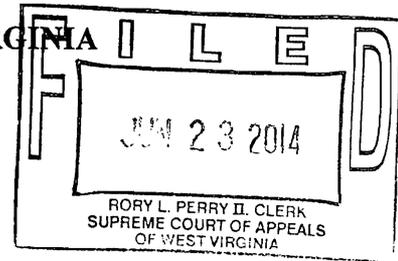


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0083



DUWANE JERMAINE HARRIS,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent,

RESPONDENT'S BRIEF

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STATUTES

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Comes now the State of West Virginia, by counsel, Julie A. Warren, Assistant Attorney General, and files the within Response to the Petition for Appeal.

I. STATEMENT OF THE CASE

Duwane Jermaine Harris, the Petitioner, was indicted in the Circuit Court of Kanawha County during the September 2013, term of court on one count of Third Offense Domestic Battery and one count of Malicious Assault. App. at 8-9, 23-25. The Petitioner pled guilty to Third Offense Domestic Battery, and in exchange, the State agreed that it would recommend any sentence run concurrently with a federal parole violation; it would not invoke the Recidivist Act; and it would dismiss the Malicious Wounding charge. *Id.* at 26-30.

According to the Petitioner's Presentence Report, on July 8, 2013, the Petitioner engaged in an argument with Jada Starcher, with whom he was described as "involved with," and the argument proceeded to turn physical when the Petitioner "struck Ms. Starcher several times on her face and head." *Id.* at 9. According to the Report, the Petitioner had twice been previously convicted for Domestic Battery, first on November 6, 2008, and again on July 11, 2013. *Id.* On January 3, 2014,

the Petitioner was sentenced to a term of imprisonment of 1 to 5 years, with credit for time served. *Id.* at 2-3. The sentence was ordered to run concurrently with the federal sentence which the Petitioner was serving at the time the Sentencing Order was entered. *Id.*

At the time of this incident, the Petitioner was still serving a three-year supervised release term stemming from a federal conviction in the U. S. District Court for the Southern District of West Virginia for distribution of cocaine. *Id.* at 40-64. Several petitions, in addition to a petition being filed concerning the subject incident, were filed in the Federal District Court alleging the Petitioner had violated his supervised release. *Id.* at 57-69. On July 24, 2013, a petition was filed asserting that charges were pending against the Petitioner after he was caught operating a vehicle without a valid driver's license, and a search of the vehicle revealed 14 grams of marijuana. *Id.* at 57. The Petitioner was arrested on April 7, 2013, and charged with domestic battery and failure to fingerprint. *Id.* On May 13, 2013, the Petitioner was charged with telephone harassment and assault, after allegedly choking and pulling the hair of his ex-girlfriend and threatening to kidnap their child. *Id.* at 57-58. The Petitioner also tested positive for marijuana three times during his supervision. *Id.* at 58. As a result of these numerous violations, the Petitioner's supervised release was revoked by the Federal court on July 24, 2013 which issued a warrant. *Id.* at 59.

After the sentence was imposed related to the Third Offense Domestic Battery conviction, the Petitioner filed 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, wherein he requested the court correct the Sentencing Order and extend him 154 days of time served. *Id.* at 41. He appealed to the court that his federal felony charge and the subject Third Offense Domestic

¹ The Petitioner based his claim for 154 days of credit for time served on the claim that he was incarcerated from July 16, 2013 to October 4, 2013, when he posted bond, which is a total of 81 days. His bail piece was returned and he was again incarcerated on October 23, 2013 until he was convicted on January 3, 2014, a total of 73 days.

Battery charge were “his only felonies,” and that he had been out on federal parole for 2.5 years. *Id.* He further maintained that he was “remorse[ful]” for the battery and that he had “taken full responsibility.” *Id.* at 5. He also appealed to the court for reconsideration on the basis that he “has five children,” is “self-employed,” and “coaches little league, basketball and football.” *Id.* He further referenced the testimony of the victim, Jada Starcher, whom he asserts “testified at sentencing that she exaggerated her charge to the investigating officer,” and that “she was mad and wanted to get [the Petitioner] in trouble.” *Id.* The court issued an order denying the motion, explaining that the Petitioner was incarcerated at the South Central Regional Jail on July 16, 2013, until his federal supervised release was revoked 32 days later on August 16, 2013, and that he only received credit for time served on the subject charge and that the court would not “incorporate time served after [the Petitioner’s] federal supervised release was revoked,” because it “refused to grant credit for two sentences simultaneously.” *Id.* at 6. The court noted that the Petitioner did “receiv[e] credit on another sentence for time-served after revocation of his federal supervised release.” *Id.*

