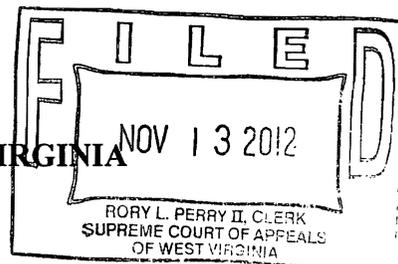


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

v.

**Supreme Court No. 12-0513
Circuit Court No. 11-F-40
(Kanawha)**

GABRIEL HARGUS,

Petitioner.

PETITIONER'S REPLY BRIEF

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ASSIGNMENTS OF ERROR

- I. The West Virginia Extended Supervision of Sex Offenders Act, W.Va. Code §62-12-26 (2010), is unconstitutional under the West Virginia and United States Constitutions in that it violates the defendant's rights of procedural due process, substantive due process, equal protection, prevention of double jeopardy, and right to proportionate sentencing.
- II. The notice of violation of extended supervision was constitutionally defective in that the original criminal complaint giving rise to the violation allegation did not contain the charge of failing to provide a valid social security number and Petitioner was eventually found in violation of his term of extended supervision due in part to this specific allegation of failure to properly register as a sex offender.
- III. Petitioner's term of extended supervision, including the length of the term and the conditions added by the trial court judge, is excessive.

REPLY ARGUMENT

I. The West Virginia Extended Supervision of Sex Offenders Act, W.Va. Code §62-12-26 (2010), is unconstitutional under the West Virginia and United States Constitutions in that it violates the defendant's rights of procedural due process, substantive due process, equal protection, prevention of double jeopardy, and right to proportionate sentencing.

Mr. Hargus currently is incarcerated as a result of a violation of his period of extended supervision. The trial court gave Mr. Hargus a sentence of five (5) years of incarceration for violating his term of extended supervision by failing to register as a sex offender. This sentence of five (5) years of incarceration is unconstitutional and unjust as it is a sentence two-and-a-half times greater than the sentence Mr. Hargus received for his original criminal offense giving rise to his period of extended supervision and requirement to register as a sex offender.¹ Further, Mr. Hargus received no time credit for the two (2) years he already served on this conviction.

The State posits that this issue was resolved by this Court's ruling in *State v. Payne*, 2012 WL 2892245 (Memorandum Opinion, Feb. 13, 2012). State's Brief, pp. 5-6. However, this case differs from *Payne*. First, Mr. Hargus's violations were technical violations regarding registration, unlike Mr. Payne who had begun spending time unsupervised with children after being specifically ordered not to do so. Second, Mr. Hargus argues that his sentence was not only excessive, but that *any* punishment arising from a violation of extended supervision is in violation of his constitutional rights; Mr. Payne was only contending that he received an excessive sentence.

In *Payne*, this Court stated that extended supervision is not designed to punish, but to supervise and regulate. *Id.* However, this explanation begs the question, what is incarceration if it is

¹ On February 22, 2011, Gabriel Hargus plead guilty to one count of possession of materials of visually portraying a minor engaged in sexually explicit conduct. As a result, he was sentenced to two (2) years incarceration, a period of thirty (30) years extended supervision, and lifetime registration as a sex offender.

not punishment? A person loses his liberty for an act occurring after he has completed his full term of his first punishment for the underlying offense, whether it be probation, incarceration, parole, or some combination thereof. It is unlike parole where a person gains limited freedom before the end of his term of incarceration or like probation where there is no incarceration. Extended supervision is not a matter of grace like probation or parole; it is mandatory for certain offenders, therefore it is punishment. A sex offender is subject to a second punishment by having his behavior constantly monitored while on extended supervision. The offender is then punished a third time with incarceration if he is deemed to have violated the rules of his extended supervision. That is what occurred here.

The State contends that Mr. Hargus should be glad he only received the punishment he did, as he could have been convicted of four felonies. State's Brief, p.7. What the State fails to realize is that conviction on those four felonies would only occur after a trial by jury and a finding of guilt is not guaranteed. Further, at trial, the State would need to show each element of each crime beyond a reasonable doubt whereas a violation of extended supervision only requires proof by clear and convincing evidence of one failure to properly register as a sex offender. Therefore, the State achieves its goal of punishment without having to prepare evidence to show each element of each crime beyond a reasonable doubt, which is a great windfall for the State and a great detriment for the defendant.

Turning to federal supervised release, it is clear that extended supervision of sex offenders in West Virginia is significantly different than federal supervised release. In the federal system, supervised release can be ordered for any crime, not just sex crimes, with the goal of helping offenders transition back into society. 18 USC §3583 *et seq.* (2011). Federal supervised release puts

some limits on the amount of time a person may be on supervised release and the amount of time a person is incarcerated for a violation. *See id.* at §3583(b), (c), & (e). Essentially, federal supervised release replaces the federal parole system. *Johnson v. United States*, 529 U.S. 694, 120 S.Ct. 1795 (2000). It is not designed to target one specific group and it is designed to be personalized for each offender to maximize success.² *Id.* at 708-09, 1805. The federal supervised release statute itself says supervised release may be included “as a part of the sentence.” 18 USC §3583(a). West Virginia’s extended supervision is not designed that way; terms of extended supervision are much longer as are the periods of incarceration for violations. *See* W.Va. Code § 61-12-26 (2011). Further, this Court held that extended supervision itself is an additional punishment prescribed by the Legislature for certain offenders. Syl. Pt. 11, *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011). It is not part of the sentence, but in addition to any probation, incarceration or parole the offender may serve.

