

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

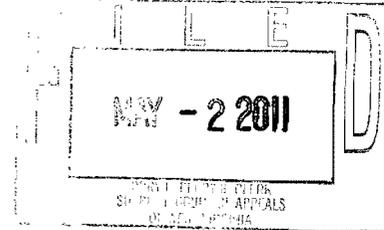
v.

MICHAEL MCGILL,

Petitioner.

Supreme Court No. 11-0261

Circuit Court No. 10-F-51
(Marshall)



PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. The Circuit Court Erred In Accepting Mr. McGill's Guilty Plea Because The Conduct He Admitted To Only Amounts To A Bond Violation As He Was Not Truly In Custody Or Confinement.
- II. The Circuit Court Lacked The Authority To Order Restitution To The State For The Costs Of Investigating And Re-Apprehending Mr. McGill Because The West Virginia Victim Protection Act Does Not Cover Law Enforcement's Investigative Costs.

STATEMENT OF THE CASE

Marshall County selectively prosecuted Michael McGill for escape from custody simply for violating the conditions of bond. (A.R. 2-3, 79-80). The circuit court subsequently sentenced him to three years in prison and to pay \$8,261.56 in restitution to the State, just because he cut off his ankle bracelet and moved from his father's home back to his own property. (A.R. 4-8).

The evidentiary record is scant because Mr. McGill pled guilty to escape from custody, W. Va. Code § 61-5-10 (2011), to avoid a recidivist charge. (A.R. 70). However, it was proffered that Mr. McGill had been required to wear a bracelet as a condition of his bond pending trial for third offense domestic battery and malicious assault. (A.R. 72-73). Subsequent to his plea in the instant case, Mr. McGill was acquitted of these felonies but convicted of the lesser-included offense of misdemeanor battery. (A.R. 85-92).

Prior to that trial, Mr. McGill's bond required him to stay at his ailing father's home in Moundsville to take care of him. (A.R. 78). It took a considerable time to bring Mr. McGill's case to trial, in part because of the inability to find an unbiased jury in Marshall County, where

the Sheriff's department had subjected him to fundamentally unfair pretrial publicity. (A.R. 19-20, 22, 78-80, 82). As time wore on, it became increasingly difficult for Mr. McGill to stay with his father. When his father got better, Mr. McGill requested the circuit court to change the conditions of his bond to allow him to move back to his own property, in the Fish Creek area of Marshall County. *Id.* For reasons outside the record, the Court denied this motion despite the wishes of Mr. McGill's father. (A.R. 78, 82).

Understandably conflicted, Mr. McGill decided to respect his father's wishes. (A.R. 78). He removed his home confinement bracelet and moved back to his property several minutes south of Moundsville but still within Marshall County. (A.R. 72-73). Cell phone records indicated that he traveled to Pennsylvania at one point, possibly related to his work as a truck driver, but he always returned to the area around where he lived in Marshall County awaiting trial. (A.R. 83).

Rather than only seeking to revoke Mr. McGill's bond for this violation, the State indicted him for escape from custody and larceny. (A.R. 2-3). Mr. McGill moved to dismiss the escape charge, arguing that pretrial home confinement is a condition of bond, not real confinement or custody, in accordance with this Court's rulings that defendants are not entitled to credit for time served while on home confinement. (A.R. 45-53). The circuit court rejected this argument, and so to avoid a recidivist charge, Mr. McGill pled guilty to the escape. (A.R. 70).

At sentencing, the court ordered Mr. McGill to serve a three-year sentence and to pay restitution. (A.R. 7). The court's theory was that the State, or "society" was a victim for purposes of the West Virginia Victim Protection Act, West Virginia Code § 61-11A-1 *et. seq.* (2011), and that he should have to pay back the police for the time and money spent investigating and re-apprehending him. (A.R. 81). Specifically, the Marshall County Prosecutor proffered that it took

a multijurisdictional taskforce, culling 37 officers from local, state, and federal law enforcement agencies, putting in 248 person-hours total, with helicopter air support, to track down Mr. McGill. (A.R. 9-10, 81, 83). In total, Marshall County spent \$8,261.56 to ascertain that Mr. McGill was precisely where he said he would be – the Fish Creek area of Marshall County. (A.R. 73)

Mr. McGill now appeals, arguing that the circuit court lacked the jurisdiction to accept his plea where the factual predicate only amounts to a bond violation and that it lacked the statutory authority to order restitution to the State.

