

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Larry K. Dailey,
Petitioner Below, Petitioner**

vs.) **No. 11-0646** (Taylor County 11-C-13)

**James J. Ielapi, Warden, Pruntytown
Correctional Center, Respondent Below,
Respondent**

FILED

September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Larry K. Dailey appeals the circuit court's February 11, 2011 order denying his petition for a writ of habeas corpus. Petitioner argues that the circuit court erred when it did not award him good time credit for the time he spent incarcerated, because of a pending new charge, while on parole for a previous offense. Upon consideration of the standard of review, the record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

Petitioner, an inmate in the custody of the West Virginia Division of Corrections (hereinafter "the DOC"), was on parole on a sentence from Wayne County when he was arrested on May 6, 2003, in Putnam County for third offense DUI.¹ Petitioner was placed in jail and did not post bond. However, the docket sheet from Putnam County Felony No. 03-F-48 indicates that on August 13, 2003, an Amy Swords posted a \$5,000 bond and petitioner was consequently released from incarceration and placed on home confinement pending final resolution of the case.²

Petitioner entered a guilty plea in Putnam County No. 03-F-48 on September 24, 2003. On November 12, 2003, the Circuit Court of Putnam County sentenced petitioner a term of

¹ In addition to third offense DUI, petitioner was also charged of misdemeanor assault of a police officer. However, the sentence for that offense is not relevant to the case sub judice.

² It is noted that petitioner disputes whether he was released from incarceration to home confinement on August 13, 2003. Petitioner contends that he was not released from incarceration until November 12, 2003. The record on appeal does not support petitioner's contention.

one to three years in the state penitentiary on the DUI offense. In lieu of the sentence of incarceration, the circuit court continued petitioner on home confinement as an alternative disposition.

Petitioner's home confinement was revoked on August 9, 2004, and the Circuit Court of Putnam County imposed the sentence of incarceration. The circuit court made May 6, 2003, the effective sentence date and gave petitioner 462 days of credit for the whole period from May 6, 2003, to August 9, 2004. A December 28, 2010, letter to petitioner from the DOC Records Supervisor Henry E. Lowery indicates that the DOC credited the 462 days towards the sentence on the DUI offense, where Mr. Lowery states that "[y]our subsequent conviction on the pending charge gave you jail credit from May 6, 2003, so you did receive credit for the time you were incarcerated." In his reply brief, petitioner acknowledges that "jail credit" includes good time credit.

"Good time" is a statutory commutation of an inmate's sentence based on each day the inmate serves his sentence. *See* W.Va. Code §§ 28-5-27(b) and (c). The statutory commutation is applied against only the maximum term of the inmate's indeterminate or determinate sentence. Assuming that the inmate is not granted parole, yet loses no good time for prison misconduct, his time incarcerated and the statutory commutation meet at the halfway point of the inmate's maximum term. The inmate is released at that point.

Petitioner was charged with parole violations stemming from the Putnam County offense and a hold was placed on him in the event that he posted bond on the offense. As already indicated, petitioner did not to post bond and was not released from incarceration to home confinement until August 13, 2003. Petitioner was never held in custody because of the hold, and the parole violations were subsequently dismissed by the West Virginia Parole Board on August 15, 2003. For the period from May 6, 2003, to August 13, 2003, petitioner was incarcerated solely because of the Putnam County offense.

Consequently, petitioner received no good time credit for the sentence on which he was on parole, his Wayne County sentence. Petitioner did receive street credit towards his Wayne County sentence for the time he spent on parole from February 11, 2002, to May 28, 2004, when he was arrested on new charges in Cabell County.³ The fact that he received

³ "Street credit" is credit a prisoner receives for the time he spent on parole. *See Adams v. Circuit Court of Randolph County*, 173 W.Va. 448, 452, 317 S.E.2d 808, 811 (1984) (explaining that when there has been a revocation of parole, the Parole Board is statutorily authorized to require the prisoner to serve all or any portion of the maximum sentence for which he was granted parole but that the Board must give the prisoner credit

street credit for his Wayne County sentence is something petitioner also acknowledges in his reply brief, explaining that good time credit is preferable to street credit because street credit affects only “the front end of the sentence and not the back of the sentence/discharge date as does the credit for good time.”

On January 28, 2011, petitioner filed a petition for a writ of habeas corpus in the Circuit Court of Taylor County based on the claim that the DOC was not calculating his good time credit correctly. In its order denying petitioner’s habeas petition, the circuit court found that he received credit for the time he spent in jail on his DUI sentence from Putnam County but was arguing that he should also have received good time credit towards his Wayne County sentence for which he had been on parole. The circuit court denied petitioner’s petition for a writ of habeas corpus, concluding as follows:

* * *

4. This Court has reviewed the Petition and all exhibits attached thereto, and has concluded that the Petitioner was given credit for the time spent in jail, and that the Petitioner is not entitled to have the time credited against his previous sentences. Thus, the Court concludes that the [DOC] acted within its discretion and within the law in calculating the Petitioner’s time served and good time.

Therefore, the Court has determined that the Petition is without merit.

Petitioner subsequently filed a notice of appeal from the circuit court’s denial of his habeas petition. Thereafter, this Court entered a scheduling order. Petitioner filed his brief and an appendix on April 29, 2011. The respondent warden then filed both a summary response and a motion to supplement the record. The respondent warden filed the proffered supplemental appendix on the same day. On July 14, 2011, the Court granted the motion to supplement the record. Petitioner filed his reply brief on August 1, 2011.

Petitioner argues that he should receive good time credit for the time he spent incarcerated on the Putnam County charge towards at least one of his two relevant sentences. The respondent warden argues that petitioner received good time credit towards his Putnam

for the time he has served while on parole).

County sentence for the time he spent incarcerated on the DUI charge and that petitioner is not entitled to receive good time credit for the period towards his Wayne County sentence.

STANDARD OF REVIEW

The applicable standard for reviewing a circuit court's order denying a habeas petition was set forth in Syllabus Point One, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006):

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

GOOD TIME CREDIT FOR PETITIONER'S PUTNAM COUNTY SENTENCE

The circuit court found that "the Petitioner was given credit for the time spent in jail" towards his Putnam County sentence. The circuit court's finding was supported by the December 28, 2010, letter to petitioner from the DOC Records Supervisor. Therefore, after careful consideration, this Court concludes that the circuit court did not clearly err in finding that petitioner received good time credit towards his Putnam County sentence.

GOOD TIME CREDIT FOR PETITIONER'S WAYNE COUNTY SENTENCE

The circuit court found that "the Petitioner is not entitled to have the time credited against his [Wayne County sentence]." Petitioner was on parole on his Wayne County sentence, which parole was never revoked during the period he was incarcerated. Under Syllabus Point Eleven, *Woodring v. Whyte*, 161 W.Va. 262, 242 S.E.2d 238 (1978), "[a] prisoner is not entitled to good time credits while on parole." There is an exception when an individual is detained on parole revocation charges and there is an unreasonable delay in the Parole Board's holding of the final parole revocation hearing. *See State ex rel. Valentine v. Watkins*, 208 W.Va. 26, 537 S.E.2d 647 (2000). In the case sub judice, petitioner was never detained because of parole revocation charges. For the period from May 6, 2003, to August 13, 2003, when he released, petitioner was incarcerated solely because of the Putnam County offense. Therefore, after careful consideration, this Court concludes that the circuit

court did not abuse its discretion in denying petitioner’s petition for a writ of habeas corpus as “without merit.”

For the forgoing reasons, we affirm.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh