

RENDERED: July 15, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002623-MR

CHARLES WILLIAM TYLER

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 93-CR-00082-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: Charles William Tyler, pro se, has appealed from an order of the Marion Circuit Court entered on November 24, 2003, which denied his motion requesting credit towards his Kentucky prison sentence for 4,657 days he served in federal custody before his arrest on Kentucky charges. Having concluded

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

that the trial court did not err in denying Tyler credit for the previously served time, we affirm.

On July 3, 1980, Tyler was convicted on federal charges by a jury in the United States District Court, Southern District of West Virginia, and was sentenced to 22 years in federal prison.² Tyler received a mandatory release from the federal sentence on December 4, 1992, and did not serve the remainder of time on his federal sentence. On June 9, 1993, approximately six months after his release from federal custody, Tyler was indicted by a Marion County grand jury for burglary in the first degree,³ robbery in the first degree,⁴ theft by unlawful taking over \$300.00,⁵ and two separate counts of being a persistent felony offender in the first and second degree (PFO I and PFO II).⁶ The indictment alleged that on or about February 25, 1993, in Marion County, Kentucky, Tyler and two other men,⁷ armed with handguns, identified themselves as police officers

² The charges that led to Tyler's federal conviction include: Interstate Transportation of Stolen Property, Violations of the Federal Firearms Act, and Possession with the Intent to Distribute Heroine, Cocaine and Marijuana.

³ KRS 511.020.

⁴ KRS 515.020.

⁵ KRS 514.030.

⁶ KRS 532.080(2) and (3).

⁷ One of the men was Michael Stricker.

and entered the home of Gary D. Mattingly⁸ and took items from the Mattingly residence valued at approximately \$12,620.00.

A jury trial was held on February 28, 1995, and Tyler was found guilty as charged in the indictment. On April 18, 1995, the trial court entered its final judgment and sentenced Tyler to prison for two life terms for robbery and burglary and 20 years for theft. The sentences were ordered to run concurrently with each other, but consecutively "with all other charges [for which] he was on probation or parole at the time he committed those crimes [on] Feb. 25, 1993."

Tyler appealed the judgment and our Supreme Court ordered⁹ that the conviction for theft be dismissed.¹⁰ On October 22, 1997, Tyler filed a RCr 11.42 motion claiming ineffective assistance of counsel. By order entered on May 12, 1998, the trial court denied Tyler's motion and he appealed to

⁸ Once inside the Mattingly residence, the men told Gary and his wife, Martha, that they were there to question them. One of the men led Gary into the rear bedroom, advised him of his rights, informed him that he was under arrest, then tied his hands with plastic ties and forced him to lie face down on the floor. Meanwhile, Martha was taken into the kitchen where she was questioned regarding the location of a safe that was allegedly inside the house. Martha was then taken into the rear bedroom and tied in the same manner as Gary. In addition to Gary and Martha, the Mattingly children were forced to sit on the couch, then they too were tied up. Prior to leaving, the three men took the following items from the residence: one 357 magnum pistol, \$710.00 in cash, one Rolex watch, one three-and-one-half carat diamond ring, two sweetheart rings, one diamond ring in the shape of a flower, one liberty coin ring, assorted cosmetic jewelry, one Phantom of the Opera charm, and one cross charm.

⁹ Case No. 1995-SC-0627-MR, not-to-be published, final on September 19, 1996.

¹⁰ Because Tyler was convicted of robbery in the first degree, our Supreme Court held that an additional conviction for theft constituted double jeopardy.

this Court. After determining that the Commonwealth, during the sentencing phase of the trial, had failed to present properly authenticated and attested copies of out-of-state records concerning Tyler, this Court vacated the PFO I conviction and remanded¹¹ the case.

On remand, the Commonwealth made the following written plea offer:

On plea of guilty to PFO I, Commonwealth recommends 25 years on each count, concurrent one with the other for a total of 25 years to run concurrently with any and all federal sentences currently applicable to Defendant or applicable to him at any time since his arrest herein [emphasis added].

Tyler accepted the Commonwealth's offer, but the trial court's final judgment and sentence, entered on July 17, 2001, ordered Tyler to be imprisoned for a maximum term of "25 [years] each on each [count] to run concurrent & concurrent with any federal charges now serving [emphasis added]."

