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

FILED
March 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
March 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, dissenting:

In this criminal case, the defendant asserts that the circuit court was obligated to credit him for time served in jail pending his conviction. The circuit court declined to give the defendant such credit reasoning that the court had suspended *imposition* of the sentence and placed the defendant on probation with a condition of six months in jail. The majority opinion has determined that, because a condition of probation included six months confinement, the circuit court was constitutionally obligated to credit the defendant for time served pending his conviction. The majority opinion is fundamentally unsound. Therefore, I dissent.

A. Suspending Imposition of a Sentence Versus Suspending a Sentence Imposed

The initial problem with the majority opinion is its failure to understand the procedural distinctions between suspension of the *imposition* of sentence, and suspension of a *sentence* imposed. Failure to understand these procedural differences is the reason for the majority's unsound conclusion in this case.

Suspension of imposition of sentence means that no sentence is imposed.

Instead, the defendant is merely placed on probation. That is, the sentence is deferred and may never be imposed should the defendant successfully complete probation. In such a situation, should a defendant's probation subsequently be revoked, a sentencing hearing on the underlying conviction would then be required, and *at that time the sentencing order will give a defendant credit for any time previously served in jail pending trial*. By contrast, the suspension of a sentence imposed refers to the actual sentence. The sentence is actually imposed, but then the execution of the sentence is suspended and the defendant is placed on probation. In the latter situation, should a defendant's probation be revoked, no further sentencing hearing is required because the sentence has been previously imposed.[1] Trial courts generally defer granting credit for time served in jail pending trial when the trial court suspends imposition of a sentence. On the other hand, trial courts typically award a defendant credit for time served in jail pending trial when the court imposes a sentence, but then suspends it and places the defendant on probation.

In the case currently before the Court, the trial court's order stated:

> It appearing to the satisfaction of the Court that the

[1]*See* 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, 409 (2d ed. 1993) ("Suspension of sentence means either delay in the imposition of sentence for a crime or the staying of execution of the sentence imposed."); *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997) ("W. Va. Code § 62-12-3 specifies the discretionary nature of the circuit court's authority to suspend either the imposition or execution of a sentence of incarceration and to place the defendant on a period of probation[.]").

> character of the defendant and 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 of its own motion doth suspend the imposition of sentence and doth release the defendant on probation.

The order makes abundantly clear that the trial court did not impose a sentence. Because of the disposition reached, the trial court, in the proper exercise of its discretion, did not grant the defendant credit for time served in jail prior to his conviction. This deferment does not mean that the defendant has been denied credit for preconviction jail time. It simply means that, if the defendant's probation is never revoked, he will need no credit for time served. To the contrary, should his probation be revoked, he will be given credit for preconviction jail time at the sentencing hearing following his probation revocation.

B. Preconviction Jail Time Should Not be Credited to a Probationary Period of Confinement

In the preceding section, I have attempted to illustrate why the trial court was not required to give the defendant credit for time served in jail prior to his conviction. Nevertheless, I would not be so concerned with the majority opinion's disposition of this case if the opinion had limited itself to concluding that a trial court's order that suspends imposition of a sentence and places a defendant on probation must also give the defendant credit toward any future sentence imposed for time served in jail prior to the conviction.[2] Unfortunately, the

[2]Obviously, such a requirement is academic. The trial court could do this during (continued...)

majority opinion is not so limited. The havoc created by the majority opinion lies in the fact that it also requires trial courts to grant preconviction jail time credit toward any probationary sentence that carries a period of incarceration. For example, in this case the defendant will have 119 days of preconviction jail time credited against his six months probationary jail time. Such a conclusion by the majority is wrong and has no statutory or constitutional support.

