IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

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February 21, 2002
RORY L. PERRY II, CLERK
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OF WEST VIRGINIA

No. 29839

RELEASED
February 22, 2002
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

v.

ROBERT F. McCLAIN,
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
The Honorable James C. Stucky, Judge
Criminal Action No. 00-F-381

REVERSED, IN PART, AND REMANDED

Submitted: January 15, 2002
Filed: February 21, 2002

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JUSTICE ALBRIGHT delivered the Opinion of the Court.
CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS

1. "We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syl. Pt. 1, in part, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

2. "A statute should be read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syl. Pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).

3. "Ambiguous penal statutes must be strictly construed against the State and in favor of the defendant." Syl. Pt. 1, *Myers v. Murensky*, 162 W.Va. 5, 245 S.E.2d 920 (1978).

4. The legislative intent reflected in the provisions of West Virginia Code § 62-12-9 (b)(4) (1994) (Repl. Vol. 2000) is to establish a six-month limit for the period of incarceration which may be imposed as a condition of probation. When a minimum or

indeterminate sentence is involved, then the maximum term of incarceration as a condition of probation is one-third of the express minimum or indeterminate sentence or six months, whichever is less; for all other types of statutory penalties, the maximum term of incarceration as a condition of probation is six months.

5. "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." Syl. Pt. 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978).

6. The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable.

Albright, Justice:

Robert McClain (hereinafter "Appellant") appeals the April 13, 2001, order of the Kanawha County Circuit Court denying his motion, filed pursuant to Rule 35 of the Rules of Criminal Procedure, to correct the sentence imposed after he pled guilty to the offense of leaving the scene of an accident which resulted in death. Appellant specifically argues that the trial court's refusal to grant him credit for the time he served in jail before he was convicted due to the fact that he could not meet the bail requirements for pretrial release amounted to violation of the equal protection and double jeopardy clauses of the West Virginia Constitution. Based upon the briefs and arguments of the parties and a full review of the record, we remand this case with direction to amend the sentencing order so as to provide credit for the time Appellant spent in jail before his conviction.

I. Factual and Procedural Background

On the night of September 2, 2000, Appellant was driving with a female companion in his car when, during the course of an argument with the companion, Appellant felt his car hit something which he guessed was a dog or other animal. After stopping his vehicle and detecting nothing in his rearview mirror, Appellant proceeded on his way. In his statement to the police, Appellant said that the next morning he noticed that the car's passenger side headlight was damaged and the hood of the car was dented. Four days after this incident,

the body of Richard Parry was found on the side of the road in the vicinity where Appellant was driving.

According to Appellant, although he decided to contact the authorities when he heard about the discovery of Mr. Parry's body in the area where he had been driving, the police arrested him before he could do so. Following his arrest on September 7, 2000, Appellant was charged in magistrate court with feloniously driving and operating a motor vehicle and leaving the scene of an accident from which death resulted. During the initial appearance before the magistrate, Appellant waived a preliminary hearing and thereafter was committed to the regional jail because he was unable to satisfy the $150,000 bail fixed by the magistrate. Appellant filed a motion for reduction of bail in the circuit court on September 21, 2000, requesting specifically that bail be set at not more than $20,000.

The grand jury returned an indictment during the September 2000 term of court, charging Appellant with leaving the scene of an accident resulting in death and operating a motor vehicle while his license was suspended for driving under the influence (hereinafter "DUI"). Appellant was arraigned on these charges on November 22, 2000, at which time the lower court set the date for trial and continued bail, but at the reduced amount of $75,000. Appellant still could not satisfy the new bail amount established by the circuit court, so he was returned to jail to await trial on January 2, 2001.

On the day of trial and pursuant to the terms of a plea agreement, Appellant tendered to the court a plea of guilty to the charge of leaving the scene of an accident resulting in death. In return for Appellant's guilty plea, the State recommended probation and moved to dismiss the charge of driving on a license suspended for DUI. The lower court accepted Appellant's guilty plea on January 2, 2001, and at that time also set the sentencing hearing for March 30, 2001, and fixed the amount of post-conviction bail at $20,000. Appellant was able to post the requisite bond at this point, and was released from custody after spending 119 days in jail.

