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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0977

STATE OF WEST VIRGINIA

Plaintiff Below,
Respondent.

v.

ELLIOTT FITZSIMMONS,

Defendant Below,
Petitioner.

NOTICE OF AUTHORITY

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NOTICE OF AUTHORITY

Comes now the Respondent by counsel and informs opposing counsel and this Court, that on Friday, March 29, 2013, in preparation for oral argument in the above-styled action, counsel located the within West Virginia decision, which appears to be decisive authority as to one of the allegations of error in the petitioner's brief. Further, that decision, *State v. Hersman*, 161 W. Va. 371, 242 S.E.2d 559, (1978), was cited by neither petitioner nor respondent in the brief and summary response. However, that decision examines the language "the judge may allow the defendant credit on his sentence for time he has spent in the center." (*Hersman* at 372, 242 S.E. 2d at 560.) Although the statute has been amended since 1978, the provision for leaving the decision of whether or not the offender should be given credit for time spent at the center on the underlying offense, if he is returned unfit, to the discretion of the sentencing judge, appears to be substantially unchanged. Therefore, it appears as if under *Hersman*, an offender is entitled to credit for time spent at the center if he is returned unfit and sentenced to an active term.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent

By counsel,

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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *NOTICE OF AUTHORITY* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 1st day of April, 2013, addressed as follows:

To: Gerald G. Jacovetty, Jr., Esquire
1201 Main Street, Suite 701
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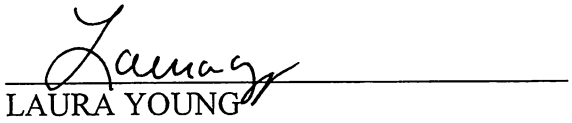
Wheeling, WV 26003



LAURA YOUNG

161 W.Va. 371
Supreme Court of Appeals of West Virginia.

STATE of West Virginia
v.
Randall HERSMAN.

No. 14066. | March 28, 1978.

Petitioner who had been found to be unfit for confinement at correctional center was sentenced by the Circuit Court, Wood County, Arthur N. Gustke, J., and he appealed. The Supreme Court of Appeals, Miller, J., held that petitioner who was sentenced as youthful male offender was entitled under double jeopardy clause to be credited with time spent at correction centers when he was found to be unfit to remain at such center and was sentenced for crime for which he had been convicted.

Reversed and remanded.

West Headnotes (3)

[1] **Double Jeopardy** ⇐ Effect of Commencement or Service of Prior Sentence; Sentence Credit

Petitioner who was sentenced as youthful male offender was entitled under double jeopardy clause to be credited with time spent at correctional centers when he was found to be unfit to remain at such center and was sentenced for crime for which he had been convicted. Const. art. 3, § 5; Code, 25-4-6, 60A-4-401(c), 62-12-19.

11 Cases that cite this headnote

[2] **Double Jeopardy** ⇐ Prohibition of Multiple Proceedings or Punishments

Double jeopardy clause provides immunity from further prosecution where court having jurisdiction has acquitted accused, it protects against a second prosecution for same offense after conviction and it also prohibits multiple punishments for same offense. Const. art. 3, § 5.

3 Cases that cite this headnote

[3] **Double Jeopardy** ⇐ Effect of Commencement or Service of Prior Sentence; Sentence Credit

Double jeopardy clause requires State to give credit on criminal sentence for all time spent in detention pursuant to criminal conviction. Const. art. 3, § 5.

2 Cases that cite this headnote

****559** ***Syllabus by the Court***

***371** 1. "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further ***372** prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution

for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syllabus Point 1, Conner v. Griffith, W.Va., 238 S.E.2d 529 (1977).

2. It is a violation of the Double Jeopardy Clause of the West Virginia Constitution, Article III, Section 5, to fail to credit the time served at a detention center under W.Va.Code, 25-4-6, when pursuant to this section a prisoner is found unfit to remain at a detention center, is returned to the court which committed him, and is sentenced for the crime for which he has been convicted.

Attorneys and Law Firms

Robert B. Black, Parkersburg, for Randall Hersman.

Chauncey H. Browning, Jr., Atty. Gen., Edward W. Gardner, Asst. Atty. Gen., Charleston, for the State.

Opinion

MILLER, Justice:

This appeal involves the question of whether a person sentenced as a youthful male offender under W.Va.Code, 25-4-6, [1] is ****560** constitutionally entitled to credit for time spent at a correctional center.

***373** Petitioner, Randall Hersman, was indicted for possession of marijuana. On August 13, 1976, he entered a guilty plea and was sentenced by the Circuit Court of Wood County to the custody of the Commissioner of Corrections pursuant to W.Va.Code, 25-4-6. This section provides: "confinement in the center shall be for a period of six months, or longer if it is deemed advisable by the center superintendent, but in any event such period of confinement shall not exceed two years."