On November 15, 2001, Tyler filed a motion¹² claiming that he had served 4,657 days in federal custody between March 1980 and December 1992 prior to his mandatory release, and that those days should be credited towards his state sentence. The

¹¹ Case No. 1998-CA-001462-MR, not-to-be published, final on March 21, 2001.

¹² This motion was not styled as an RCr 11.42 motion, but rather as a "MOTION FOR FEDERAL TIME CREDIT PURSUANT TO KRS 523.110(1)[sic]; 532.115; AND 532.120(1)(a)."

trial court denied Tyler's motion by order entered on December 3, 2001, which stated, in relevant part, as follows:

The number of days credit was to be determined by the Department of Corrections. The Defendant was given credit for the time served from December 30, 1993. The defendant now wants credit for time he served on federal charges from March 2, 1980 to his release on December 4, 1992, all of which occurred prior to these offenses. He claims that a detainer/warrant lodged against him by the U.S. Department of Justice (USDOJ) for mandatory release violation entitles him to a credit for the days he served prior to this offense. That is not what the Judgment and Sentence calls for. The Judgment that was entered on July 16, 2001, only allows the state time to run concurrent with any federal time now serving.

At the present time, it does not appear that the Defendant is serving any federal time in that a detainer is all that has been filed against him. It does not appear that the balance of his federal time (if any) was revoked at the time of his sentencing on July 16, 2001. Even if it was, the Defendant would only be entitled to run his state time with his new federal time and the number of days credit would still only relate back to the original arrest date on those state charges.

Tyler did not appeal this decision. However, almost two years later, on September 11, 2003, Tyler filed another RCr 11.42 motion, raising the identical issue he raised in his November 15, 2001, motion and arguing that he should receive credit for the 4,657 days he served in federal custody prior to his arrest in Marion County. In the motion at issue, Tyler

alleged that his trial counsel was ineffective for allowing him to enter a guilty plea because the language in the Commonwealth's plea offer and the language in the final judgment differed. Tyler contended that the terms of the final judgment denied him credit for the time he served in federal custody, thus requiring him to serve more days of his state sentence than required by the plea offer.

After reviewing Tyler's RCr 11.42 motion, the trial court, in an order entered on November 24, 2003, credited Tyler's state sentence with 158 days that he had served in a federal in-transit facility between April 8, 1998, and September 2, 1998, but did not give him credit for the 4,657 days he served prior to his arrest in Marion County. The order stated, in relevant part, as follows:

A history of the Defendant's incarceration is helpful to the disposition of the matter herein. Tyler was sentenced to twenty two years (22) in federal prison in 1980. He subsequently received a mandatory release from the federal system on December 4, 1992. At the time of the commission of this offense in 1993, Tyler was not in federal custody. At most, Tyler was on supervised release as verified by a phone conversation with Stephen Cruetz, Inmate Systems Manager in Loretto, Pennsylvania. The next federal action regarding Mr. Tyler was when he was placed at an in-transit facility on April 8, 1988 after picking up on his state charges. Tyler was then released from Federal custody on September 2, 1988 as it appears his time

was run concurrent with his Kentucky sentence.

The Defendant's plea agreement recommended 25 years on each count, to run concurrently with any and all Federal sentences currently applicable to defendant or applicable to him at any time since his arrest herein. The Judgment entered by the Court on July 17, 2001 stated that the Defendant was sentenced to 25 years on each count to run concurrent and concurrent with any federal charges now serving. The Defendant was not serving any federal sentence at the time of his sentencing, nor has he served any federal time since then.

The Court finds that the only Federal time to which Defendant Tyler should be given credit by the Department of Corrections would be the time period incarcerated at an in-transit facility in the Federal system from April 8, 1998 to September 2, 1998 consisting of 158 days.

. . .

The Defendant's Motion for modification of his sentence is GRANTED insofar as the Defendant should receive 158 days of credit for jail time served in the federal system from 4/8/98 to 9/2/98 if he has not already been credited same by the Department of Corrections.

This appeal followed.