As detailed in the March 30, 2001, sentencing order, the lower court, acting sua sponte, suspended the imposition of sentence and released Appellant on probation for a period of three years with one of the conditions of probation being that Appellant spend six months confined in the regional jail during the probationary period. The sentencing court explained during the sentencing hearing that Appellant was not given credit for the 119 days he spent in jail awaiting trial because the six-month incarceration condition was not the sentence, but a part of probation. The sentencing judge added: "If he were sentenced to the penitentiary, he would get credit for the one hundred and nineteen (119) days he served. As a condition of probation, he is not getting credit for those days." Appellant challenged the circuit court's decision not to give him credit for the time he served in jail awaiting trial by filing a motion on April 9, 2001, to correct the sentence pursuant to Rule 35(a) of the Rules of Criminal

Procedure.[1] Without conducting a hearing, the lower court denied the motion to correct the sentence by order entered April 13, 2001. It is from this order that the instant appeal is taken.

II. Standard of Review

As a general rule, the sentence imposed by a trial court is not subject to appellate review. However, in cases as the one before us in which it is alleged that a sentencing court has imposed a penalty beyond the statutory limits or for impermissible reasons, appellate review is warranted. Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Once an appropriate basis for review is established, this Court applies a three-prong standard of review to issues involving motions made pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure: "We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review." Syl. Pt. 1, in part, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

III. Discussion

[1]Rule 35 (a) of the Rules of Criminal Procedure provides that: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence."

This appeal involves a challenge to the penalty prescribed by the lower court for the felony offense of leaving the scene of an accident resulting in the death of a person for which a person upon conviction "may be confined in a correctional facility for not more than three years." W.Va. Code § 17C-4-1 (1999) (Repl. Vol. 2000).[2] Although Appellant's argument centers on violation of his rights under the state constitution because the sentencing court refused to credit him with the 119 days he served in jail, we would be remiss in carrying out our constitutional duty if we did not first examine the question fairly arising on the record of whether the underlying penalty was a correctly imposed alternative punishment in light of the pertinent statute governing probation conditions. W.Va. Constit. art. VIII, §4.[3]

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[2]The provisions of West Virginia Code § 17C-4-1 relevant to this case are:

> (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and shall remain at the scene of the accident until he or she has complied with the requirements of section three of this article: Provided, That the driver may leave the scene of the accident as may reasonably be necessary for the purpose of rendering assistance to an injured person as required by said section three. Every such stop shall be made without obstructing traffic more than is necessary.
>
> (b) Any person violating the provisions of subsection (a) of this section after being involved in an accident resulting in the death of any person is guilty of a felony and, upon conviction thereof, shall be punished by confinement in a correctional facility for not more than three years or fined not more than five thousand dollars, or both.

[3]Article 8, section 4 of the West Virginia Constitution addresses the scope of decisions of this Court and directs: "When a judgment or order of another court is reversed, (continued...)

The mandatory and discretionary conditions related to probation are set forth in West Virginia Code § 62-12-9 (2001) (Supp. 2001).[4] One of the allowable discretionary conditions of probation delineated in this statute is confinement in jail during the term of probation for "a period not to exceed one third of the minimum sentence established by law or one third of the least possible period of confinement in an indeterminate sentence, but in no case may the period of confinement exceed six consecutive months." W.Va. Code § 62-12-9 (b)(4). We previously recognized in *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992), that this statutory provision reflects the Legislature's intent to restrict the discretion of the trial court with regard to the amount of time a probationer may be confined to jail as a condition of probation. *Id.* at 536, 425 S.E.2d at 212. In *White* we were faced with a situation where the relevant penalty statute did not contain a minimum sentence nor was an indeterminate sentence involved. However, the trial court had imposed and suspended a twelve-month sentence to a correctional facility before placing White on probation. We concluded in *White* that, in order to give effect to West Virginia Code § 62-12-9 (b) (4), the twelve-month sentence actually imposed by the court was an acceptable basis on which the statutorily prescribed one-third calculation could be made. *Id*. at 536, n. 3, 425 S.E.2d at 212, n. 3. We now have before us a somewhat different situation: like the circumstances in *White*,

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[3](...continued)
modified or affirmed by the [supreme] court, every point fairly arising upon the record shall be considered and decided . . . ."