SUMMARY OF ARGUMENT

When Mr. McGill cut off his ankle bracelet, he no doubt violated his bond but he did not escape from custody because pretrial home confinement is not true custody. This Court has ruled that Double Jeopardy requires defendants be given credit for any time served for pretrial custody/confinement. Yet this Court has also ruled that defendants do not get credit for time spent on pretrial home confinement. The only way to read these cases consistently is to conclude that pretrial home confinement is not true custody or confinement – it is merely a condition of bond. As such, the circuit court lacked jurisdiction to accept Mr. McGill's plea because the stipulated factual predicate did not constitute the offense charged.

Additionally, the circuit court erred by awarding restitution to the State for investigative and prosecutorial costs. The legislative intent underlying West Virginia's Victim Protection Act, W. Va. Code § 61-11A-1 *et. seq.*, clearly does not authorize the State to enrich itself for these costs. The only case in West Virginia remotely on point is *State v. Cummings*, 214 W. Va. 317, 320-21, 589 S.E.2d 48, 50-51 (2003), where the State sought restitution to pay its expert

witnesses. However, this case does not contain any useful analysis because on appeal the State conceded that it could not receive restitution for this expense. Turning to foreign case law, the consensus seems to be that this result is correct for one of two reasons: either the State cannot be a victim under these circumstances, or such costs are not pecuniary losses recoverable through restitution. Under either theory, it is illegal to order Mr. McGill to pay the State for the costs of apprehending him pursuant to the West Virginia Victim Protection Act, and he asks this Court to vacate his conviction and the restitution order for the reasons stated above.

STATEMENT REGARDING ORAL ARGUMENT

Mr. McGill respectfully requests a full hearing pursuant to Revised Appellate Rule 20. Whether violating pretrial home confinement amounts to an escape from custody and whether the State can enrich itself through the West Virginia Victim Protection Act in this manner both appear to be issues of first impression for this Court.

ARGUMENT

I. The Circuit Court Erred In Accepting Mr. McGill's Guilty Plea Because The Conduct He Admitted To Only Amounts To A Bond Violation As He Was Not Truly In Custody Or Confinement.

When Mr. McGill cut off his ankle bracelet, he violated the conditions of his bond. He did not, however, escape from custody, pursuant to this Court's holdings in Syllabus Point 6, *State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002), and Syllabus Point 4, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996). As such, there was no factual basis for the offense and the circuit court should not have accepted the plea. See Syllabus Point 5, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984) ("As to what is meant by a plea bargain being in the public

interest in the fair administration of justice, there is the initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant *and that there is a factual basis for his guilty plea.[.]*) (emphasis added).

West Virginia Code § 61-5-10 (2011) states:

“Whoever escapes or attempts to escape by any means from the custody of a county sheriff, the director of the regional jail authority, an authorized representative of said persons, a law-enforcement officer, probation officer, employee of the Division of Corrections, court bailiff, or from any institution, facility, or any alternative sentence confinement, by which he or she is lawfully confined, if the custody or confinement is by virtue of a charge or conviction for a felony, is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not more than five years; and if the custody or confinement is by virtue of a charge or conviction for a misdemeanor, is guilty of a misdemeanor and, upon conviction thereof, he or she shall be confined in a county or regional jail for not more than one year.”

