

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
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OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2011-SC-000187-MR

ERVIN KING

APPELLANT

V. ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, SPECIAL JUDGE
NO. 06-CR-01037

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

Ervin King pleaded guilty in 2011 for the 1990 murder of Gina Dolly Payne. The trial court sentenced him to twenty years' confinement to be served concurrently with the sentences he was then serving under an earlier judgment. That earlier judgment, entered in 2003, imposed a forty-five year concurrent sentence for two other murders.

King now appeals to this Court as a matter of right¹ arguing that the trial court erred by failing to grant him appropriate custody credit for the time he had served under the 2003 judgment, *i.e.* from 2003-2011. The Commonwealth concedes that the trial court erroneously denied this custody credit. So we agree that the judgment in the present case should be vacated

¹ Ky. Const. § 110(2)(b).

and the matter remanded to the trial court with directions to amend the judgment to correct the error.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The facts of this case are undisputed. Ervin King pleaded guilty in 2011 to the 1990 murder of Gina Dolly Payne. Before pleading guilty to the Payne murder, King had pleaded guilty to two other murders and received a total sentence of forty-five years' imprisonment, which he was actively serving when he entered a guilty plea for the murder of Payne.

The trial court accepted King's plea to the Payne murder and sentenced King to twenty years' imprisonment, to be served concurrently with the forty-five year sentence King was already serving. King does not challenge the plea agreement. But King challenges the trial court's failure to award in-custody credit toward his twenty-year sentence.

Before the trial court, King argued that the twenty-year sentence for the Payne murder was to run concurrent with the two prior convictions; and, as a result, the time he served on either or both of the 2003 convictions should be credited to the sentence for the Payne murder. The Commonwealth disagreed with King and argued that because King was arrested on a new charge while he was serving time on other charges, he could not get credit for time spent in custody. The trial court agreed with the Commonwealth's position and ruled that because there was not an agreement to allow the credit, King was not entitled to it.

King's plea was not entered conditionally, so he does not have the right to withdraw the plea if successful before this Court. The sole issue before us pertains to the computation of King's custody credit under the twenty-year sentence. Our ruling today will not affect the status of King's conviction and the sentence imposed.

II. ANALYSIS.

Kentucky Revised Statutes (KRS) 197.035(2), dealing with sentences designated to run concurrent, as King's was, instructs that "the additional sentence . . . shall be considered as having started to serve . . . on the day [the confined prisoner] was committed on the first sentence." Here, the trial court erred in failing to credit King for the time served between his initial convictions in 2003 and the conviction at issue in 2011. Service of King's most recent sentence, twenty years, must be considered as having started on the day he began serving his previous sentences. At the time of King's sentencing, this was the duty of the trial court.² The language of the applicable statutes is clear.

² When King was sentenced, KRS 532.120(3) read:

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. (emphasis added).

And the Commentary to KRS 532.120(3) noted that an "offender be given credit for all time spent in custody prior to the commencement of his term of imprisonment" and

The Commonwealth does not dispute the trial court's error in failing to give King credit for the time served for the previous murder convictions. And our case law clearly supports the credit. In *Rodgers v. Wingo*,³ this Court was faced with a defendant who was convicted of a crime; and his sentence was ordered to "run concurrently with the sentence he is now serving."⁴ In denying Rodgers's release from the penitentiary, this Court held that "the second judgment, in providing that the sentence imposed should run concurrently with the first sentence, merely accorded appellant the right to have the time served on the first sentence to be credited against the second sentence."⁵ We affirm this principle today. It was error for the trial court to deny custody credit to King.

placing the duty on the trial judge was "the surest way to guarantee against oversight of the credit."

But, effective in July 2012, the General Assembly amended KRS 532.120(3), placing the duty to award the credit on the Department of Corrections:

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. 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. (emphasis added).

³ 467 S.W.2d 369 (Ky. 1971).

⁴ *Id.* at 369-70.

⁵ *Id.* at 370. See also *Ingram v. Commonwealth*, 338 S.W.3d 302 (Ky.App. 2012) (holding defendant was entitled to custody credit against two-year sentence for time served from date of incarceration on misdemeanor offenses to date probation was revoked for flagrant non-support).

Of course, as a practical matter, the custody credit to be given to King will have no effect on the amount of time he will serve incarcerated. The twenty-year sentence for the murder of Payne, ordered in 2011, will expire, with or without credit, before the forty-five year sentence from the murder convictions in 2003.

III. CONCLUSION.

King is entitled to the custody credit for the 2011 conviction for the time served under the 2003 convictions. We vacate the judgment and remand the matter to the trial court with directions to amend the judgment to be consistent with this opinion.

All sitting. All concur.

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