[4]Although this statute was amended and reenacted after the sentencing order was entered in the instant case, the 2001 amendments to the statute did not substantively affect the issues presented herein.

we are dealing with a penalty statute that involves neither an indeterminate sentence nor a minimum sentence; however, unlike *White*, the sentencing judge exercised his option under West Virginia Code § 62-12-3 (1988) (Repl. Vol. 2000),[5] to delay imposing a sentence when he granted Appellant probation as an alternative punishment. Consequently, we are faced with the task of resolving the resulting ambiguity by determining whether the Legislature intended to curtail the lower court's discretion in imposing jail as a condition of probation in cases where a penalty statute does not involve a minimum sentence or an indeterminate sentence and no specific sentence is established by the terms of the sentencing order. We approach our task of ascertaining legislative intent of these ambiguous statutory provisions guided by the general process and principles of statutory construction embodied in syllabus point five of *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908):

> A statute should be read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to

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[5]West Virginia Code § 62-12-3 provides, in pertinent part:

> Whenever, upon the conviction of any person eligible for probation under the preceding section [§ 62-12-2], it shall appear to the satisfaction of the court that the character of the offender and the circumstances of the case indicate that he is not likely again to commit crime and that the public good does not require that he be fined or imprisoned, the court, upon application or of its own motion, may suspend the imposition or execution of sentence and release the offender on probation for such period and upon such conditions as are provided by this article.

> harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Id. at 660, 63 S.E.2d at 386.

Turning to the language of West Virginia Code §62-12-9 (b)(4), we initially note that because an indeterminate sentence is not involved the relevant language to the case before us is "a period not to exceed one third of the minimum sentence established by law . . . but in no case may the period of confinement exceed six consecutive months." *Id.*
In the case sub judice, the applicable penalty for an offense under West Virginia Code § 17C-4-1 is confinement "in a correctional facility for not more than three years." *Id.*

One interpretation of these provisions is that the minimum sentence in this case can be as little as one day, which would result in incarceration as a condition of probation not being available when offenses carrying such penalties are at issue. Such a reading could easily serve to dissuade circuit judges from considering probation as an alternative sentence and consequently may result in a more restrictive sentence being imposed which is at odds with another principle of statutory construction summarized in syllabus point one of *Myers v. Murensky*, 162 W.Va. 5, 245 S.E.2d 920 (1978). In *Myers* we held that "[a]mbiguous penal statutes must be strictly construed against the State and in favor of the defendant." *Id.* We have repeatedly applied this rule when presented with interpretation of probation statutes containing ambiguous provisions. *See State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305

S.E.2d 268 (1983); *State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981); *State ex rel. Hanley v. Hey*, 163 W.Va. 103, 255 S.E.2d 354 (1979).

We find that a more plausible reading of the provisions in question which applies the rule of strict construction in favor of a criminal defendant that the Legislature intended under the provisions of West Virginia Code § 62-12-9 (b)(4) to establish a six-month limit for the period of incarceration which may be imposed as a condition of probation. When a minimum or indeterminate sentence is involved, then the maximum term of incarceration as a condition of probation is one-third of the express minimum or indeterminate sentence or six months, whichever is less; for all other types of statutory penalties, the maximum term of incarceration as a condition of probation is six months. By so holding, we reach a balance between the Legislature's intent to limit incarceration as a condition of probation and to allow sentencing courts discretion in fashioning an appropriate sentence in each case, and we also resolve the statutory ambiguity in favor of the criminal defendant. Applying this holding to the instant case, we find that the period of incarceration imposed as a condition of probation by the sentencing court was appropriate.

