No. 30692 State of West Virginia v. Ryan Farnsworth Scott

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

Davis, J., dissenting:

Mr. Scott argues that all of his presentence credit for time served should have been apportioned between the two consecutive sentences imposed by the circuit court.[1] He further asserts that the time served credit should be deducted from the minimum terms of incarceration. The majority has agreed with Mr. Scott and, by way of footnote 11 of the opinion, has suggested that the circuit court "allocate 365 days toward the first uttering count, and the remaining 202 days toward the transporting count." For the reasons outlined below, I dissent from the majority's disposition of this issue.

The disposition of this case was controlled by the prior decision of this Court in *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1986). In *Echard*, the defendant was sentenced in Ritchie County to a term of five to eighteen years. He was also sentenced in Wood County to a term of five to

[1]To clarify some relevant facts not fully articulated in the majority opinion, I note that Mr. Scott was never indicted on the uttering charge. Rather, Mr. Scott was arrested following the return of a four-count indictment that involved transporting a controlled substance onto the jail grounds. Two days after his arrest, Mr. Scott was released on a personal recognizance bond. At a subsequent hearing before the circuit court wherein a plea agreement was reached between Mr. Scott and the State, an information was filed charging Mr. Scott with the crime of uttering. Pursuant to the plea agreement, Mr. Scott waived his right to be indicted on the uttering charge. In addition, Mr. Scott agreed to plead guilty to the uttering charge and to one count of the indictment (the crime of transporting a controlled substance onto the grounds of a jail). The remaining counts of the indictment were dismissed.

twenty-three years. The Wood County sentence was ordered to run consecutively with the Ritchie County sentence. The defendant eventually filed a habeas corpus petition in circuit court challenging how good time credit[2] was awarded him while in prison. The defendant alleged that his minimum discharge date had been incorrectly calculated because good time credit was improperly being distributed between his consecutive sentences. The circuit court disagreed and dismissed the petition. The defendant appealed.

While the particular issue in *Echard* involved how good time credit was awarded, to resolve the issue of defendant's minimum discharge date, the *Echard* Court had to first determine the amount of credit earned by the defendant for time served prior to imposition of his two sentences.[3] After determining the amount of credit for time served by the defendant prior to imposition of his two sentences, as well as the total amount of possible good time, the Court established the following formula for determining how credit was to be distributed when consecutive sentences are imposed:

> The maximum terms of the consecutive sentences, determinate or indeterminate, must first be added together to determine the inmate's maximum discharge date. *It is from this maximum discharge date that all presentence* and good time *deductions must be made* in order to establish the inmate's minimum discharge date.[4]

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[2]Good time credit is received after sentence and confinement.

[3]It was determined that the defendant had accumulated 1,487 days credit while awaiting the final disposition of the Wood County prosecution. The Court found that the defendant had not accumulated any presentence credit for the Ritchie County case because that prosecution took place while he was being held on the Wood County charge.

[4]The Court applied this formula to determine the defendant's minimum discharge date.

Echard, 177 W. Va. at 143, 351 S.E.2d at 56-57 (emphasis added).[5]

Under the decision in *Echard*, in cases involving consecutive sentences, credit for time served prior to sentencing is to be applied to and deducted from the aggregate of the maximum terms of the sentences. The ruling in *Echard* is consistent with the general rule throughout the country. *See Endell v. Johnson*, 738 P.2d 769, 771 (Alaska Ct. App. 1987) ("[C]ourts of other jurisdictions . . . have uniformly held that, when consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the aggregate of all terms imposed."); *State v. Tauiliili*, 29 P.3d 914, 918 (Haw. 2001) ("[W]hen consecutive sentences are imposed, credit for presentence imprisonment is properly granted against only the aggregate of the consecutive sentence terms."); *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000) ("It is well-settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, [the law] entitles him to receive credit time applied against each separate term. However, where he receives consecutive terms he is only allowed credit time against the total or aggregate of the terms."); *State v. Anderson*, 520 N.W.2d 184, 187 (Minn. Ct. App. 1994) ("When applying credit to consecutive sentences, however, credit is applied only to the first sentence, since to do otherwise would constitute 'double credit' and defeat the purpose of consecutive sentencing."); Syl. pt. 2, *State v.*

