

NO. 11-0977

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

ELLIOTT FITZSIMMONS,

*Defendant Below,
Petitioner.*

SUMMARY RESPONSE OF THE STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0977

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ELLIOTT FITZSIMMONS,

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SUMMARY RESPONSE OF THE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

The Petitioner and Defendant Below, Elliot Fitzsimmons, was indicted by the grand jury in the Circuit Court of Ohio County. In the indictment, the Petitioner was charged with one count of entering without breaking, one count of conspiracy, one count of burglary and one count of grand larceny. (App. at 1-3.) Thereafter, on July 26, 2010, the Petitioner entered a plea agreement wherein he would enter a guilty plea to one count of entering without breaking in violation of West Virginia Code § 61-3-11(b) as charged in the indictment. As part of the agreement, the State agreed to recommend that the Petitioner be placed at the Anthony Center and to dismiss the three remaining charges in the indictment. (*Id.*)

On August 9, 2010, the circuit court entered a "Plea and Sentencing Order." In the order, the court accepted and entered the Petitioner's guilty plea and sentenced the Petitioner to not less than

one (1) nor more than ten (10) years for the entering without breaking charge. The court thereafter suspended the sentence and ordered the Petitioner to be placed at the Anthony Center. The court dismissed the Petitioner's remaining charges. (*Id.* 4-6.) The Petitioner was placed at the Anthony Center on August 11, 2010. (*Id.* at 56.)

Following a lengthy string of institutional violations, a Multidisciplinary Unit Team at the Anthony Center reviewed the Petitioner's file. Shortly thereafter, based on the review, the warden determined that the Petitioner be returned to the circuit court as unfit to remain at the Anthony Center. (*Id.* at 9.) The Petitioner was removed from the Anthony Center by an Order issued by the circuit court on February 11, 2011. (*Id.* at 7.) On February 14, 2011, Anthony Center Associate Warden of Security, Mark Wegman, issued a report detailing the Petitioner's disciplinary violations. In the report, eighteen violations were listed including ten instances of "Refusing an Order", one instance of "Insubordination/Insolence", one instance of "Creating a Disturbance", one instance of "Contraband", two instances of "Unauthorized Communication", one instance of "Bucking Line", one count of "Fraudulent Representation" and one instance of "Attentiveness." (*Id.* at 8-10.)

Thereafter, the court scheduled a hearing pursuant to West Virginia Code § 25-4-6 to determine if the warden abused his discretion in removing the Petitioner from the Anthony Center. Prior to the hearing, Petitioner's counsel requested a continuance of the hearing which was to be held on April 28, 2011. (*Id.* at 28-30.) Petitioner's counsel also filed a motion for discovery. Both motions were denied by the circuit court at the beginning of the hearing. (*Id.* at 52).

At the hearing, Associate Warden of Security, Mark Wegman appeared via telephone. Mr. Wegman testified that the Petitioner had eighteen (18) violations as outlined in his previous report. (*Id.* at 56-57.) Mr. Wegman also testified that the magistrate had held hearings with all of the

Petitioner's previous writeups. (*Id.* at 59.) Petitioner's counsel was given the opportunity to cross-examine Mr. Wegman. (*Id.* at 62-66.) The Petitioner also testified at the hearing. The Petitioner testified that he was given a "good opportunity to be heard." (*Id.* at 66-67.) Thereafter, the circuit court upheld the warden's determination that the Petitioner was not fit to remain at the Anthony Center and reinstated the Petitioner's original sentence of one (1) to ten (10) years. The court also found that pursuant to West Virginia Code § 25-4-6, the Petitioner should not be granted credit for time served at the Anthony Center. (*Id.* at 68.)

On May 3, 2011, the Petitioner filed a "Motion for Relief from Judgment for Credit for Time Served." (*Id.* at 44.) The motion was denied by the circuit court on May 4, 2011. (*Id.* at 47.) On May 31, 2011, the Petitioner was appointed new counsel to represent him in this appeal.

II.

ARGUMENT

The Petitioner raises three arguments on appeal. First, the Petitioner argues that the circuit court erred in denying the Petitioner's motions for discovery and for the continuance of the hearing. Second, the Petitioner argues that the circuit court erred in upholding the warden's decision in removing the Petitioner from the Anthony Center. Finally, the Petitioner argues that the circuit court erred in denying him credit for time served at the Anthony Center.

The Petitioner's first argument, that the hearing held on April 28, 2011 pursuant to West Virginia Code § 25-4-6 is a "criminal proceeding" and therefore, the West Virginia Rules of Criminal Procedure, including those pertaining to discovery should apply. Prior to the hearing, Petitioner's counsel filed a motion for discovery requesting "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.” (App. at 29.) Petitioner’s counsel also requested an extension of time based on the discovery request. Both motions were denied by the circuit court. (*Id.* at 52.) The Petitioner asserts that the circuit court erred in denying his motions for discovery and extension of time.

West Virginia Code § 25-4-6 provides that the standard of review at hearing following the removal of a youthful offender from the Anthony Center program is:

whether the warden, considering the offender’s overall record at the center in 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.

