FILED

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL MCGILL,

Petitioner.

Supreme Court No. 11-0261

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

PETITIONER'S REPLY

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STATEMENT OF THE CASE

Because the State has conceded error regarding Mr. McGill's second assignment of error, the following facts are the only ones relevant to deciding whether the trial court lacked jurisdiction to accept his guilty plea where the State failed to present an adequate factual predicate. (Respondent's Brief, 1-2). On February 26, 2010, the Marshall County Circuit Court released Mr. McGill on bond with the condition of home confinement, to be monitored via an ankle bracelet. (A.R. 46). After unsuccessfully attempting to modify his bond to place him in a different residence, Mr. McGill removed his ankle bracelet and left his father's home. (A.R. 72-73, 78).

The State chose to prosecute him for escaping from custody. (A.R. 70). At sentencing, Mr. McGill's trial counsel represented that there was no doubt that the State was selectively prosecuting Mr. McGill. (A.R. 79). The circuit court had to move both the escape case and the underlying case out of Marshall County due to pretrial publicity so fundamentally unfair that the court did not even attempt to seat a jury. (A.R. 19-20). The court had to issue a gag order against all law enforcement agencies connected to the case to prevent them from further prejudicing Mr. McGill. (A.R. 20, 80). In trial counsel's 18 years practicing in Marshall County, he had never seen a bond violation prosecuted as a felony escape. Mr. McGill now argues that there is a reason for this; the escape statute does not legitimately extend to violations of pretrial home confinement.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. McGill agrees with the State that this case involves questions of first impression and requires Rule 20 oral argument.

ARGUMENT

I. Mr. McGill Did Not Waive Or Forfeit The Right To Challenge His Conviction By Pleading Guilty Because Where, As Here, The Factual Predicate Is Insufficient To Support A Guilty Verdict The Court Lacks Jurisdiction To Accept A Guilty Plea.

Mr. McGill argues that the circuit court lacked jurisdiction to accept his guilty plea without a sufficient factual predicate to convict. However, because the circuit court permitted Mr. McGill to plead guilty, the State argues that this is a question of statutory construction rather than jurisdiction, and so his plea constitutes waiver of the issue. (Respondent's Brief, 7-8). In actuality, this case presents both a question of construction and jurisdiction. The meaning of the escape statute, West Virginia Code § 61-5-10 (2011), establishes the elements of the crime, and thus sets the prima facie threshold that the State must meet before a guilty conviction may be delivered, either pursuant to trial or plea. *See Menna v. New York*, 423 U.S. 61, 62-63, 96 S. Ct. 241, 242 (1975) (ruling that a counseled guilty plea did not effectuate a waiver where the trial court lacked jurisdiction); *See also Kennedy v. Frazier*, 178 W. Va. 10, 12, S.E.2d 43, 45 (1987); 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); W. Va. Crim. Pro. R. 11(f) (2011). If leaving home confinement can be an escape, then Mr. McGill loses on the merits and on the waiver issue. However, if it is merely a bond violation, then the circuit court lacked jurisdiction to take the plea and Mr. McGill prevails. Either way then, the Court must address the merits of Mr. McGill's claim.

II. The Circuit Court Erred In Accepting Mr. McGill's Plea Because In Accordance With The Vast Majority Of Jurisdictions, If Pretrial Home Confinement Is Insufficiently Custodial To Award Time-Served Credit As This Court Has Previously Decided, It Is Insufficiently Custodial To Sustain An Escape Charge.

Mr. McGill argues that the trial court lacked jurisdiction to accept his guilty plea to escape because this Court has already decided that pretrial home confinement is an insufficient curtailment of liberty to compel credit for time served. *See* Syllabus Point 4, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996). As such, it should not be construed as "custody" for purposes of West Virginia Code § 61-5-10 (2011). The State responds that "custody" and "confinement" are two different things, and cases like *Hughes* only refer to confinement. (Respondent's Brief, 9-10). However, the vast majority of foreign authority holds that there is an inherent connection between the level of custody required to trigger credit for time served and that required to sustain an escape charge. *See State v. Sutton*, 2004 Ohio App. LEXIS 2379, 12-13 (Ohio Ct. App. 2004) (*affirmed* by *State v. Sutton*, 815 N.E.2d 677 (Ohio 2004)). As such, Mr. McGill is entitled to relief.

The Ohio courts were confronted with an issue remarkably similar to the one at bar in *State v. Sutton*. *Id.* at 1-2. Just as here, the defendant had been released on pretrial bond, and the court required home confinement to ensure his attendance at trial. *Id.* He violated home confinement, the State charged him with escape, and he appealed his no contest plea. *Id.* at 2-3. The court found it significant that the defendant had been released on pretrial bond, rather than serving a sentence. *Id.* at 6. The court noted, "[A] person not under detention/confinement while awaiting trial does not obtain credit for time served." *Id.* at 10. The Ohio court ruled that this was dispositive: "If pre-trial electronic monitoring is not detention for crediting purposes, it is not detention for prosecuting the crime of escape." *Id.* at 12-13.