Violations of probation and parole are not considered additional sentences, whereas extended supervision is an additional punishment. This comparison shows that a violation of extended supervision is different and should be handled differently than a violation of probation or parole. One such difference should be that any person accused of violating a term of extended supervision receives all the constitutional rights and protections that the person would receive if he were standing accused of a crime. The United States Supreme Court mandated that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and must be proved beyond a reasonable doubt. *Apprendi v. New Jersey*,

² Federal supervised release is shorter for most defendants, however federal supervised release does have a carve out for certain sex offenses that allows longer terms of supervision and longer terms of incarceration when there is a violation. 18 USC §3583(k).

530 U.S. 466, 120 S.Ct. 2348 (2000). In this case, in addition to showing Mr. Hargus's sex offense conviction, the State had to show that Mr. Hargus failed to comply with the rules of his extended supervision, which required proof of an additional act such as not providing information for the sex offender registry. Under *Apprendi*, that determination should have been made by a jury.

The West Virginia Supreme Court of Appeals has set forth both an objective test and a subjective test to aid in determining whether a sentence violates the proportionality principle. *State v. David D.W.*, 214 W.Va. 167, 588 S.E.2d 156 (2003). In light of Mr. Hargus's lack of criminal history, his only conviction being to the offense that qualified him for a term of extended supervision, and that his violations were technical rather the commission of new sex crimes, the punishment for violating his period of extended supervision shocks the conscience. Other less dramatic punishments are available for dealing with technical violations of extended supervision, including more frequent contact with a parole officer. These alternatives are significant given this State's problems with prison overcrowding.

Additionally, this Court must consider that this statute is only applicable to sex offenders, likewise making it constitutionally disproportionate as sex offenders are more severely punished than similarly-situated non-sex offenders without sufficient justification. The rational basis provided for extended supervision is that sex offenders recidivate at a much higher rate than other criminals, which is not true, as reflected in the social science information cited in Petitioner's initial brief. *See* Petitioner's Brief, pp. 22-23. Therefore, there is no rational basis for applying extended supervision to sex offenders, thus rendering that measure unconstitutional.

II. The notice of violation of extended supervision was constitutionally defective in that the original criminal complaint giving rise to the violation allegation did not contain the charge of failing to provide a valid social security number and Petitioner was eventually found in violation of his term of extended supervision due in part to this specific allegation of failure to properly register as a sex offender.

Constitutional due process requires that a defendant receive notice of the charges against him so that he may prepare a proper defense. *See generally*, Syl. Pt. 12, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976). Mr. Hargus received proper notice of his alleged failures to provide the following: an accurate birth date, an accurate accounting of his alias, accurate information regarding vehicles in his home, and accurate information regarding access to the internet in his house. However, nowhere in the Notice of Violation, or the original criminal complaint for Failure to Register, is there any language or any reference to allegations regarding providing an inaccurate social security number. Yet at the conclusion of the violation hearing, the trial judge found that Mr. Hargus had violated his term of extended supervision, in part, because he failed to provide an accurate social security number. (A.R., pp. 1-2).

The State asserts that this issue is not relevant as it was not properly preserved through an objection by trial counsel. State's Brief, p. 11. However, an objection is not necessary when there is plain error. To show plain error, there must be "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194W.Va. 3, 459 S.E.2d 114 (1995). Failing to provide fundamental due process via appropriate notice and an opportunity to be heard is clearly plain error as in order to prepare a proper defense, a defendant must know the accusations against which he must defend himself. Without this notice, the defendant's trial becomes more of a witch hunt and

less of a proceeding handled with due process and fairness. In turn, the public loses confidence in the criminal justice system as it does not appear fair. Since Mr. Hargus did not receive constitutionally adequate notice of this charge, the finding of a violation of extended supervision based on failing to provide an accurate social security number must be reversed as being unconstitutional.

III. Petitioner's term of extended supervision, including the length of the term and the conditions added by the trial court judge, is excessive.

This Court reviews sentencing orders under a “deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). This Court also held that “[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

Part of examining the fairness of sentencing in this case is interpreting the Extended Supervision Act. This Court held that extended supervision is an additional punishment prescribed by the Legislature for those convicted of certain enumerated sex offenses. *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011). This Court did not address the constitutional issues regarding a violation of extended supervision, finding it too theoretical given the facts of the cases at hand. *Id.* The Petitioner now is being punished for a violation of his term of extended supervision and the constitutionality and fairness of that sentence is ripe for review. Petitioner asserts that his sentence is based on an impermissible factor, that being a violation of his constitutional right against double jeopardy.

The new condition imposed by the trial court likewise is unconstitutional as it directly

impinges on Petitioner's First Amendment rights. A person's internet usage can be monitored in other ways that would not require a full ban. The Internet is a vital part of modern living and without it, a person loses many opportunities to apply for jobs and stay in contact with one's support network. Therefore, this new condition is excessive and must be struck down.

CONCLUSION

Mr. Hargus respectfully requests that this Honorable Court remand this case back to the Circuit Court of Kanawha County with directions to dismiss the finding that he violated his term of extended supervision, and with further directions to eliminate the new conditions regarding the ban from computers/Internet from his term of extended supervision.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that I have served the attached Reply Brief of the Appellant by delivering a true copy thereof to Laura Young, at the Attorney General's Office, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301; by hand delivery or by U.S. States Mail postage prepaid this the 13th day of November, 2012.



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