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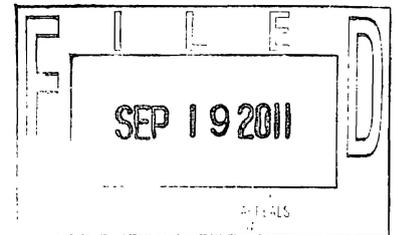
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0977

State of West Virginia

v.

Elliot Fitzsimmons



**APPEAL FROM ORDER OF CIRCUIT
COURT OF OHIO COUNTY, WEST
VIRGINIA; CASE NO. 10-F-54**

PETITIONER ELLIOT FITZSIMMON'S BRIEF

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3ASSIGNMENT OF ERROR

- I.** The Circuit Court erred in denying the request of defendant, Elliot Fitzsimmons for a continuance of the April 28, 2011 evidentiary hearing.
- II.** The Circuit Court erred in confirming and upholding the expulsion of defendant, Elliot Fitzsimmons from the program at the Anthony Center for Youthful Offenders.
- III.** The Circuit Court erred in denying the request of defendant, Elliot Fitzsimmons that he be given credit for time served while at the Anthony Center for Youthful Offenders as against his sentence of not less than One (1) year nor more than Ten (10) years.

STATEMENT OF THE CASE

On or about May 10, 2010, petitioner/defendant, Elliot Fitzsimmons was indicted by the Ohio County, West Virginia Grand Jury through a four count Indictment. On July 26, 2010 the defendant/petitioner entered a plea of guilty to Count 1 of the Indictment which charged "Entering Without Breaking." (Appendix, at pages 1-3). Paragraph 3 of the plea agreement stated that the defendant/petitioner's sentence of one (1) to ten (10) years in the penitentiary would be suspended in lieu of his being placed at the Anthony Center for Youthful Offenders. (Appendix, at page 1). The defendant/petitioner was placed at the Anthony Center on August 11, 2010. (Appendix, at pages 56, lines 6-8)

Sometime before February 11, 2011 the administration of the Anthony Center made a determination that the defendant/petitioner was unfit to continue his placement at that facility. On February 11, 2011 an order was entered by Arthur M. Recht, Circuit Court Judge for Ohio County, West Virginia transferring defendant/petitioner from the Anthony Center and returning him to the West Virginia Northern Regional Jail. (Appendix, at page 7). The basis of the termination of the defendant/petitioner's placement in the Anthony Center youthful offender program was multiple write-ups. (Appendix, at page 56, lines 13-16). Thereupon, the Court scheduled a hearing for April 28, 2011 as required by West Virginia Code § 25-4-6. Pursuant to that statute, the focus of the hearing was for the Circuit Court to review for possible abuse of discretion in the Anthony Center warden's decision terminating the defendant/petitioner's placement at that facility.

Prior to the commencement of that hearing, defense counsel, John Jurco, filed a motion on behalf of the defendant/petitioner requesting a continuance of the April 28, 2011 hearing. (Appendix, at page 29). The motion was filed on the ground that counsel was in need of

discovery in order to effectively defend the petitioner. The Court summarily denied the continuance motion and the hearing went forward. (Appendix, at page 52, lines 15-19).

Upon conclusion of the hearing, the Court upheld the decision of the warden terminating petitioner's placement at the Anthony Center; it reinstated the one to ten year prison sentence; and ordered that the petitioner not be given any credit towards the one to ten-year prison sentence for the time served at the Anthony Center. (Appendix, at page 68, lines 2-17; pages 42 and 43). Important to note is that the Circuit Court did not inquire about, nor consider, the possible abusiveness of the warden's decision.

Thereafter, defense counsel on May 4, 2011 filed petitioner's Motion for Relief from Judgment for Credit for Time Served. (Appendix, at page 44). Also, on May 4, 2011 the Court entered an order denying the said Motion for Relief. (Appendix, at page 47).

On May 31, 2011 an order was entered by the Court permitting defense counsel John Jerco to withdraw as counsel for defendant/petitioner, Elliot Fitzsimmons and appointing Gerald G. Jacovetty Jr. to represent the defendant/petitioner in the appeal matter which is now pending before this Court.