The record reflects that on October 18, 1976, petitioner arrived at the Davis Center, where he remained until June of 1977. By a letter dated June 22, 1977, the Superintendent of the Davis Center notified the Circuit Court that petitioner had successfully completed the program and recommended his "release and probation." The court subsequently entered an order directing the return of the petitioner.

Before the order could be implemented, however, the Circuit Court received a brief letter from the Superintendent, asking that the request in his letter of June 22, 1977, be cancelled and that "due to his behavior" petitioner was being transferred to the Anthony Center. The court, by an order dated June 29, 1977, rescinded its order directing the return of the petitioner.

Thereafter, on September 9, 1977, the court was apprised by the Superintendent of the Anthony Center that petitioner had been found unfit, and the request was made that he be returned to court.

[1] This was done, and on September 19, 1977, the court sentenced the petitioner to 90 days in the Wood County ***374** Jail. [2] The petitioner was not credited with the 343 days spent at the Davis and Anthony Centers, although he was given credit for the time spent in jail awaiting transport to the Centers and awaiting sentence by the court on his return from the Anthony Center.

The State points out that W.Va.Code, 25-4-6, specifically provides that where a person is found to be unfit at the center and returned to the court, it "may place him on probation or sentence him for the crime for which he has been convicted." If he is sentenced, "the judge may allow the defendant credit on his sentence for time he has spent in the center."

[2] We acknowledge that this language has been in the statute since its enactment in 1955. This, however, does not answer the constitutional question of whether the failure to credit the time spent at the center is a violation of our Double Jeopardy Clause, which prohibits multiple punishments for the same offense. West Virginia Constitution, Article III, Section 5; Conner v. Griffith, W.Va., 238 S.E.2d 529 (1977).

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In Conner, under similar language in W.Va.Code, 62-12-19, giving discretion to credit time spent on parole, we held the Double Jeopardy Clause required the credit to be given. Conner's rationale was that parole involved substantial restrictions on liberty, and therefore a parolee was serving his sentence while on parole.

Here, we have an even greater restriction on liberty, since a person sent to a center is under confinement. The State does not deny that the detention centers are penal in nature. The statute provides for a period of confinement of not less than six months nor more than two years.

If a prisoner is returned from the detention center and "given the sentence he would have originally received" ***375** on his underlying criminal conviction without credit for the time spent at the center, he will have been twice punished for the same offense a result specifically forbidden by our Double Jeopardy Clause. Conner v. Griffith, W.Va., 238 S.E.2d at 530.

****561** Conner is not the only authority for this principle. The United States Supreme Court has mandated this result in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), when it held that the state is required under double jeopardy principles to credit time previously served on a sentence when a second sentence is imposed for the same offense. The controlling concept was the bar against multiple punishments for the same offense. See Vickers v. Haynes, 539 F.2d 1005 (4th Cir. 1976); Durkin v. Davis, 538 F.2d 1037 (4th Cir. 1976); Ham v. North Carolina, 471 F.2d 406 (4th Cir. 1973).

The State cites State v. Fuentes, 26 Ariz.App. 444, 549 P.2d 224 (1976), adopted without comment by the Supreme Court of Arizona in State v. Fuentes, 113 Ariz. 285, 551 P.2d 554 (1976). In Fuentes, the court held that time spent in jail as a condition of probation need not be credited when probation is revoked and a sentence imposed. The court seemed of the view that because the initial sentence was suspended the defendant's jail time was not the result of serving a sentence. A vigorous dissent was filed by the presiding judge, who maintained the Double Jeopardy Clause was violated, citing North Carolina v. Pearce, supra.

The Supreme Court of Florida has reached a result contrary from that of the Arizona court in State v. Jones, 327 So.2d 18, 25 (Fla.1976), where the court concluded:

> "To hold otherwise would result in a possible constitutional violation under the standards set down in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)."

[3] We decline to follow Fuentes for the simple reason that it is not in accord with what we conceive to be one of the ***376** primary purposes of our Double Jeopardy Clause. See Conner, Pearce, and the Fourth Circuit cases cited, supra. We hold our Double Jeopardy Clause requires the State to give credit on a criminal sentence for all time spent in detention pursuant to a criminal conviction.

The facts in the present case aptly illustrate the reason for this rule. Petitioner spent 343 days at detention centers for an offense which carried confinement in the jail for 180 days. He was then given 90 days in jail. One might suspect that he would have preferred to be initially found not worthy of treatment as a youthful male offender.

Finally, the State asserts that if we require credit for the time spent at a detention center, sentencing judges will be less likely to utilize the more beneficent provisions of W.Va.Code, 25-4-6. We do not agree. When we address matters involving constitutional rights, we cannot define the limits of these rights by such subjective considerations.

However, our holding should not deter the appropriate exercise of discretion by a sentencing judge. The determination of fitness for treatment as a youthful male offender should be predicated on factors relating to the subject's background and his rehabilitation prospects. Of necessity, the decision to treat a person as a youthful male offender is based on the fact that he will benefit and respond to the rehabilitative atmosphere of a detention center. It does not flow from the thought that he will be declared unfit and require further punishment.