It is axiomatic that an essential element of this offense is that the defendant was in custody or confined, and the State in this case opted to proceed on a theory of custody. (A.R. 2, 35-38). At Mr. McGill’s plea hearing, the circuit court accepted as the factual basis for the plea that Mr. McGill was on pre-trial home confinement, cut off his ankle bracelet, and left the premises without permission. (A.R. 72-73). Mr. McGill argues violating pre-trial home confinement is legally insufficient to show an escape from custody. As this is essentially a challenge to the sufficiency of the evidence, this Court should assume that the State’s factual assertions are true and draw all inferences in its favor, but review the legal question of whether pre-trial home confinement is “custody” *de novo*. See Syllabus Point 3, *State v. Malfregeot*, 224 W. Va. 264, 685 S.E.2d 237 (2009).

Although this Court has never directly addressed whether violating pretrial home confinement amounts to an escape, it has implicitly answered this question in the negative through related holdings. In *State v. McClain*, this Court reaffirmed that the Due Process and

Double Jeopardy clauses of the West Virginia Constitution require defendants to receive time served credit for pretrial detention Syllabus Point 6, *McClain*, 211 W. Va. at 62, 561 S.E.2d at 784. However, in *State v. Hughes* this Court ruled that defendants do NOT get credit for time served on pre-trial home confinement. Syllabus Point 4, *Hughes*, 197 W. Va. at 520, 476 S.E.2d at 191. The Court's rationale, and the only way to read these cases consistently, is that pre-trial home confinement is not truly confinement or custody, but merely a condition of bond. *Id.* This Court stated:

“When a person who has been arrested, but not yet convicted of a crime, is admitted to pre-trial bail with the condition that he be restricted to home confinement pursuant to *West Virginia Code § 62-1C-2(c)* (1992), the home confinement restriction is not considered the same as actual confinement in a jail, nor is it considered the same as home confinement under the Home Confinement Act, *West Virginia Code §§ 62-11B-1 to -12* (1993). Therefore, the time spent in home confinement when it is a condition of bail under *West Virginia Code § 62-1C-2(c)* does not count as credit towards a sentence subsequently imposed.”

Id. The Court reached this conclusion after thoroughly analyzing West Virginia Code § 62-11B-1 *et. seq.* (1996) and recognized that it was penal in nature and inapplicable to pre-trial home confinement, which was merely a bond condition. *Id.* at 527-28, 476 S.E.2d at 198-99. The implication for the instant case is clear – if pre-trial home confinement is not truly detention or custody, then leaving the premises is simply a bond violation, not an escape from custody. *See id.* at 528, 199 (“[B]ail, even with a home confinement restriction, is not the equivalent of incarceration.”). This is necessarily so, because otherwise defendants would be entitled to credit for time served on pre-trial home confinement pursuant to Syllabus Point 6, *McClain*, 211 W. Va. at 62, 561 S.E.2d at 784. In fact, even if Mr. McGill had received *post-conviction* home confinement as an alternative sentence, it is doubtful that his conduct would amount to an escape as the Home Confinement Act provides that such violations be treated as probation violations. *See West Virginia Code § 62-11B-9* (2011). Therefore, this Court must vacate Mr. McGill's

conviction and sentence for escape from custody to be consistent with its earlier cases.

II. The Circuit Court Lacked The Authority To Order Restitution To The State For The Costs Of Investigating And Re-Apprehending Mr. McGill Because The West Virginia Victim Protection Act Does Not Cover Law Enforcement's Investigative Costs.

The circuit court also erred in awarding restitution to the State for the cost of re-apprehending Mr. McGill. This Court has never addressed this issue directly, but in *State v. Cummings*, 214 W. Va. 317, 320-21, 589 S.E.2d 48, 50-51 (2003), the State conceded that it could not recover investigatory and prosecutorial costs. In addition, the legislature's stated purpose clearly is not served by awarding restitution to the State in cases like this. Finally, most states that have addressed this issue have ruled that the State and law enforcement cannot co-opt restitution statutes in this manner without specific legislative authority.

