No. 29839 -- State of West Virginia v. Robert F. McClain

Starcher, J., concurring:



In my judgment, the dissent is incorrect in asserting that the majority opinion is "fundamentally unsound."

The dissent delivers a dazzling dissertation on the difference between "suspending imposition of a sentence" and "suspending execution of a sentence that has been imposed." The dissent also eloquently elucidates the nature of probation as a "matter of grace" and a "privilege of conditional liberty," and adds an erudite explanation of "good time" as an act of legislative grace -- in the intricacies of which this Court should not meddle.

From all this, the dissent concludes that "the majority opinion had little understanding of its own rationale and has actually invaded the province of the legislature;" pronouncing that henceforth only those sufficiently wealthy to obtain pre-conviction bail will not be put on probation.

All of this discourse, however, ignores the simple fact that being locked up in jail is the same whether one is locked up because he or she cannot make bail, or as a condition of probation. In both cases, the "privilege of conditional liberty" is not being enjoyed by the person who is locked up.

Thus if there must be no difference between the rich and the poor in our system of justice, and if the period of time for which one on probation may be locked up

is strictly delimited by the Legislature, then the promise of equal treatment for rich and poor alike will only be fulfilled by giving credit for the time one is locked up in jail -- before, during or after conviction.

To reiterate: being locked up is being locked up. The niceties of "suspending imposition of sentence" versus suspending a sentence, of "grace" and "privilege of conditional liberty," etc. are beside the point. If the statutory limit of permissible incarceration for a person who is put on probation for a given crime is X days, then under the majority opinion a defendant who is locked up will not be locked up for more than that number of days. Under the reasoning of the dissent, it would depend on whether the defendant made bail. In this difference lies the fundamentally *sound* law that is announced by the majority opinion.

Personally and as a policy matter, I would favor giving circuit judges the flexibility to add "more jail time" to certain probationers -- because I believe that such flexibility will encourage judges to use probation more. But the statutory prescription is clear, and it is not "fundamentally unsound" to adhere to the clear legislative directive.

Accordingly, I join the majority opinion.