Tyler contends that pursuant to the July 17, 2001, plea agreement and judgment, he should be given credit on his state sentence for the days he served in federal custody between March 1980 and December 1992.¹³ According to Tyler, his federal

¹³ In his brief, Tyler claims that "[t]he only issue that should be brought to light is [w]hether the [a]ppellant, Charles W. Tyler[,] was on [f]ederal

and state sentences should run concurrently, and thus, credit for one should extend to the other pursuant to KRS 197.035¹⁴ and KRS 532.115.¹⁵

In summarizing the procedure for appellate review in criminal cases in Gross v. Commonwealth,¹⁶ the Supreme Court of Kentucky stated that the structure for appellate review is not haphazard or overlapping.¹⁷ A criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by

[p]arole or on [f]ederal [s]upervised [r]elease." However, we conclude that Tyler was on mandatory release not parole or supervised release.

¹⁴ KRS 197.035 states:

- (1) A sentence, on conviction of a felony, imposed upon a confined prisoner for a crime committed prior to the date of his instant commitment, if designated to be served consecutively, shall be added to the sentence or sentences being served.
- (2) If the additional sentence is designated to be served concurrently, or the commitment is silent, he shall be considered as having started to serve said sentence on the day he was committed on the first sentence.

¹⁵ KRS 532.115 states:

The court in sentencing a person convicted of a felony, shall be authorized to run the sentence concurrent with any federal sentence received by that defendant for a federal crime and any sentence received by that defendant in another state for a felony offense. The time spent in federal custody and the time spent in custody in another state under the concurrent sentencing shall count as time spent in state custody; but the federal custody and custody in another state shall not include time spent on probation or parole or constraint incidental to release on bail. If the court does not specify that its sentence is to run concurrent with a specific federal sentence or sentence of another state, the sentence shall not run concurrent with any federal sentence or sentence of another state.

¹⁶ 648 S.W.2d 853 (Ky. 1983).

¹⁷ Id. at 856.

raising every error of which he should be aware.¹⁸ The Court in Sanborn v. Commonwealth,¹⁹ clearly explained the standard of review for a RCr 11.42 motion, stating that “[s]uch a motion is limited to issues that were not and could not be raised on direct appeal.”

The Commonwealth contends that since this issue has already been decided twice previously by the trial court, we are precluded from reviewing this appeal by the doctrine of res judicata.²⁰ The doctrine of res judicata is an affirmative defense that bars repetitious suits involving the same cause of action.²¹ For res judicata to apply, the issues in the current claim and the issues in a previously litigated claim must be identical. The pivotal determination which must be decided is if the claims in each action arise from the “same transactional nucleus of facts.”²²

We agree that Tyler’s claim before this Court may be barred by res judicata. However, since Tyler’s motion was filed pro se, he is not held to the same rigid procedural standards as

¹⁸ Gross, 648 S.W.2d at 856.

¹⁹ 975 S.W.2d 905, 908-09 (Ky. 1998).

²⁰ Res judicata encompasses both issue and claim preclusion and is not to be used as synonymous with either individually, but rather equally with both. Yeoman v. Commonwealth, 983 S.W.2d 459, 464-65 (Ky. 1998).

²¹ Yeoman, 983 S.W.2d at 464.

²² Id. at 465.

a litigant who is represented by counsel.²³ Therefore, we will consider the validity of Tyler's argument, even though, we hold that he is still not entitled to the relief he seeks.

The question before us is whether the time Tyler had already served under the previous federal sentence was to be considered in computing Tyler's state sentence. We are not persuaded that either KRS 197.035 or KRS 532.115 is applicable in this case. KRS 197.035 merely explains the terms "consecutively" and "concurrently." KRS 532.115 concerns the concurrent service of a federal felony sentence or a felony sentence from another state, but it does not allow credit for time spent on probation or parole.

We conclude that the applicable statute is KRS 532.120(3), which provides, in relevant part, as follows:

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 commentary to this statute states that "[i]t should be noticed that [Subsection 3] provides credit only for the amount of time spent in custody for the offense of which an offender

²³ See Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983).

stands convicted." "This statement offers a stronger indication that only the time spent in custody, which is solely due to the charge for which a defendant is ultimately sentenced, should be credited against that sentence."²⁴ Thus, a person cannot receive jail-time credit for time he spent in custody before a subsequent charge occurs. "Credit for time spent in custody prior to the commencement of a sentence applies only where the custody was a result of the charge that culminated in his sentence."²⁵ Therefore, since Tyler's state convictions were separate and distinct offenses and were not a result of his federal charges, he is not entitled to receive credit for the 4,657 days he served in federal custody.

