No. 20906 -- State of West Virginia, Plaintiff Below v. Carl Morris, Defendant Below

Miller, J., dissenting, in part, and concurring, in part:

In State ex rel. Moomau v. Hamilton, 184 W. Va. 251, 400 S.E.2d 259 (1990), we were called upon to determine whether one convicted of third-offense drunk driving could be sentenced to home confinement under the Home Detention Act, W. Va. Code, 62-11B-1, et seq. The majority focused almost exclusively on W. Va. Code, 17C-5-2(i) (1986), which provides that one convicted of such an offense "shall be imprisoned in the penitentiary for not less than one nor more than three years . . . ," and W. Va. Code, 17C-5-2(m) (1986), which provides that "[t]he sentences provided herein . . . are mandatory and shall not be subject to suspension or probation . . . ." It then concluded that these provisions precluded a sentence of home confinement. Chief Justice McHugh and I dissented.

In the dissenting opinion in Moomau, 184 W. Va. at 254-55, 400 S.E.2d at 262-63, we disagreed with the majority's interpretation. We noted that W. Va. Code, 62-11B-4(a) (1990), expressly provides that home confinement could be ordered by the circuit court "[a]s a condition of probation or as an alternative sentence to another form of incarceration . . . ."[1] (Emphasis added.)

[1]W. Va. Code, 62-11B-4(a) (1990), states: "As a condition of probation or as an alternative sentence to another form of incarceration, a court may order an offender confined to the offender's home for a period of home detention."

Thus, the legislature specifically recognized that home confinement is a form of incarceration. Moreover, W. Va. Code, 62-11B-4(b) (1990), which relates to the period of home confinement, states that it "may be continuous."[2] Where the prisoner is given continuous home confinement, there is no ability to leave the home without causing the monitoring device, which is shackled to his ankle, to be activated, in which event, the law enforcement official who is monitoring the home confinement system is immediately notified and may apprehend the prisoner.[3] Thus, it is clear from a factual standpoint that home confinement is a form of incarceration, just as surely as imprisonment in any state penal institution. This type of incarceration would satisfy the prohibition contained in driving-under-the-influence statutes that upon a conviction, the sentence "shall not be subject to suspension or probation[.]" W. Va. Code, 17C-5-2(m).

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[2]W. Va. Code, 62-11B-4(b) (1990), states:

> "The period of home detention may be continuous or intermittent, as the court orders. However, the aggregate time actually spent in home detention may not exceed the term of imprisonment or incarceration prescribed by this code for the offense committed by the offender."

[3]A violation of home confinement under W. Va. Code, 62-11B-9(b) (1990), subjects the prisoner to incarceration in a penal facility under the penalties prescribed in the original crime.

A further reason to find that the legislature intended to allow home confinement in this area is that the home confinement statute was enacted in 1990 after the mandatory penalties set out in the driving-under-the-influence statute were adopted. Had the legislature intended that incarceration under the home confinement statute not be available for driving-under-the-influence crimes, it could well have made such an exemption in the home confinement statute. Not only did it not create such an exemption, but it specifically stated in W. Va. Code, 62-11B-3(3) (1990), by defining the term "offender," that home detention was available for "any adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary."[4] This is also reinforced by W. Va. Code, 62-11B-2 (1990), dealing with the general applicability of the Home Detention Act, which states: "This article applies to adult offenders and to juveniles who have committed a delinquent act that would be a crime if committed by an adult." Thus, the Home Detention Act, because of its broad coverage as to all felonies, includes offenses for driving under the influence.

[4]The full text of W. Va. Code, 62-11B-3(3) (1990), is:

> "'Offender' means any adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary; or a juvenile convicted of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult."

The legislature adopted the Home Detention Act to accomplish two broad purposes. The first was to provide an alternative method of incarceration that would save the State from paying for the cost of a prisoner's confinement. See W. Va. Code, 62-11B-8 (1990).[5] The second goal was to provide a method of incarceration that would not result in overcrowding the State's already strained penal system. This latter problem is recognized by the majority in its footnote 2 and is the subject of a more extensive discussion in State ex rel. Smith v. Skaff, ___ W. Va. ___, ___ S.E.2d ___ (No. 21127 7/23/92).

The irony in this case is that the defendant's conviction was not for driving under the influence. Rather, he was convicted for driving while his license was suspended under W. Va. Code, 17B-4-3(b) (1986). This provision does not contain the restrictive language found in W. Va. Code, 17C-5-2(m), that a driving-under-the-influence sentence "shall not be subject to suspension or probation." The penalty under W. Va. Code, 17B-4-3(b), provides that an offender convicted of driving without a suspended

[5]W. Va. Code, 62-11B-8 (1990), provides:

> "An offender ordered to undergo home detention under section four [§ 62-11B-4] of this article is responsible for providing his own food, housing, clothing, medical care and other treatment expenses. The offender is eligible to receive government benefits allowable for persons on probation, parole or other conditional discharge from confinement."

license "shall be imprisoned in the penitentiary . . . and in addition to such mandatory jail sentence, shall be fined[.]" The majority seizes on the mandatory jail sentence language to preclude home confinement, which carries Moomau to an even more extreme result.

Had the majority made an intelligent analysis of the Home Detention Act and recognized that the legislature had plainly stated that home confinement is a form of incarceration, it could have avoided the absurdity of its bracket in the Syllabus of this case. This would have also avoided its legislative language in footnote 2 which grants the right to home confinement in driving- under-the-influence cases and in license-revocation cases under W. Va. Code, 17B-4-3(b). It is the majority's unwillingness to acknowledge its initial error in Moomau that brings it to this strange legislative result.

I concur in the limited legislative result achieved by the majority, not for its stated reason, but because I have consistently maintained that the Home Detention Act can permissibly apply to these offenses if the trial court, exercising its sound discretion, elects to so apply it.

I am authorized to state that Chief Justice McHugh joins me in this opinion.