The record is clear. The trial court did not sentence the defendant to incarceration for the offense for which he plead. Imposition of the sentence was suspended. The defendant was placed on probation. Our cases have succinctly stated that "[p]robation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime." Syl. pt. 2, *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90 (1968). *See also State v. Ramsey*, 209 W. Va. 248, 257, 545 S.E.2d 853, 862 (2000) (per curiam) ("[P]robation is 'a matter of grace.'") (citation omitted); *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997) ("We have recognized that probation is a privilege of conditional liberty bestowed upon a criminal defendant through the grace of the circuit court."). As a condition of probation, the trial court required the defendant to be confined in jail for six months. The authority for such a disposition is granted by W. Va. Code § 62-12-9(b)(4) (1994) (Repl. Vol. 2000).[3]

---

[2](...continued)
sentencing subsequent to a probation revocation.

[3]W. Va. Code § 62-12-9(b)(4) (1994) (Repl. Vol. 2000) provides in relevant part:
(continued...)

Under the law of this State, a defendant who serves six months or less in a jail is not entitled to "good time credit" during the confinement. The Court addressed this very point in *State ex rel. Goff v. Merrifield*, wherein it was said:

> [I]f a person is ordered to serve a period of confinement in the county jail as a condition of probation, that person cannot become eligible for good time credit, under W. Va. Code § 7-8-11 [1986], on that period of confinement alone. . . . [F]or a person to be eligible for good time credit under W. Va. Code § 7-8-11 [1986], that person must be sentenced to the county jail for a period exceeding six months. Clearly, the legislature did not intend for a person incarcerated in the county jail for less than six months to receive good time credit.[4]

191 W. Va. 473, 478 n.7, 446 S.E.2d 695, 700 n.7 (1994) (footnote added). It is patently illogical to have a rule of law which prohibits granting "good time credit" to a defendant who is incarcerated for six months as a condition of probation, yet also have a purported constitutional rule of law requiring this same defendant be given credit on those six months

---

[3](...continued)

> (b) In addition the court may impose, subject to modification at any time, any other conditions which it may deem advisable, including, but not limited to, any of the following:
>
> (4) That he or she, in the discretion of the court, be required to serve a period of confinement in the county jail of the county in which he or she was convicted 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.

[4]W. Va. Code § 7-8-11 (1994) (Repl. Vol. 2000) reads as follows:

> Every prisoner sentenced to the county jail for a term exceeding six months who, in the judgment of the sheriff, shall faithfully comply with all rules and regulations of said county jail during his term of confinement shall be entitled to a deduction of five days from each month of his sentence.

for time served while awaiting conviction. Unfortunately, the majority opinion has created this patently illogical situation. Now, the trial courts must sadly live with the problem.[5]

In the final analysis, it is evident that the majority opinion had little understanding of its own rationale and has actually invaded the province of the legislature. It is for the legislature to determine and harmonize the issue of "good time credit" and credit for preconviction jail time in relation to confinement for six months as a condition of probation. Until the decision in this case, the legislature had harmonized this situation because neither "good time credit" nor credit for preconviction jail time were permitted under such circumstances.

C. Discrimination Against Indigent Defendants

The majority opinion suggests that refusing to allow credit for preconviction jail time to be credited toward probationary confinement would discriminate against indigent defendants. The majority so concludes because, theoretically, an indigent defendant could be confined longer than the statutory penalty. This indigent-based discrimination claim is wrong.

---

[5]The position taken in the Model Penal Code, § 301.1(3) is that the term of confinement imposed as a condition of probation should not be credited toward the service of a sentence upon revocation of probation. *See also Williams v. State*, 673 So. 2d 873 (Fla. Dist. Ct. App. 1996) (a defendant sentenced after revocation of probation is not entitled to credit against the sentence for jail time served as a condition of probation); *State v Peterson*, 828 P.2d 338 (Idaho Ct. App. 1992) (same); *People v Rollins*, 520 N.E.2d 1255 (Ill. App. Ct. 1988) (same); *People v Jaynes*, 178 N.W.2d 558 (Mich. Ct. App. 1970) (same); *State v Sutherlin*, 341 N.W.2d 303 (Minn. Ct. App 1983) (same).