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[5]This formulation was based upon the statute governing good time credit. *See* W. Va. Code § 28-5-27(e) ("An inmate under two or more consecutive sentences shall be allowed good time as if the several sentences, when the maximum terms thereof are added together, were all one sentence."). Since no statute actually addressed how to distribute credit for time served prior to sentencing, the Court in *Echard* applied the formulation used in the good time credit statute.

Sanchez, 520 N.W.2d 33 (Neb. Ct. App. 1994) ("Credit for presentence incarceration is properly granted only against the aggregate of all terms imposed.").[6]

Unfortunately, the majority opinion has attempted to overrule *Echard* without acknowledging that fact. The majority opinion, at first blush, appears to apply only to defendants who are initially placed at a youthful offender center. A closer look reveals that the opinion is not limited to that situation. This is true because, under Syllabus point 6 of the majority opinion, a defendant placed at such a center must be awarded time served "as if the defendant had not been committed to a young adult offender center." In other words, such a defendant must be granted time served in the same manner as any other defendant with presentence time served. However, the syllabus point fails to explain exactly how credit for time served should be awarded. This is where the Court's prior decision in *Echard* should have been applied. Instead, however, the majority opinion chose to elaborate on the application of its syllabus point in footnote 11.[7] This was improper for two reasons. First, footnote 11 does not follow the rule announced in *Echard*, and is, therefore, simply

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[6]*See generally, United States ex rel. Derengowski v. United States Attorney General*, 457 F.2d 812 (8th Cir.1972); *State v. McClure*, 938 P.2d 104 (Ariz. Ct. App. 1997); *State v. Hoch*, 630 P.2d 143 (Idaho 1981); *Cox v. State*, 522 P.2d 173 (Kan. 1974); *Commonwealth v. Carter*, 411 N.E.2d 184 (Mass. App. Ct. 1980); *State v. Decker*, 503 A.2d 796 (N.H. 1985); *State v. Aaron*, 703 P.2d 915 (N.M. Ct. App.1985); *People ex rel. Bridges v. Malcolm*, 407 N.Y.S.2d 628 (1978); *Wilson v. State*, 264 N.W.2d 234 (Wis. 1978).

[7]Footnote 11 directs that a circuit court imposing consecutive sentences on any defendant must apportion credit for time served among the sentences imposed. In addition, under footnote 11, such apportionment must be made to the minimum term of each sentence that is imposed.

wrong. Second, by providing instruction to the bar that is contrary to the existing law in this state, the majority has attempted to create new law in a footnote. A footnote is not the proper place to announce new law. "'[N]ew points of law . . . will be articulated through syllabus points as required by our state constitution.' Syllabus Point 2, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001)." Syl. pt. 13, *State ex rel. Medical Assurance of West Virginia v. Recht*, No. 30840, ___ W. Va. ___, ___ S.E.2d ___ (April 30, 2003). Furthermore, we have explained "language in a footnote generally should be considered obiter dicta which, by definition, is language 'unnecessary to the decision in the case and therefore not precedential." *Id.*, slip op. at 25, ___ W. Va. at ___. ___ S.E.2d at ___ (quoting *Black's Law Dictionary* 1100 (7th ed. 1999)).

The least of the problems caused by the majority opinion will be appeals challenging the manner in which circuit courts apportion presentence time served. The greater problem will arise from defendants being released far too early from prison because of the imposition of credit for time served on the minimum terms of consecutive sentences. Because the majority opinion improperly attempts to create new law in a footnote, and because the legal principles explained in that footnote are contrary to the established law of this state and inconsistent with the rule followed by courts throughout the country, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.