SUMMARY OF ARGUMENT

The Court erred on three issues in this matter as concerns this appeal:

1. The Court erred in not granting defense counsel's motion for the production of discovery and for a continuance of the hearing. The Court erred because the defendant/plaintiff should have been provided the Rule 16 discovery as requested because the hearing was a criminal hearing to which the West Virginia Rules of Criminal Procedure were applicable. Additionally, the hearing should have been continued to allow defense counsel the opportunity to appropriately review the documents and use them in the hearing if necessary;
2. The Court erred when it upheld the Anthony Center warden's ruling that the defendant/petitioner was an unfit person to remain at the Center in the youthful offender program. There was error because the Court's focus in the hearing was incorrect. The Court did not review the basis of the defendant/petitioner's write-ups to determine if the warden's reliance upon them, as a basis for the dismissal, was an abuse of his discretion. The Court focused on whether the defendant/petitioner had been provided an administrative hearing on each of the write-ups with an opportunity to address each of them; and
3. The Court erred when it did not give defendant/plaintiff credit for the time served at the Anthony Center as against his re-instated jail sentence because placement at the Anthony Center is actually incarceration at a West Virginia Department of Corrections facility which triggers constitutional rights that mandate that credit be given for time served toward the jail sentence that was re-instated after his dismissal from the youthful offender program.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, appeal counsel for the defendant/petitioner, Elliot Fitzsimmons believes that oral argument is necessary in this case because he opines that none of the factors of Rule 18(a) have been met

Appeal counsel further opines that this matter should be scheduled for Rule 19 argument because one of the issues involved in this appeal meets the criteria of subsection (3) of Rule 20 (a) of the West Virginia Rules of Appellate Procedure that being that the case involves “constitutional questions regarding the validity of a statute.”

Appeal counsel for the defendant/petitioner further opines that this matter is not appropriate for a memorandum decision.

I. The Circuit Court erred in denying the request of defendant, Elliot Fitzsimmons for a continuance of the April 28, 2011 evidentiary hearing.

STANDARD OF REVIEW

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, State v. Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000).

ARGUMENT

In West Virginia, the linchpin of every lawyer’s duty is to zealously represent each and every client. Canon 7 of the Code of Professional Responsibility. Many times, in order to meet this standard, the lawyer has to rely on the assistance of one or more of the various rules which have been promulgated over the years by this Court. In the criminal matter which underlies this appeal, defense counsel sought the use of Rule 16 of the West Virginia Rules of Criminal Procedure. As aforesaid in the Statement of the Case, the hearing of April 28, 2011, concerned the issue of the possible abuse of discretion of the Anthony Center warden’s decision terminating the petitioner/defendant's post-conviction placement at that facility. The use of Rule 16 was necessary for the zealous representation of the petitioner/defendant at the hearing.

As concerns the circuit courts of West Virginia and the West Virginia Rules of Criminal Procedure, Rule 1 states: “These rules govern procedure in all criminal proceedings in the Circuit Courts of West Virginia, as defined in Rule 54(c).” Rule 54(c) (5) of the West Virginia Rules of Criminal Procedure states: “Circuit Court includes all courts in the state having jurisdiction

pursuant to Article 8, Section 6 of the Constitution of West Virginia.” Rule 16 of the West Virginia Rules of Criminal Procedure was applicable to the hearing of April 28, 2011. Therefore, the West Virginia Rules of Criminal Procedure applied to the Circuit Court of Ohio County, West Virginia in the hearing of April 28, 2011.

Prior to the commencement of the April 28, 2011 hearing, defense counsel filed a two part motion. (Appendix, at page 29). First, the motion requested certain discovery materials, those being “any and all books, manuals, rules, regulations and/or any and all other documents regarding inmates’ conduct and/or discipline when staying at the Anthony Center.” Secondly, the motion requested a continuance of the April 28, 2011 hearing until the requested discovery was provided by the State. The documents requested through the motion could have had a significant impact on the outcome of the hearing, possibly reversing the outcome. As is always the case with discovery, the requesting party never knows until the discovery is provided and reviewed if it will provide the anticipated benefit. The issue that was to be addressed in the April 28, 2011 hearing was the possible abusiveness of the warden’s decision in deciding that the petitioner was not fit to remain in the youthful offender program. At the hearing,

“The standard for review is whether the warden, considering the offender’s overall record at the center in 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 at the center.” West Virginia Code § 25-4-6

Because of the statutory standard of review for the hearing, the defendant/petitioner’s discovery request for “any and all books, manuals, rules, regulations and/or any and all other documents regarding inmates’ conduct and/or discipline when staying at the Anthony Center.” was certainly relevant and necessary for the zealous and proper defense of the defendant/petitioner. Only upon the review of the requested discovery materials could defense

counsel zealously cross-examine the warden's decision in order to determine possible abuse of discretion in the decision.

Both the motion for discovery and the motion for the continuance should have been granted. The proper granting of the motion for the discovery would have necessitated the granting of the request for a continuance to allow for the discovery to be adequately reviewed and used. The cause of justice would have been bolstered by the granting of the motions..