In *Sutton*, the keyword was "detention," but the court defined detention in such a way as to include "custody," the statutory language at issue in the instant case. *See id.* at 4-5. Further, many other courts have reached similar results regardless of the specific language used in their respective escape statutes. The *Sutton* court specifically noted that the United States Supreme Court, the Eleventh Circuit, Arkansas, and Wisconsin "have held that if a defendant is not entitled to a sentencing credit for time served on pre-trial electronic monitoring, that individual may not be prosecuted for escape." *Id.* at 12-13 (*citing Reno v. Koray*, 515 U.S. 50, 115 S. Ct. 2021, fn. 4 (1995); *Dawson v. Scott*, 50 F.3d 884, fn. 10 (C.A.11 1995); *Bush v. State*, 2 S.W.3d 761, 765 (Ark. 1999); *State v. Magnuson*, 606 N.W.2d 536, 540 (Wis. 2000)). Still other courts have addressed the inverse of this situation by requiring credit for time served because under their laws the defendant *could* have been prosecuted for escape. *Id.* (*citing People v. Pottorff*, 47 Cal.App. 4th 1709, 1716-1717, 55 Cal. Rptr. 2d 536 (1996); *Dedo v. State*, 343 Md. 2, 11-13, 680 A.2d 464 (1996); *State v. Guillen*, 2001 NMCA 79, 130 N.M. 803, 804, 806, 32 P.3d 812 (2001); *State v. Ammons*, 136 Wn. 2d 453, 459, 963 P.2d 812 (Wash. 1998); *State v. McCullough*, Spokane App. Nos., 21180-1-III, 21181-9-III, 2003 Wash. App. LEXIS 1176) (Wash.App.2003) (unpublished)).

All of these cases stand for the proposition that there is a link between the credit for time served and the crime of escape. *See Sutton*, 2004 Ohio App. Lexis at 12-14. If the curtailment of liberty, whether described as detention, confinement, or custody, is not severe enough to trigger credit for time served, then it is not severe enough for the basis of an escape charge, and vice versa. *Id.* The *Sutton* court only located two counter examples, Kentucky and Indiana. *Id.* at 12-13 (*citing Grabarczyk v. State*, 772 N.E.2d 428, 431-432 (Ind. App. 2002), and *Buford v. Commonwealth*, 58 S.W.3d 490, 491-492 (Ky. App. 2001)). However, the Indiana court did not

address the issue of time served at all, and Kentucky brushed it off with no real discussion. *See Grabarczyk*, 772 N.E.2d at 430-32; *Buford*, 58 S.W.3d at 491-92. As noted above, though, those courts that do consider the relationship between time served and escape recognize that if a defendant is not in custody for one, then he is not in custody for the other either, and vice versa. *See, e.g. Sutton*, 2004 Ohio App. Lexis at 12-13.

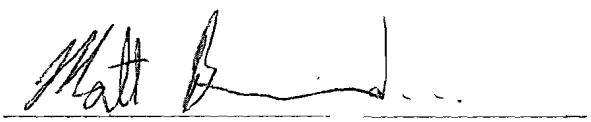
This Court should reach the same result as the Ohio court in *Sutton*. Just as in Ohio, this Court has already decided that pretrial home confinement is merely a condition placed upon defendants released on bond. *Compare Sutton*, 2004 Ohio App. at 7 *with* Syllabus Point 4, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996). In accordance with the above cases, it would be inconsistent to hold that Mr. McGill is not in custody for purposes of time served credit but simultaneously IS in custody for purposes of an escape prosecution. Therefore, Mr. McGill is entitled to relief and to have his conviction for escape from custody reversed.

CONCLUSION

For the foregoing reasons, Mr. McGill respectfully requests that this Court reverse his conviction for escape from custody.

Respectfully Submitted,

Michael McGill
By Counsel



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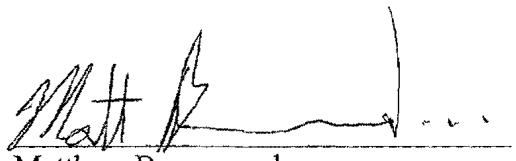
CERTIFICATE OF SERVICE

I, Matthew Brummond, hereby certify that on this 8th day of September, 2011, I sent the foregoing "Petitioner's Reply" to Barbara Allen, Assistant Attorney General by US mail to: 1900 Kanawha Blvd. East, Room E-26, Charleston, WV 25305.



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