Tyler claims that his co-defendant, Stricker, previously received a favorable decision from this Court which involved the same language contained in his plea agreement and final judgment. In Stricker,²⁶ this Court vacated the sentence and remanded the case to the trial court for an accurate determination of the credit to be given to Stricker's sentence. This Court ruled that there was a conflict between the plea agreement and the final judgment and held that the language in

²⁴ Mills v. Commonwealth, 723 S.W.2d 859, 860 (Ky.App. 1986).

²⁵ Handley v. Commonwealth, 653 S.W.2d 165, 166 (Ky.App. 1983) (citing KRS 532.120(3)).

²⁶ Stricker v. Commonwealth, 2002-CA-000204-MR, rendered August 8, 2003, not-to-be-published.

the plea agreement entitled Stricker to credit for the federal time he served between September 1993 and April 1994, after his arrest but prior to his conviction. Tyler claims that his sentence should, likewise, be vacated, and his case should be remanded since he and Stricker received the same plea agreement and were sentenced on the same day. Regardless of this Court's analysis in Stricker, we conclude that Tyler is not entitled to relief because unlike Stricker, Tyler was not in federal custody between the time the warrant was issued for his arrest on the state charges and the entry of his guilty plea.

After the Marion County warrant was issued against Stricker, but before he stood trial, Stricker began serving a 20-month federal sentence on September 9, 1993. On April 4, 1994, seven months after he began serving his federal sentence, Stricker was transferred from the federal penitentiary to the Marion County jail to stand trial on the February 25, 1993, charges. Stricker appealed his conviction, and this Court held that "[u]nder the literal terms of the plea agreement, those seven months should be credited to him based upon an interpretation that the phrase 'since his arrest herein' refers to the execution of the [Marion County] warrant[,]" whereas the terms "now serving" would not include the seven months he served on his federal sentence because he was not serving the federal sentence at the time the final state judgment was entered.

Unlike Stricker, Tyler was out of federal custody, and at liberty on mandatory release, at the time the Marion County warrant was issued against him. At no time after the Marion County warrant was issued, or prior to the entry of his guilty plea, was Tyler detained in federal custody. Therefore, Tyler is not eligible to receive credit for the 4,657 days he spent in federal custody. He has already received credit for the 158 days he served in a federal in-transit facility, and this is all the credit he is entitled to under either the language of the plea agreement or the final judgment.

Our decision in this case is consistent with Stricker, since in Stricker, this Court gave Stricker credit for some of the federal sentence he had previously served, but also denied him credit for a one-year sentence he served in federal custody in 1991, prior to the commencement of the Marion County charges. The one-year sentence Stricker sought credit for and the 4,657 days Tyler is seeking credit for are analogous in the sense that neither sentence was being served at the time the Marion County warrant was issued. Both the one-year sentence Stricker sought credit for and the 4,657 days Tyler is seeking credit for occurred prior to the return of the Marion County indictment. With regard to Stricker's 1991 sentence, this Court stated that "[Stricker's] reasoning is premised on an assumption that he was still serving time on his sentence when in fact he was at

liberty on a supervised release at the time of his arrest in Marion County on state charges. We do not agree that released supervision equates with time actually served."²⁷ Thus, we see no inconsistencies between the ruling in this case and the ruling in Stricker.

Because we find no merit in Tyler's argument that he was entitled to credit for additional days served in federal custody, we hold that any inconsistency between the plea agreement and the final judgment did not prejudice Tyler or alter the outcome of his sentence. Accordingly, his claim for ineffective assistance of counsel has no merit.

For the foregoing reasons, the order of the Marion Circuit Court is affirmed.

HUDDLESTON, SENIOR JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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²⁷ Tyler argues that, unlike Stricker, he was not on released supervision. However because he was on mandatory release, we fail to see how this is relevant.