

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0083

DUANE JERMAINE HARRIS,

Petitioner,

**Appeal from a Final Order
of the Circuit Court of Kanawha
County (11-F-692)**

v.

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S BRIEF

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I.

ASSIGNMENT OF ERROR

A. THE CIRCUIT COURT ERRED DENYING A MOTION TO CORRECT AN ILLEGAL SENTENCE WHICH SENTENCE CREDITED PETITIONER 32 DAYS SERVED TO THE REVOCATION OF HIS FEDERAL SUPERVISED RELEASE WHEN THE PETITIONER HAD SERVED 154 DAYS INCARCERATED AT THE DATE OF HIS SENTENCING

II.

STATEMENT OF THE CASE

The Petitioner was indicted by the September Term 2013 Kanawha County Grand Jury for Third Offense Domestic Battery and Malicious Wounding. (App. pp. 22-25) The Petitioner signed a plea agreement on November 12, 2013. (App. pp. 26-27) On November 12, 2013, the Petitioner entered a plea to Third Offense Domestic Battery as contained in Count One of Felony Indictment Number 13-F-695. In exchange for this plea, the Office of the Prosecuting Attorney agreed to dismiss Count Two of Felony Indictment Number 13-F-695. (App. p. 26) The State of West Virginia recommended that any sentence imposed be served concurrently with the Petitioner's current federal parole violation. (App. p. 26)

On January 3, 2014 at disposition hearing, the Petitioner was sentenced to an indeterminate term of one (1) to five (5) years in the penitentiary of this State with credit for time spent of 32 days. (App. pp. 2, 3) The Petitioner was only given 32 days credit served when he had been incarcerated on this charge for 154 days at time of sentencing. (App. p. 15)

The Petitioner was incarcerated on July 16, 2013 and Leon Harris posted \$500 cash bond for the Petitioner on October 4, 2013. On October 16, 2013 a bail piece was issued and returned on October 23, 2013. (App. p.1) The Petitioner was incarcerated on this offense at sentencing for 154 days. He served from July 16, 2013 to October 4, 2013, 81 days and October 23, 2013 to January 3, 2014, 73 days. (App. p.4) A Motion for Correction of Sentence Pursuant to Rule 35(a) and Reconsideration of Sentence Pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure was filed on January 6, 2014. (App. pp. 4, 5) An Order Denying Motion for Correction of and Reconsideration of Sentence was filed on January 10, 2014. The Notice of Appeal for this appeal was filed on January 17, 2014.

III.

SUMMARY OF THE ARGUMENT

The Circuit Court was clearly erroneous crediting 32 days served when the Petitioner had been incarcerated for 154 days on the date of his sentencing. The Circuit Court erroneously credited days served to the date of the revocation of the Petitioner's federal supervised release.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner contends that oral argument is necessary in this case. The Petitioner contends that the oral argument in this case should be subject to Rule 19 of the Rules of Appellate Procedure. The Petitioner contends that the case is appropriate for a Rule 19 argument in that the Petitioner claims the Circuit Court erred in the application of settled law. The Petitioner contends that the case is appropriate for a memorandum decision.

VI.

ARGUMENT

A. THE CIRCUIT COURT ERRED DENYING A MOTION TO CORRECT AN ILLEGAL SENTENCE CREDITING DAYS SERVED TO THE DATE THE UNITED STATES OF AMERICA REVOKED THE PETITIONER'S SUPERVISED RELEASE

“The Supreme Court of Appeals reviews sentencing orders...under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.’ Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011). More specifically, “In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal procedure, we apply a three pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and the questions of law and interpretations of statutes and rules are subject to a de novo review. *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

The Circuit Court was clearly erroneous crediting the Petitioner 32 days time served when he had been incarcerated for 154 days on the date of his sentencing. (App. pp. 6, 7, 8) The Circuit Court determined that days served should be credited to the date the petitioner's federal supervised release was revoked. The presentence report states 32 credit for time served. (App. p. 15) The Court found the petitioner was receiving credit on his federal violation of his supervised release. There is no rule or law that mandates such a determination. Indeed, because of the fundamental constitutional rights involved, this Court has held that the

granting of presentence credit is in fact mandatory: “The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable.” Syl. Pt. 6, *State v. McLain*, 211 W.Va. 61, 561 S.E. 2d 783 (2002). The underlying crime in this case is clearly bailable. (App. p. 1)

