gary Haven Mills, pled guilty in the Johnson Circuit Court to complicity to murder, robbery in the first degree, and arson in the third degree, and was sentenced to twenty-five years in prison. He does not appeal from his convictions, but only from the trial court's failures to (1) award him the proper amount of jail time credit, and (2) order that his presentence investigation (PSI) report, KRS 532.050, be amended to reflect that he did not kill the victim but acted only as an accomplice.

Appellant was initially arrested on these charges on March 15, 1998, and remained in custody until he escaped on November 2, 1998. He was captured and reincarcerated on November 22, 1998, and has remained in custody since that date. Following a trial by jury in 1999, Appellant was initially convicted of complicity to murder,

robbery in the first degree, arson in the third degree, and of being a persistent felony offender in the second degree (PFO 2nd), and was sentenced to life in prison without the possibility of parole for twenty-five years. KRS 532.030(1). On May 24, 2001, those convictions and sentences were reversed and remanded for a new trial. Mills v. Commonwealth, 44 S.W.3d 366 (Ky. 2001). On July 3, 2001, Appellant was discharged from state prison and reincarcerated in Johnson County.

On December 6, 2001, Appellant was convicted of escape in the second degree based on his escape from custody on November 2, 1998, and was sentenced to three years in prison. The Johnson Circuit Court awarded him jail time credit on that sentence from July 3 to December 6, 2001. He completed service of that sentence and was administratively discharged by the Department of Corrections on August 29, 2003. Counting jail time credit, he served a total of 787 days on the escape conviction.

Appellant's retrial of his murder, robbery, arson and PFO 2nd charges was scheduled for November 2003. On the third day of jury selection, November 12, 2003, he pled guilty to complicity to murder, robbery in the first degree, and arson in the third degree, in exchange for dismissal of the PFO 2nd charge and a recommended sentence of twenty-five years of imprisonment. At the sentencing hearing on January 8, 2004, Appellant objected to the PSI report because it credited him with only 133 days of presentence incarceration, and because its narrative of the crime stated that Appellant shot the victim with a .32 caliber weapon, an allegation that Appellant denies, noting that both of his murder convictions were premised upon accomplice, not principal, liability. Pursuant to the plea agreement, the trial court sentenced Appellant to twenty-five years in prison, but granted Appellant's motion for a supplemental hearing on the issues raised by his objection to the PSI report.

I. JAIL TIME CREDIT.

The 133 days of jail time credit reflected in the PSI report represents the time period between the discharge of the escape sentence and the sentencing hearing on the guilty plea, i.e., Aug. 29, 2003 – Jan. 8, 2004. The calculation did not consider the time Appellant spent in custody prior to his discharge from state prison after the reversal of his first conviction, i.e., 1,174 days from March 25, 1998, to July 3, 2001, excluding the 20 days between his escape and recapture.[1] The supplemental hearing was held on July 9, 2004, and the probation and parole officer testified that he agreed with Appellant's claim of entitlement to 1,307 days of jail time credit. However, the officer testified that he could not credit the time owed to Appellant because it was credited against Appellant's original sentence, and that it was the responsibility of the Department of Corrections, not the Division of Probation and Parole, to credit that time against his new sentence.

> Probation Officer: We can only give jail credit for the charge at hand. His original conviction he was given jail credit at that time, which he was sentenced and serving. Therefore, it is the Department of Corrections at the institution level that keeps track of the time. That time has already been credited, so I cannot count that time in my calculations. . . . So, the only thing I can give credit for is from the time he has served out on the escape charge until date of final sentencing for the plea in this matter.
> . . . .
>
> Court: Are you telling me and the appellate court that the time that he spent in custody on his original conviction, that you can't add because that is a Department of Corrections?
>
> Probation Officer: Correct.
> . . . .

[1] The Commonwealth submitted a letter from the Department of Corrections with its brief in an attempt to explain the apparent lack of jail time credit awarded Appellant. This letter is not properly before this Court because it was not a part of the record on appeal.

> Defense Counsel: Well, I am specifically asking you, Judge, to find that he should be given one thousand three hundred seven (1,307) days custody credit.
>
> Court: The purpose of the motion moves the Court to supplement the record, and we've done that. I think we do understand what the problem is, or at least one of the problems; that, you know, Mr. Mills will probably get some time credit, but it's just a matter of the method by which he's given that credit, Probation and Parole tell me they cannot do that, okay.
>
> Defense Counsel: I'm objecting to that conclusion based on the statute saying the court has to make that determination here.
>
> Court: Your objection is noted and OVERRULED. We'll let the appellate court decide because, quite frankly, if that's a problem, it needs to be corrected.

In fact, it is the responsibility of neither the Department of Corrections nor the Division of Probation and Parole (which, of course, is a division of the Department of Corrections) to award the appropriate jail time credit. That responsibility is vested in the trial court.

> Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence <u>shall be credited by the court imposing sentence</u> toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the <u>time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time spent in prison</u>.

KRS 532.120(3) (emphasis added).

