

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000785-MR

JOHNATHAN Z. MILLER

APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 00-CR-00369

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Jonathan Miller appeals from an order of the Boone Circuit Court denying his request for an additional 173 days custody credit for time spent on home incarceration prior to his conviction. Miller argues that he is entitled to the credit because Kentucky Revised Statute (KRS) 532.120(3) requires the sentencing court to credit pretrial time spent in custody toward a defendant's final sentence. We find that KRS 520.010(2), which defines custody to exclude pretrial home incarceration, applies to the fact situation at hand and, therefore, the trial court's determination that Miller was not

entitled to credit for time spent on home incarceration is affirmed.

Miller was initially indicted on charges of second-degree assault and tampering with physical evidence. While released on a cash bond, he was indicted for first-degree assault. The trial court set his bond at \$7,500.00 and released him on home incarceration to live with his mother. Eventually, the order of release was amended to allow Miller to live with his father. The conditions of his release included a requirement that he stay at home except when working or traveling directly to and from work. His bond was revoked after he was arrested for second-degree escape.

At his bond forfeiture hearing, Miller pled guilty to fourth-degree assault and second-degree assault and was sentenced to twelve months and sixty-one months, with the two sentences to run concurrently. The trial court credited Miller with forty-five days spent in custody and denied his motion for an additional 173 days credit for the time spent on home incarceration. Miller filed a motion to reconsider which the trial court also denied, and this appeal followed.

KRS 439.244 requires time spent by an inmate on probation or parole to count toward the maximum expiration date of his sentence. Miller argues that he is entitled to credit for an additional 173 days toward the fulfillment of his sixty-

one month sentence because the conditions of his home incarceration were more restrictive than the terms under which he may later be placed on parole. In addition, he points out that inmates on parole have already been convicted of a felony while he was only charged with felony offenses at the time of his home incarceration. Still, Miller fails to show how KRS 439.244 is relevant to his request for custody credit for time spent on pretrial home incarceration.

In his second argument, Miller contends that the trial court erroneously relied on Buford v. Commonwealth, Ky. App., 58 S.W.3d 490 (2001), in reaching the conclusion that he was not entitled to credit for the 173 days spent on home incarceration. This argument is based on the fact that the defendants in Buford relied on KRS 532.210(4) to support their request for credit for home incarceration while Miller's motion for an additional 173 days credit cited KRS 532.120(3). KRS 532.120(3) does require the sentencing court to credit "[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence" against Miller's total sentence, but KRS 520.010(2) specifically defines the term "custody" to exclude "constraint incidental to release on bail." Therefore, release on a bond which includes a condition of home incarceration does not count toward Miller's total sentence of sixty-one months.

In addition, the factual situation in Buford is indistinguishable from the case at hand in that both defendant Buford and defendant Lively were released on their own recognizance by the juvenile court while their robbery charges were pending. As a condition of that pretrial release, both juveniles were placed in home incarceration in lieu of posting a cash bond. When their cases were transferred to the circuit court, both remained on home incarceration, although Lively was required to post a cash bond as an additional condition of pretrial release. The trial court refused to grant either defendant credit for time spent in home incarceration prior to their convictions, and we affirmed that decision. Likewise, Miller posted a cash bond and was granted pretrial release to home incarceration. We find no meaningful distinction between his situation and the facts underlying our decision in Buford.

For the foregoing reasons, the decision of the Boone Circuit Court is affirmed.

ALL CONCUR.

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