- II. **The Circuit Court erred in confirming and upholding the expulsion of defendant, Elliot Fitzsimmons from the program at the Anthony Center for Youthful Offenders.**

STANDARD OF REVIEW

At issue is a "penal" statute, a law that imposes "a penalty, fine or punishment for certain offenses of a public nature or wrongs committed against the State" Black's Law Dictionary 1020 (5th Addition 1979). This Court has repeatedly stated that penal statutes are construed against the State and in favor of a defendant. For example, in Syllabus Point 3 of State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E. 2d 482 (1970), we stated that "[p]enal statutes must be strictly construed against the State and in favor of the defendant." State v. Scott, 214 W.Va. 1, 585 S.E. 2d 1 (2003)

ARGUMENT

It was the Circuit Court's statutory mandate to provide the defendant/petitioner with a hearing concerning the warden's decision to terminate the defendant/petitioner's post-conviction participation in the youthful offender program at the Anthony Center. More specifically the issue to be addressed in the April 28, 2011 hearing was whether the warden's determination that the

defendant/petitioner was not a fit person to remain in the youthful offender program was an abuse of discretion.

“The standard for review is whether the warden, considering the offender’s overall record at the center in 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 at the center.” West Virginia Code § 25-4-6

While the Court did provide the defendant/petitioner with a hearing, the focus of the hearing was not on the potential abuse of discretion of the warden's decision. (Appendix, at page 52, lines 19-24; page 53, lines 1-12). The Court never reviewed and/or analyzed the basis of any of the defendant/petitioner’s write-ups upon which the warden's decision rested. (Appendix, at pages 50-69).

The assistant prosecutor in his direct examination of the representative of Anthony Center only addressed the fact that the defendant/petitioner had had 18 write-ups while at the Anthony Center. He then essentially focused on the procedural nature of the hearings provided at the time of each write-up. (Appendix, at pages 53-61). There was never any questioning by the State concerning the nature or basis of any of the individual 18 write-ups.

The Court did not permit defense counsel to cross-examine the state's witness about the nature or basis of any of the individual 18 write-ups. When defense counsel attempted to get specific about the basis of the write- ups, asking questions about Policy Directive 325, the Court interrupted the questioning.

THE COURT: Move on. We don't need that.

MR. JURCO: Understood, Your Honor.

(Appendix at page 64, lines 1-2)

The Court at that time also gave direction as to its perceived focus of the April 28, 2011 hearing.

THE COURT: This is a very simple hearing, and all I want to know is: Was a hearing conducted? Was he present?

(Appendix at page 64, lines 3-11)

The Court further focused on that the State did not have to provide independent proof concerning the write-ups if in fact had been an administrative hearing. (Appendix at page 53)

While the Court did state on the record, during the hearing, that the court file contained a letter from the Anthony Center which summarized all of the write-ups of the defendant/petitioner, the Court never addressed the basis or nature of any one of the individual write-ups. The Court did not make a finding as to whether or not the warden had abused his discretion in finding that the defendant/petitioner was unfit to continue in the youthful offender program. The Court upheld the warden's decision on the basis that there had been an administrative hearing and that the defendant/petitioner had had the opportunity to appear at the administrative hearings and respond to the allegations in each of the write-ups. In reading West Virginia Code § 25-4-6, the significance of there having been a hearing provided to the defendant is that the State does have to provide evidence independent at the Circuit Court level. In other words, the State does not have to put forward again the same evidence which had been presented at the administrative hearing. However, there having been an administrative hearing does not relieve the Circuit Court of the statutory duty to review the evidence that had been presented below for possible abusesiveness in the decision making process of the warden.

The warden's decision was upheld on issue other than the statutory mandate as to whether the warden had abused his discretion in determining that the defendant/petitioner was an unfit person to remain at the center. The matter should be returned to the Circuit Court for hearing on the possible abuse of discretion of the warden. That issue, one way or the other, was not addressed during the April 28, 2011 hearing or at the conclusion thereof.