Appellant's sentence is for three felony convictions, thus is an indeterminate term of imprisonment. KRS 532.060(1). Based on the word "shall," KRS 532.120(3) is mandatory and precludes any discretion on the part of the trial court in crediting time for pre-sentence custody. <u>Bartrug v. Commonwealth</u>, 582 S.W.2d 61, 63 (Ky. App. 1979). Furthermore, the 1974 Commentary to the statute notes that the statute imposes a duty on the trial judge to see that this credit is properly given in order to guarantee against oversight of the credit. KRS 532.120(3) (1974 cmt.); <u>Polsgrove v. Ky. Bureau of Corr.</u>, 559 S.W.2d 736, 737 (Ky. 1977).

However, KRS 532.120(3) is only mandatory if the time spent in custody relates to the charge which ultimately culminated in the conviction and sentence for which credit is sought. KRS 532.120(3) (1974 cmt.) ("this subsection provides credit only for the amount of time spent in custody for the offense of which an offender stands convicted"); Lemon v. Corr. Cabinet, 712 S.W.2d 370, 371 (Ky. App. 1986). Appellant is not entitled to (and does not claim) any jail time credit for time served on the escape charge. Bailey v. Commonwealth, 598 S.W.2d 472, 473 (Ky. App. 1980) (defendant entitled to credit time spent in custody as a result of escape against the sentence for second-degree escape, but not against the sentence being served at the time of the escape); Belt v. Commonwealth, 2 S.W.3d 790, 794 (Ky. App. 1999) (defendant not entitled to custody credit for time served while simultaneously awaiting trial on assault charges and serving out a sentence on a separate misdemeanor conviction).

Excluding time served on the escape charge, Appellant's time spent in custody is clearly "[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence . . . ." KRS 532.120(3). The original charges of murder, arson, and robbery culminated in Appellant's guilty plea after his first conviction was reversed. Appellant is entitled to jail time credit for all time spent in custody as a result of those charges, including time spent prior to the date his original conviction was reversed. The total jail credit time to which Appellant was entitled as of January 12, 2004, was 1,307 days. The final judgment entered by the trial court erroneously awarded Appellant only 133 days credit for time served on the murder, robbery and arson charges prior to final sentencing.

II. PRESENTENCE INVESTIGATION REPORT.

Under the heading "Nature and Description of Convicted Acts," the PSI report recited that Appellant actually shot the victim. During the supplemental hearing, the trial court ordered that the PSI report be amended to reflect that the challenged statement was an allegation, not a fact. It is unknown whether the copy of the report on file with the Department of Corrections has been so amended. The copy in the record on appeal has not been so amended – perhaps because it has never been available for amendment.

Appellant now asserts that this Court should order the trial court to amend the report by deleting entirely the statement that Appellant shot the victim. However, Appellant did not object to and, in fact, agreed with the trial court's proposed amendment at the supplemental hearing:

Court: I tell you what. Amend your P.S.I. to say "allegations."

Defense Counsel: Okay.

To preserve an issue for appeal, a party must inform the court of its error and request relief. RCr 9.22; West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989). Appellant failed to do so by assenting to the trial court's proposed amendment of the PSI report. The question of striking the challenged statement was not preserved for appeal, thus is not properly before this Court. Nevertheless, if the report has, in fact, never been amended, Appellant may, on remand, move the trial court to order compliance with the trial court's original order of amendment.

III. MOTION TO STRIKE COMMONWEALTH'S BRIEF.

Appellant filed a motion pursuant to CR 76.12(8)(a) to strike the brief of the Commonwealth on grounds that it refers to evidence not included in the record on appeal. The motion to strike was passed to the consideration of the case upon the merits. CR 76.12(8)(a) provides that a brief may be stricken "for failure to comply with any substantial requirement of this Rule 76.12." CR 76.12(4)(c)(iv) requires "ample references to the specific pages of the record," clearly referring to the record on appeal.

On appeal, our review is confined to matters properly made a part of the record below. Fortney v. Elliott's Adm'r, 273 S.W.2d 51, 52 (Ky. 1954); Rohleder v. French, 675 S.W.2d 8, 10 (Ky. App. 1984). Some of the matters presented in the Commonwealth's brief, i.e., factual evidence introduced at the first trial and a letter from the Department of Corrections, are not contained in the record. Although the presentation of extraneous material in briefs is improper, it is not always sufficiently egregious to warrant the drastic relief urged by Appellant. Rankin v. Blue Grass Boys Ranch, Inc., 469 S.W.2d 767, 769 (Ky. 1971), superseded on other grounds by statute as stated in Zurich Am. Ins. Co. v. Haile, 882 S.W.2d 681, 686 (Ky. 1994). Here, the presentation of material not in the record on appeal does not warrant striking the entire brief of the Commonwealth. Therefore, we will deny the motion to strike but observe that we have not considered any extraneous material in reaching the decision on the merits.

Accordingly, the judgment of convictions and sentences imposed by the Johnson Circuit Court are affirmed, but the judgment imposing sentence is reversed in part and remanded with directions to amend the judgment to reflect the proper jail time credit to

which Appellant is entitled and to readdress, if requested, Appellant's motion to amend the PSI report if it has not been amended.

All concur.

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