To illustrate my point, I will examine the trial court's decision in this case in a different context. Assume that the defendant was able to make bail and did not accumulate any preconviction jail time. Let us further assume that the trial court suspended imposition of the defendant's sentence and placed the defendant on probation with a condition of confinement for six months. Moreover, let us assume this defendant served the six months confinement, but, after being released, violated probation. Subsequently, the trial court revoked probation and sentenced the defendant to the maximum allowable sentence of imprisonment which is three years. Under this hypothetical situation, the defendant does not have any preconviction jail time to use as credit toward the prison sentence. Therefore, the net result is that this non-indigent defendant would have spent three years in prison and six months in jail.[6]

---

[6]The appellate court in *State v. Dana*, No. 26007, ___ P.2d ___, 2001 WL 760973 (Idaho Ct. App. July 9, 2001), addressed the issue of a defendant being confined longer than the statutory period of imprisonment. In *Dana*, the defendant received two consecutive three year terms of imprisonment. The sentences were suspended and the defendant was placed on probation with 180 days in jail imposed as a condition thereof.
After the defendant served the jail time his probation was revoked and he was ordered to serve the original sentences. On appeal, the defendant sought to have credit for the 180 days he spent in jail counted against his term of imprisonment. He pursued this relief on the theory that he would serve more confinement time than allowed for the offenses of which he was convicted. The appellate court, citing prior precedent, rejected the contention and held:

> Under our Supreme Court's [precedent], a period of incarceration served as a condition of probation is simply not a part of the defendant's penitentiary sentence. Applying that rationale, Dana has not been sentenced to a term exceeding the statutory maximum.

Dana, ___ P.2d at ___, 201 WL 760973, at *2.

(continued...)

Had the defendant in this case not been granted preconviction jail time credit toward his probationary term of confinement, he would have been subjected to the same total period of confinement as the non-indigent defendant in the hypothetical situation described above. In other words, under the law as it existed prior to the majority opinion, both the indigent and non-indigent defendants would have been confined for a total of three years and six months.

---

[6](...continued)

Similarly, in *People v Jaynes*, 178 N.W.2d 558 (Mich. Ct. App. 1970), the defendant spent six months in jail as a condition of probation. The defendant's probation was later revoked and he was sentenced to two to five years imprisonment. On appeal, the defendant argued that he should be given credit for time he spent in jail as a condition of his probation, otherwise he faced spending a total of five and a half years confinements which exceeded the statutory penalty. The appellate court rejected the argument and held:

> The plain and unambiguous language used in the . . . controlling statutes clearly indicates a legislative intention to allow a court to impose the maximum penalty even though jail time has accumulated under a probationary order.

Jaynes, 178 N.W.2d at 559.

The soundness of the decisions in *Dana* and *Jaynes* is well-grounded in the fact that the legislatures of Idaho and Michigan created criminal statutes with imprisonment as a penalty, and also created statutes that allowed for confinement as a condition of probation. The Idaho and Michigan legislatures were aware that, in theory, a defendant could serve the maximum prison sentence in addition to any probationary jail time, but did not create an exception for this that would allow credit for the probationary jail time. This same situation exists in West Virginia. Our legislature has decided that it is appropriate for a defendant to serve a maximum prison sentence and probationary jail time. The majority opinion has exceeded its authority in this case and created an exception whereby an *indigent defendant* can escape serving a maximum prison sentence and probationary jail time.

The result of the majority opinion in this case, in essence, permits trial courts to use probationary confinement only against defendants who are able to post pretrial bail. The defendants who do not post pretrial bail will have preconviction jail time that will defeat imposition of probationary confinement. This antagonistic situation may force trial courts to sentence indigent defendants to jail rather than suspending their sentence. I submit that such a scheme as created by the majority opinion is wrong and contrary to what the legislature has deemed fair and appropriate.

For the above reasons, I dissent from the majority opinion. I am authorized to state that Justice Maynard joins me in this dissenting opinion.