"The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syllabus Point 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). Here, Mr. McGill challenges the circuit court's legal interpretation of the West Virginia Victim Protection Act rather than its factual findings, and so review is *de novo*. See Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Beginning with the text of the statute, it is clear that the legislature did not intend the State to be a "victim" in circumstances like this. West Virginia Code § 61-11A-1 (2011) lays out the legislative findings and intent in authorizing courts to pay restitution to victims, but none of the legislature's objectives are furthered by awarding restitution to the police for normal investigative costs. The legislature refers, *inter alia*, to the fact that victims are often treated

unfairly by the State and law enforcement, that they face financial hardships because of criminal activity, and that they lack an advocate within the criminal justice system – none of this is true of the police. W. Va. Code § 61-11A-1(a)-(b) (2011) (“The Legislature finds further that all too often the victim of a serious crime is forced to suffer ... hardship first as a result of the criminal act and then as a result of contact with a criminal justice system not totally responsive to the needs of such victims.”). The very fact that the statute treats victims and the State as different actors with different interests shows that the legislature did not intend the conclusion reached by the circuit court in this case. *Id.* (“The Legislature declares that the purposes of this article are to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process and to ensure that the State and local governments do all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.”).

In a prior case, *State v. Cummings*, 214 W. Va. 317, 589 S.E.2d 48 (2003), the State even acknowledged that the Victim Protection Act was not intended to reimburse investigatory and prosecutorial costs in the manner that the circuit court did in this case. *Id.* at 320-21, 589 S.E.2d at 50-51. There, the trial court ordered that the defendant reimburse the State for expert witness and attorney fees. *Id.* at 320, 589 S.E.2d at 50. If the Court disagreed with the State, it could have considered the issue on its own authority, but it chose not to. Syllabus Point 8, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991) (“This Court is not obligated to accept the State’s confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred.”). As part of the cost of investigating and prosecuting a crime, this would have been directly analogous to the present case, where the State seeks restitution for the costs of investigating and re-apprehending Mr. McGill. However, because the State in *Cummings* conceded error on this

point, and because the Court did not take issue with the State's decision, there is no meaningful discussion of this point of law. *Cummings*, 214 W. Va. at 320-21, 589 S.E.2d at 50-51.

Turning to foreign authority, the consensus of other states is supportive of Mr. McGill's position. *See, e.g., People v. Danenberger*, 848 N.E.2d 637, 642 (Ill. App. Ct. 2d Dist. 2006). Of course, victim restitution statutes vary from state to state, and some legislatures have seen fit to include governmental entities as possible victims and investigative costs as restitution in the statutes themselves. *See, e.g., SDCL 23A-27-26* (2011) (South Dakota). But of the states whose statutes are silent as to these issues, the majority largely support the position taken by Mr. McGill and the State in *Cummings*. *See State v. Guilliams*, 90 P.3d 785, 792 (Ariz. Ct. App. 2004) ("We decline to construe the restitution laws to encompass costs incurred by governmental entities that are performing their routine functions, regardless of whether those costs can be traced back to a criminal act."); *State v. Wilson*, 92 P.3d 729, 730 (Ore. Ct. App. 2004) ("Defendant contends that the State did not suffer pecuniary damages and that, therefore, restitution was improperly ordered. We agree."); *People v. Derengoski*, 617 N.E.2d 882, 884 (Ill. App. Ct. 4th Dist. 1993) ("There is no 'private' victim who is being made whole by the government for criminal conduct."); *State v. Jones*, 724 P.2d 146, 149 (Kan. Ct. App. 1986); *State v. Fertterer*, 841 P.2d 467 (Mont. 1992) *overruled* on other grounds, *State v. Gatts*, 928 P.2d 114 (Mont. 1996) (distinguishing between restitution for actual damages and for investigation); *See also State v. Batalona*, 2006 Haw. App. LEXIS 88 (Haw. Int. App. Ct. 2006) (unpublished) (defendant only required to pay cost of damage to prison property); *But see State v. Lewis*, 711 A.2d 669, 673 (Vt. 1998) (extradition costs recoverable because they are an extraordinary expense).