Although the Petitioner argues otherwise, the Rules of Criminal Procedure do not apply to this hearing. The hearing is not truly a “criminal proceeding” as defined under Rule 54(c) of the West Virginia Rules of Criminal Procedure. The hearing was not held in conjunction with a trial, sentencing or anything of the like. The hearing provided to the Petitioner on April 28, 2011, pursuant to W. Va. Code § 25-4-6, was simply a judicial review under an abuse of discretion standard, of the warden’s previous determination to remove the Petitioner from its program. The scope of the hearing was limited to determining if the warden had abused his discretion in determining that the Petitioner was unfit to continue with the Anthony Center program. Because the hearing was not a criminal proceeding as defined in the Rules of Criminal Procedure, the rules of discovery pertaining to criminal proceedings cannot apply.

Discovery rules are specifically inapplicable to a hearing held under W. Va. Code § 25-4-6, which provides that, “the State need not offer independent proof of the offender’s disciplinary infractions when opportunity for administrative hearings on those infractions was previously made available.” Prior to the April 28, 2011 hearing, the Petitioner had been provided with hearings

before a magistrate for each of his eighteen violations. (App. at 59.) At these hearings, the Petitioner was provided with the “opportunity to give his version of the events.” (*Id.* at 60.)

The hearing held on April 28, 2011 pursuant to W. Va. Code § 25-4-6 was simply a judicial review of an administrative hearing and not a “criminal proceeding” as defined under West Virginia Rules of Criminal Procedure Rule 54(c). At the hearing, the warden testified that the Petitioner was previously provided with hearings before a magistrate with each of his eighteen institutional violations. Therefore, pursuant to the language of W. Va. Code § 25-4-6, “the State need not offer independent proof of the offender’s disciplinary infractions.” The circuit court did not err in denying the Petitioner’s motion for discovery, or the extension of time based on the request for discovery.

The Petitioner next argues that the circuit court misconstrued the purpose of the hearing and erred in upholding the decision of the warden in determining the Petitioner unfit to continue at the Anthony Center. The Petitioner argues that the court “never reviewed and/or analyzed the basis of the defendant/petitioner’s write-ups upon which the warden’s decision rested.” (Pet’r’s Br. at 12.) The Petitioner’s argument has no merit.

As previously discussed, West Virginia Code § 25-4-6 provides that the standard of review at hearing following the removal of a youthful offender from the Anthony Center program is:

whether the warden, considering the offender’s overall record at the center in 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.

The scope of the hearing held pursuant to W. Va. Code § 25-4-6 is whether the warden abused his discretion in determining that the Petitioner was unfit to remain at the Anthony Center. The Petitioner complains that the state’s witness did not testify as to the nature or the basis of any of the Petitioner’s write ups. However, as previously addressed, at a hearing held under W. Va.

Code § 25-4-6, “the State need not offer independent proof of the offender’s disciplinary infractions when opportunity for administrative hearings on those infractions was previously made available.”

The Petitioner seems to misinterpret the scope of a hearing held under W. Va. Code § 25-4-6. The purpose of the hearing is not to redetermine the validity of the Petitioner’s violations. The purpose of a hearing held under W. Va. Code § 25-4-6 is to confirm that the Petitioner was previously provided with the opportunity to address the violations before a magistrate, that the magistrate determined that the violations were valid and based on the violations, the warden did not abuse his discretion in reviewing the Petitioner’s overall record and determining him unfit to remain at the Anthony Center. At the hearing, the warden testified that the Petitioner had hearings before a magistrate for each of his eighteen violations. At the hearing, the warden also testified, and the Petitioner agreed that, he had previously had “good opportunity to be heard” regarding the violations. (App. at 67.) The circuit court heard testimony that the Petitioner was previously provided with the opportunity to be heard before a magistrate and the magistrate determined the violations were valid. Therefore, the circuit court did not err in finding that: “this Court upholds the warden’s determination as contained in Mr. Wegman’s letter of February 14, 2011, demonstrating that he was not fit to remain at the Anthony Center.” (*Id.* at 68.)

The Petitioner’s last argument that the circuit court erred in denying him credit for time served while at the Anthony Center. The Petitioner argues that the denial of credit for time served deprives him of constitutional rights under the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.

West Virginia Code § 25-4-6 provides that:

If, in the opinion of the warden, the young adult offender proves to be 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. In that event, 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.*

(Emphasis added).

Under the specific language of West Virginia Code § 25-4-6, the circuit judge's denial of the Petitioner's credit for time served was within his discretion and completely proper. Therefore, although the circuit judge acted properly under the language of the statute, should this Court determine that such denial of credit for time served while at the Anthony Center is unconstitutional, the respondent agrees that the petitioner's discharge date and parole eligibility date would need to be recalculated.

III.

CONCLUSION

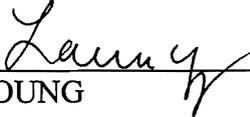
For the foregoing reasons, the State respectfully requests that this Court dismiss the petition and deny any and all relief requested by the Petitioner. However, should this Court determine that the language of West Virginia Code § 25-4-6 granting the circuit judge discretion in awarding a Petitioner credit for time served while at the Anthony Center is unconstitutional, the State believes it would be proper to grant the Petitioner's request for time served.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

by counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



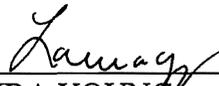
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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the *Summary Response of the State of West Virginia* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 14th day of October, 2011, addressed as follows:

To: Gerald G. Jacovetty, Jr., Esq.
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LAURA YOUNG