II. SUMMARY OF THE ARGUMENT

The Petitioner is only entitled to 32 days of credit for time served. The remaining time the Petitioner was incarcerated does not count toward his conviction of Third Offense Domestic Battery, since his incarceration was due to the revocation of his federal supervised release. Therefore, the trial court did not abuse its discretion by denying the Petitioner’s Motion for Reconsideration pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure.

III. STATEMENT UPON ORAL ARGUMENT

The State asserts that oral argument is not required, as the decisional process would not be assisted by oral argument. The facts and legal arguments are argued by and presented in the briefs and appendix.

IV. ARGUMENT

A. **Standard of Review.**

Appellate review of a sentence is appropriate when the petitioner alleges under West Virginia Rule of Criminal Procedure 35 that his sentence was imposed for impermissible reasons or was beyond the statutory limits. *State v. McClain*, 211 W. Va. 61, 64, 561 S.E.2d 783, 786 (2002). Such claims are considered under a three-prong 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 questions of law and interpretations of statutes and rules are subject to a de novo review.” Syl. Pt. 1, in part, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

B. **The Petitioner Received all of the “Time Served” Credit to which He was Entitled.**

Although the Petitioner may have spent 154 days in jail between his indictment and his conviction of Third Offense Domestic Battery, only 32 of those 154 days were served as the result of those charges. The remaining 122 days of incarceration followed as a result of the revocation of the Petitioner’s federal supervised release. Since the Petitioner may not receive credit for time served on unrelated charges, he was only entitled to receive 32 days of credit for time served for the Third Offense Domestic Battery.

The Petitioner is entitled to receive credit for certain time he served in jail prior to his conviction. West Virginia Code §§ 61–11–24, 62–1C–1(a); *State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002). However, he is only entitled to credit for the time served on the offenses for which he was convicted. *State v. Bowers*, No. 13–0408 (Jan. 17, 2014) (unpublished opinion) (“The petitioner is not entitled to have time served credit applied to his current sentence for time spent incarcerated on unrelated charges.”); *Echard v. Holland*, 177 W. Va. 138, 144, 351 S.E.2d 51, 57 (1986) (explaining that a defendant is not entitled to credit for time served on another conviction);

see also, Yost v. Plumley, 2013 WL 310047 (Jan. 25, 2013) (unpublished memorandum decision) (discussing *Echard*); cf. *Miller v. Luff*, 175 W. Va. 150, 153, 332 S.E.2d 111, 114 (1985) (“Where a defendant has been convicted of two separate crimes, and the legislature authorized a distinct punishment for each, the defendant has no constitutional right to serve less than the cumulative total.”) The sentence was ordered to run concurrently with the federal sentence which the Petitioner was serving at the time the Sentencing Order was entered. *Id.*

The Petitioner’s demand for the 154 days of credit for time served is misguided. He was only incarcerated on the Third Offense Battery charge from July 16, 2013, until his federal supervised release was revoked 32 days later on August 16, 2013. During this time, the Petitioner was found to have violated his supervision on a variety of grounds and his supervision was revoked, and as a result, the Petitioner was incarcerated from August 16, 2013, until he was sentenced January 3, 2014. As this Court has made abundantly clear, particularly in *State v. Bowers*, the Petitioner may not receive credit for the time served prior to his January 3, 2014 sentencing to the extent the time was served as a result of the revocation of his supervised release.

Therefore, the lower court did not err when it denied the Petitioner’s Motion for Correction of Sentence, as only the 32 days from July 16, 2013 to August 16, 2013 relate to his Third Offense Domestic Battery conviction.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court dismiss the petition and deny any and all relief requested by the Petitioner.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Julie A. Warren', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Julie A. Warren, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "RESPONDENT'S BRIEF" upon Petitioner by depositing said copy in the United State mail, with first-class postage prepaid, on this 23rd day of June, 2014, addressed as follows:

Charles R. Hamilton
Hamilton Law Office
5130 MacCorkle Ave., SE
Charleston, WV 25304-2149



JULIE A. WARREN