Guilliams, *Wilson* and *Jones* deserve special note because just as in this case, the State in Arizona, Oregon, and Kansas (respectively) sought restitution for the cost of apprehending

fugitives. *Guilliams*, 90 P.3d at 786-87; *Wilson*, 92 P.3d at 729; *Jones*, 724 P.2d at 147-48. In those cases, the courts distinguished between pecuniary loss to the government, such as damage to prison facilities, and the costs of investigating and apprehending the defendant – only the former of which is recoverable as restitution. *Guilliams*, 90 P.3d at 791-92; *Wilson*, 92 P.3d at 729; *Jones*, 724 P.2d at 148-49 (Kan. App. 1986). The restitution sought by the State in this case, just as in *Cummings*, clearly falls into the latter category, and is not authorized by the West Virginia Victim Protection Act. Mr. McGill has only located a single state that has ruled otherwise where the police have re-apprehended a defendant. In *State v. Lewis*, 711 A.2d 669, 673 (Vt. 1998), the court ruled that the cost of extraditing a captured fugitive could be recovered as restitution. However, in order to reach this conclusion the court completely ignored the common sense distinction noted in *Guilliams*, *Wilson*, *Jones*, and implied by *Cummings*. *Id.* at 672.

In other contexts, courts have also rejected States' attempts to recover investigation costs. In *People v. Danenberger*, 848 N.E.2d 637, 642 (Ill. App. Ct. 2006), the court ruled that a police department could not recover expenses incurred investigating a false claim. Likewise, in *State v. Pfau*, 2000 Mont. LEXIS 208N, P12-19 (Mont. 2000) (unpublished), the State could recover restitution for fraudulently acquired workers compensation benefits, but not for the cost of investigating the case.¹ In the context of drug stings, courts in most states have concluded that the State cannot even reclaim drug “buy money” under restitution statutes. *See, e.g., Igbinovia v. State*, 895 P.2d 1304 (Nev. 1995) (“The overwhelming number of these courts have determined that police departments are not 'victims' within the meaning of sentencing statutes allowing restitution to 'victims of the offense'”).

¹ The Montana statute does contain an explicit exception for escapes. Mont. Code Ann. § 46-18-243(a)(iii) (2011). If our legislature intended such a result, it could have written such a section as well.

Finally, this consensus should be unsurprising in light of a historical analysis of the role of restitution in criminal law. The New Jersey Supreme Court undertook such an analysis in *State v. Newman*, 623 A.2d 1355, 1358-59 (N.J. 1993). Originally, criminal law was almost entirely remunerative, intended as a remedy for actual crime victims. *Id.* at 1358. However, in exchange for its service, the State gradually started taking over restitution, before completely converting it into criminal fines, paid to State coffers instead of those actually hurt by crime. *Id.* at 1358-59. To justify this usurpation, the State shifted the focus of criminal justice away from restoring individual victims and towards protecting “society” as a whole. *Id.* The legislature, in enacting the Victim Protection Act with its purpose of “...ensur[ing] that the State and local governments do all that is possible ... to assist victims,” clearly intended to at least lessen the hardship caused by this historical shift. W. Va. Code § 61-11A-1(b) (2011). This Court should give affect to the legislature's intent, and not allow the State to once again co-opt restitution for its own purposes.

CONCLUSION

For the reasons stated herein, Mr. McGill respectfully requests that this Court reverse his conviction for escape from custody as the circuit court should not have accepted a plea based on an insufficient factual predicate. In the alternative, Mr. McGill requests that this Court vacate the restitution order from his sentence, as the circuit court lacked the authority to order reimbursement to the State pursuant to the West Virginia Victim Protection Act.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Matthew D. Brummond, hereby certify that on this 2nd day of May, 2011, I sent the foregoing "Brief of Petitioner" to Jake Morgenstern, Assistant Attorney General by US mail to: 812 Quarrier Street, 6th Floor, Charleston, WV 25301.

A handwritten signature in black ink, appearing to read 'M. D. Brummond', is written above a horizontal line.

Matthew D. Brummond
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