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In Conner, we noted that it was not necessary to declare the statute involved unconstitutional. What was required was to apply it in a constitutional manner. 238 S.E.2d at 534, n. 18. Here, the same result is reached and W.Va.Code, 25-4-6, must be applied in a constitutional fashion by giving credit for the time spent at a detention center, once the youthful male offender is declared unfit and the court determines to impose the sentence on the underlying crime for which he has been convicted.

***377** For the foregoing reasons, the sentence of the Circuit Court of Wood County is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Parallel Citations

242 S.E.2d 559

Footnotes

1 Pertinent portions of the statute are:
"The judge of any court with original criminal jurisdiction may suspend the imposition of sentence of any male youth convicted of or pleading guilty to a criminal offense, other than an offense punishable by life imprisonment, who has attained his sixteenth birthday but has not reached his twenty-first birthday at the time of the commission of the crime, and commit him to the custody of the West Virginia commissioner of public institutions to be assigned to a center. The period of confinement in the center shall be for a period of six months, or longer if it is deemed advisable by the center superintendent, but in any event such period of confinement shall not exceed two years. If, in the opinion of the superintendent, such male offender proves to be an unfit person to remain in such a center, he shall be returned to the court which committed him to be dealt with further according to law. In such event, the court may place him on probation or sentence him for the crime for which he has been convicted. In his discretion, the judge may allow the defendant credit on his sentence for time he has spent in the center. . . ."

2 The crime of possession of more than 15 grams of marijuana carries a penalty under W.Va.Code, 60A-4-401(c), of confinement in jail of "not less than ninety days nor more than six months" or a fine of "not more than one thousand dollars, or both."

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West's Annotated Code of West Virginia
Chapter 25. Division of Corrections
Article 4. Centers for Housing Young Adult Offenders (Refs & Annos)

W. Va. Code, § 25-4-6

§ 25-4-6. Assignment of offenders to center; period of center confinement; return to court; sentence or probation; revocation of probation

Effective: March 12, 2011
Currentness

The circuit court may suspend the imposition of sentence of any young adult, as defined in this section, convicted of or pleading guilty to a felony offense, other than an offense punishable by life imprisonment, including, but not limited to, felony violations of the provisions of chapter seventeen-c of this code, who had attained his or her eighteenth birthday but had not reached his or her twenty-fourth birthday at the time the offense was committed for which the offender is being sentenced and commit the young adult to the custody of the West Virginia Commissioner of Corrections to be assigned to a center: *Provided,* That no person over the age of twenty-five may be committed pursuant to this section. Young adult offenders who have previously been committed to a young adult offender center are not eligible for commitment to this program. The period of confinement in the center shall be for a period of not less than six months but not more than two years to successfully complete the program requirements set by the warden. The court shall order a presentence investigation to be conducted and provide the warden with a copy of the presentence investigation report, along with the commitment order.

If, in the opinion of the warden, the young adult offender is an unfit person to remain in the center, the offender shall be returned to the committing court to be dealt with further according to law. The offender is entitled to a hearing before the committing court to review the warden's determination. The standard for review is whether the warden, considering the offender's overall record at the center and the offender's compliance with the center's rules, policies, procedures, programs and services, abused his or her discretion in determining that the offender is an unfit person to remain in the center. At the hearing before the committing court, the state need not offer independent proof of the offender's disciplinary infractions contained in the record of the center when opportunity for an administrative hearing on those infractions was previously made available at the institution. If the court upholds the warden's determination, the court may sentence the offender for the crime for which the offender was convicted. In his or her discretion, the judge may allow the defendant credit on the sentence for time the offender spent in the center.

A young adult offender shall be returned to the jurisdiction of the court which originally committed the offender when, in the opinion of the warden, the young adult offender has satisfactorily completed the center training program. The offender is then eligible for probation for the offense the offender was convicted of or plead guilty to and the judge of the court shall immediately place the offender on probation. If the court finds there is reasonable cause to believe that the offender has engaged in new criminal conduct between his or her release from the center and the sentencing hearing for the crime for which the offender was ordered to the center, the judge may sentence the offender for the crime for which the offender was first convicted, with credit for the time spent at the center. In the event the offender's probation is subsequently revoked, the judge shall impose the sentence the young adult offender would have originally received had the offender not been committed to the center and subsequently placed on probation. The court shall, however, give the offender credit on his or her sentence for the time spent in the center.

Credits

Acts 1955, c. 16; Acts 1972, c. 99; Acts 1975, c. 186; Acts 1999, c. 64, eff. 90 days after March 11, 1999; Acts 2001, c. 70, eff. 90 days after April 12, 2001; Acts 2004, c. 61, eff. 90 days after March 13, 2004; Acts 2009, c. 42, eff. July 10, 2009; Acts 2011, c. 184, eff. March 12, 2011.

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Notes of Decisions (49)

W. Va. Code, § 25-4-6, WV ST § 25-4-6
Current through End of the 2012 First Extraordinary Session

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