We now turn to the question of whether the sentencing court was required to credit Appellant with the 119 days he spent in jail prior to conviction. The statute addressing credit for time served in jail prior to conviction is West Virginia Code § 61-11-24 (1923) (Repl. Vol. 2000), which provides:

> Whenever any person is convicted of an offense in a court of this State having jurisdiction thereof, and sentenced to confinement in jail or the penitentiary of this State, or by a justice of the peace [magistrate] having jurisdiction of the offense, such person may, in the discretion of the court or justice [magistrate], be given credit on any sentence imposed by such court or justice [magistrate] for the term of confinement spent in jail awaiting such trial and conviction.

Although West Virginia Code § 61-11-24 states that the grant of credit for time served prior to conviction is within the discretion of the sentencing court, this Court has held that "[t]he 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." Syl. Pt. 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978). As Appellant correctly notes, although our holding in *Martin* only referred to indeterminate sentences, we later explained that the rule announced in *Martin* applies equally to determinate sentences since the same concerns are raised:

> Constitutional protections are implicated because a person who is unable to make bail will be incarcerated before trial. If such person is not given credit for the jail time, a longer period of incarceration will occur than for the person who commits the same offense but is released on pretrial bail.

State ex rel. Roach v. Dietrick, 185 W.Va.23, 25 n. 5, 404 S.E.2d 415, 417 n. 5 (1991). The State does not question whether a different rule applies to determinate versus indeterminate sentences, but argues instead that a trial court is not mandated by the constitutional provisions involving the principle of equal protection and the prohibition against double jeopardy to grant

credit for time served unless the maximum allowable sentence is imposed. We fail to see how the imposition of this limitation would cure the inherent equal protection and double jeopardy problems which arise when two people receive a sentence for the same term of incarceration but one of those people actually serves a longer period of time in jail simply because he or she is financially unable to post the bail required to secure pretrial release.

We also are not persuaded by the State's argument that it was appropriate for the sentencing court not to credit Appellant with the time he served in jail prior to conviction because Appellant was not sentenced to a period of incarceration but instead was granted probation conditioned on serving six months in jail. We find it disingenuous to claim that incarceration in a jail is different when a person is sentenced to jail than when sentencing is deferred and a person is required to spend a period of time in jail as a condition of being placed probation. Precisely the same limits are placed on the liberty of an individual in either instance, requiring that the constitutional principles apply with equal force to any periods of confinement in correctional facilities.

In order to alleviate the apparent confusion regarding the circumstances in which a sentencing judge is required to credit a criminal defendant for the time spent in jail prior to conviction we hold that, in furtherance of our ruling in *Martin v. Leverette*, the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration in a

correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable. Accordingly, we find in the case before us that the sentencing judge erred as a matter of law in not granting Appellant credit for the 119 days he spent in jail before being convicted and we remand the case for entry of an order providing the same.[6]

We are aware that it can be argued our insistence to afford constitutional protections to any period of pre-conviction confinement in a correctional facility will discourage the use of probation as an alternative sentence. However, we cannot ignore or minimize the protections furnished by our constitution based on such speculation. We choose instead to trust that circuit court judges will continue to wisely employ their discretion in determining the most appropriate punishment in each criminal case with due consideration to the array of alternative sentencing options available to them. Certainly, if credit given for time served nullifies the option of confinement in a correctional facility as a condition of probation, a sentencing judge could still examine the propriety of using home confinement, with or without electronic monitoring, or any other sentencing alternative appropriate to the circumstances of the case before the court.

IV. Conclusion

[6]The sentencing court is reminded that under the circumstances of this case an increased penalty may not be imposed upon remand. *See State v. Eden*, 163 W.Va. 370, 256 S.E.2d 868 (1979).

For the foregoing reasons, the sentencing order of the Circuit Court of Kanawha County is reversed to the extent that it fails to provide credit for time served awaiting conviction, and the case is remanded for entry of an order consistent with this opinion.

Reversed, in part, and remanded.