- III. **The Circuit Court erred in denying the request of defendant, Elliot Fitzsimmons that he be given credit for time served while at the Anthony Center for Youthful Offenders as against his sentence of not less than One (1) year nor more than Ten (10) years.**

STANDARD OF REVIEW

At issue is a “penal” statute, a law that imposes “a penalty, fine or punishment for certain offenses of a public nature or wrongs committed against the State” Black’s Law Dictionary 1020 (5th Addition 1979). This Court has repeatedly stated that penal statutes are construed against the State and in favor of a defendant. For example, in Syllabus Point 3 of State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E. 2d 482 (1970), we stated that “[p]enal statutes must be strictly construed against the State and in favor of the defendant.” State v. Scott, 214 W.Va. 1, 585 S.E. 2d 1 (2003)

ARGUMENT

Concurrent with upholding the Anthony Center warden's decision that defendant/petitioner Elliot Fitzsimmons was unfit to remain in the youthful offender program, the Circuit Court ruled that the defendant/petitioner should not be given credit for the time served while in the youthful offender program. While West Virginia Code § 25-4-6 grants the Circuit Court the authority to make such a ruling, stating that “[i]n his or her discretion, the judge may allow the defendant credit on the sentence for time the offender spent in the center”

Emphasis Added. However, the statute in giving such leeway to the Circuit Court violates the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.

The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable. Syllabus Point 1, Martin v. Leverette, 161 W. Va. 547, 244 S.E.2d 39 (1978), State v. Eilola, WVSCA No. 35140 (2010)

In State v. McClain, 211 W. Va. 61, 561 S.E.2d 783 (1978), this Court cited and upheld Syllabus Point 1 of Martin v. Leverette, 211 W. Va. 61, at page 64. In McClain, the Court was presented with a scenario wherein the State took the position that a defendant should not have been credited for time that had been served prior to a sentence of jail time being re-instated. In that case a defendant had initially had been placed on probation and had to serve a period of jail time as a term and condition of the probation prior to the entering the actual probationary period. Eventually the defendant was found to have violated probation and his suspended jail term was reinstated. The State argued that the defendant should not be given credit for the time served prior to the probation period starting because ultimately the probation was revoked and the jail sentence re-imposed. The McClain Court recognized this argument as “disingenuous” holding that

“Precisely the same limits are placed on the liberty of individual in either instance, requiring that the constitutional principles apply with equal force to any periods of confinement in correctional facilities. 211 W. Va. 61, at page 65. Emphasis Added.”

In State v. Scott, 214 W. Va. 1, 585 S.E.2d 1, this Court recognized that the trial judge in that matter had had the option of sending the appellant to the ““young adult offender center” managed by the DOC.” 214 W. Va. 1, at page 2. The important aspect of this finding is that the Anthony Center was recognized by this Court as a correctional facility operated under the auspices of Department of Corrections.

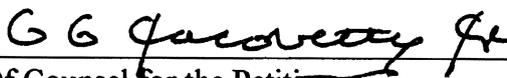
In this matter now on appeal, we have a similar situation to the McClain scenario. In this matter the defendant/petitioner, Elliot Fitzsimmons was sentenced to an indeterminate jail term. The jail term was then suspended in lieu of placement at the Anthony Center to participate in the youthful offender program. While placed at the Anthony Center, the defendant/petitioner had the same limits placed on his liberty as would any an individual who is placed in a jail or prison. The Anthony Center is a locked facility with the same promulgated rules and regulations of the Department of Corrections as used in other jails and prisons which that Department operates. Therefore, the Double Jeopardy Clause and the Equal Protection Clause of the West Virginia Constitution are applicable to time served at the Anthony Center. Thus the defendant/petitioner should be given credit for the time he served at the Anthony Center.

CONCLUSION

This matter should be remanded to the Circuit Court of Ohio County, West Virginia for a new statutorily mandated West Virginia Code § 25-4-6 hearing. The Circuit Court should be instructed to address the possible abuse of discretion of the warden of the Anthony Center as concerns his finding that defendant/petitioner, Elliot Fitzsimmons was an unfit person to remain a participant in the youthful offender program because:

1. The defendant/petitioner should have been provided the Rule 16 discovery which had been requested prior to the commencement of the April 28, 2011 hearing so that his counsel would have been provided the opportunity to competently represent him; and
2. The focus of the April 28, 2011 hearing was not the possible abuse of discretion of the warden of the Anthony Center in rendering his decision that defendant/petitioner, Elliot Fitzsimmons was an unfit person to remain a participant in the youthful offender program, but instead focused on the availability of administrative hearings each time that defendant/petitioner, Elliot Fitzsimmons was cited for a rule violation.

Additionally, if after an appropriately focused hearing the Circuit Court rules that the warden's decision finding defendant/petitioner, Elliot Fitzsimmons an unfit person to remain a participant in the youthful offender program was proper, the Circuit Court should be instructed that defendant/petitioner, Elliot Fitzsimmons is to given credit for time served for the time he was placed at the Anthony Center.



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CERTIFICATE OF SERVICE

Service of the foregoing **PETITIONER ELLIOT FITZSIMMON'S BRIEF**, was had upon the Office of the Attorney General of the State of West Virginia, by hand delivering, to the office this 19 day of September, 2011, as follows:

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