This Court has further held that “The equal protection argument runs on the premise that an invidious discrimination based on wealth occurs where the indigent defendant, unable to obtain bail, stays in jail, while his wealthier counterpart is free on bond and, receiving the same ultimate sentence, will have served less total time since he had no jail time.” *Martin v. Leverette*, 161 W. Va. 547, 244 S.E. 2d 39, (Citing *Durkin v. Davis*, 538 F.2d 1037 (4th Cir. 1976)). Also, this Court further elaborated on the fundamental constitutional underpinning of this important principle: “Constitutional protections are implicated because a person who is unable to make bail will be incarcerated before trial. If such person is not given credit for jail time, a longer period of incarceration will occur than for the person who commits the same offense but is released on pretrial bail. *State ex. rel. Roach v. Dietrick*, 185 W. Va. 23, 404 S.E. 2d 415 (1991).

Additionally, the petitioner faces the possibility that federal authorities might not accept him until completion of his state sentence. In *State ex rel. Massey v. Hun*, 197 W.Va. 729, 478 S.E. 2d 579 (1996), this Court warned trial judges of such a result. In *Del. Guzzi v. U.S.*, 980 F. 2d 1269, 1271 (9th Cir, 1992), the Court of Appeals for the Ninth Circuit found that under 18 U.S.C. 3568, (now 18 U.S.C. 3585(b)), “federal authorities need only accept prisoners upon completion of their state sentence and need not credit prisoners with time spent in state custody.”

See *McIntosh v. Looney*, 249 F. 2d 62 (10th Cir. 1957) (marshall has no duty to take petitioner into custody unit released from the second state sentence); *Lionel v. Day*, 430 F. Supp. 384, (W. D. Okla. 1976) (“Obviously no comment or order by a state judge can control the service of a federal sentence.”) In a concurring opinion in *Del Guzzi v. U.S.*, after outlining in detail the defendant’s expectation of an state order for concurrent sentences, Judge Norris found no avenue to grant relief and hoped defendant’s case would serve as a lesson. Judge Norris stated: State sentencing judges and defense attorneys in state proceedings should be put on notice. Federal prison officials are under no obligation to, and may well refuse to, follow the recommendation of state sentencing judges that a prisoner be transported to a federal facility. Moreover, concurrent sentences imposed by state judges are nothing more than recommendations to federal officials. Those officials remain free to turn those concurrent sentences into consecutive sentences by refusing to credit the time the prisoner spent in state custody. *Del Guzzi v. U.S.*, 980 F. 2d (Norris, J., concurring). See *Bloomgren v. Belaski*, 984 F.2d 688, (10th Cir. 1991) (the question of defendant’s federal sentence running consecutively “to his state sentence is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently-obtained state conviction).

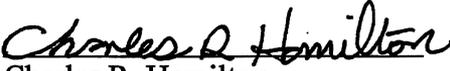
The Circuit Court committed clear error in this case crediting 32 days served to the date of Petitioner’s revocation of federal supervised release. Petitioner had served 154 days on the date of his state sentencing. This crediting of 32 days served violated his double jeopardy and equal protection rights. The petitioner could serve an extra 122 days on his state indeterminate one (1) to five (5) sentence if the federal authorities wait to transfer him to a federal facility until his state sentence is served.

VI.

CONCLUSION

The Petitioner asks that his sentencing order be vacated and this case be remanded to Kanawha County Circuit Court to correct the credit days served on this offense to 154 days and other relief deemed proper by this Court.

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VIII.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief and Appendix Record were mailed by U.S. Mail this 9th day of May, 2014, to: Julie A. Warren, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, Sixth Floor, Charleston, West Virginia 25305.


Charles R. Hamilton