

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-0049 (Fayette County 10-F-143)

**Michael A. Forren,
Defendant Below, Petitioner**

FILED

November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Michael A. Forren appeals his burglary conviction following his guilty plea. Petitioner asserts that the circuit court erred when it did not grant him credit for all periods of incarceration served following his arrest and when it did not grant him probation. Respondent State of West Virginia (“the State”) has filed a response brief.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

I. Facts

In January of 2010, in a separate criminal proceeding, petitioner pled guilty in the Raleigh County Circuit Court to one count of conspiracy to distribute a controlled substance with intent to deliver, one count of uttering, one count of felony shoplifting, and one count of obstructing an officer. The Raleigh County Circuit Court imposed an aggregate sentence upon petitioner for these offenses of not less than two nor more than fifteen years in prison. The Raleigh County Circuit Court suspended this sentence and committed petitioner to the custody of the West Virginia Commissioner of Corrections for assignment to the Anthony Correctional Center (“Anthony Center”) for youthful offenders .

While out on bond and awaiting a bed at the Anthony Center on his Raleigh County convictions, petitioner conspired with three other individuals to burglarize a home in neighboring Fayette County, which gave rise to the case *sub judice*. Petitioner was incarcerated from the time of his arrest on January 22, 2010, for the Fayette County crimes,

until he reported to the Anthony Center on his Raleigh County convictions on April 14, 2010.

On September 14, 2010, petitioner was again indicted in Raleigh County on one count of conspiracy to commit a felony, one count of burglary, and one count of grand larceny, which charges were in addition to his earlier convictions in Raleigh County. On September 28, 2010, petitioner pled guilty to one count of grand larceny. The Raleigh County Circuit Court sentenced him to one to ten years in prison to run concurrently with his earlier sentence in Raleigh County. The circuit court then suspended the sentence and petitioner was returned to the Anthony Center, where he was already serving his earlier Raleigh County sentence.

In relation to the Fayette County charges, on October 22, 2010, petitioner pled guilty to the felony offense of burglary in violation of West Virginia Code §61-3-11(a) as set forth in Count Two of the Fayette County indictment in return for the dismissal of Count One (conspiracy to commit a felony in violation of W.Va. Code §61-10-31) and Count Three (grand larceny in violation of W.Va. Code §61-3-13(a)). A sentencing hearing was held on November 29, 2010, during which the State recommended that petitioner's sentence be served concurrently with his Raleigh County sentences. Petitioner asked the Fayette County Circuit Court to adopt the State's sentencing recommendation and to grant him probation with the successful completion of his program at the Anthony Center being a condition of that probation. The circuit court denied probation and sentenced petitioner to one to fifteen years in prison to commence upon the completion of his time at the Anthony Center with eighty-three days credit for time served.

On December 23, 2010, petitioner filed a motion to reconsider his sentence in the Fayette County Circuit Court. On January 4, 2011, the circuit court denied the motion.

II. Discussion

Petitioner asserts that the Fayette County Circuit Court committed error when it did not grant him credit for his incarceration beginning with his arrest in Fayette County on January 22, 2010, through his sentencing in Fayette County on November 29, 2010. The circuit court gave petitioner eighty-three days of jail credit, which represented the number of days between his Fayette County arrest and when he entered the Anthony Center on April 14, 2010, on his Raleigh County convictions.

Petitioner asserts that time spent in confinement, whether pre-trial or post-trial, is to be credited on a defendant's sentence, and that he has been continually incarcerated since his January 22, 2010, arrest on the Fayette County charges. Petitioner cites *State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010), for the proposition that served credit is to be applied to the aggregate minimum terms of all consecutive sentences combined. Petitioner argues that

his credit for time served since his arrest on January 22, 2010, should be applied to the sentence actually imposed, which was the Fayette County sentence.¹

The State responds that petitioner is not entitled to credit on his Fayette County sentence for time spent serving his Raleigh County sentences. The State asserts that because there was no issue of credit for time served in *Eilola*, it is not dispositive here.

The State also asserts that petitioner raises this issue for the first time on appeal and, therefore, it should be deemed waived. *See State v. LaRock*, 196 W.Va. 294, 315-16, 470 S.E.2d 613, 634-35 (1996) (“The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.”)(citing *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996)). Although petitioner’s counsel wrote a letter to the probation officer requesting that the pre-sentence report reflect that petitioner was arrested on January 22, 2010, did not post bond, served a sixty-day Community Corrections sentence, and entered the Anthony Center on April 14, 2010,² the State asserts that petitioner’s counsel did not argue before the circuit court that petitioner was entitled to credit for time served from the time of his arrest on the Fayette County charges to the time of his sentencing in Fayette County.

Even if the issue is not waived, the State argues that under West Virginia Code §61-11-21, sentences imposed for two or more offenses are presumed to run consecutively. Here, the Fayette County Circuit Court stated that petitioner’s Fayette County sentence would run consecutively to his Raleigh County sentences. The State asserts that the Fayette County Circuit Court’s decision to credit petitioner with eighty-three days was correct.

Next, petitioner asserts that the Fayette County Circuit Court erred when it did not grant him probation considering that he was making satisfactory progress at the Anthony Center and that his offenses were non-violent in nature. Petitioner concedes that sentencing is in sole discretion of the circuit court and although the sentence imposed by the Fayette

¹ Petitioner adds that if he is returned from the Anthony Center as unfit, or if his Raleigh County probation is revoked, his aggregate sentence from both counties would be three to thirty years and his “argument may be for naught.”

²In a letter written by petitioner’s counsel to the Fayette County Probation Department dated November 24, 2010, he advised, *inter alia*, that he had met with petitioner regarding the pre-sentence report and that they had the following adjustment: “The report is silent on jail credit. Mr. Forren was arrested on January 22, 2010[,] and has not posted bond. In that time period he completed a 60[-]day Community Corrections sentence and beginning April 14, 2010[,] he was in Anthony Center.”

County Circuit Court is within statutory limits, he urges this Court to create a narrow exception under the facts of his case and apply principles of comity and proportionality. Petitioner asserts that the State has devoted significant resources to his education and rehabilitation at the Anthony Center, which might be lost if he is subjected to the incarceration imposed by the Fayette County Circuit Court.

The State responds that the Fayette County Circuit Court's sentencing decision was within the bounds of its discretion and that one sentencing court in West Virginia has no duty of comity to another sentencing court. The State asserts that the circuit court acted within the bounds of its discretion in refusing to grant probation to petitioner, a repeat offender.

III. Conclusion

"The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). The sentence imposed by the Fayette County Circuit Court was within statutory limits and was based, *inter alia*, upon petitioner's prior felony convictions and the fact that he committed the Fayette County crime while out on bond on his Raleigh County convictions. Upon a review of the appendix record and the parties' arguments, we find that while it appears that the credit for time served issue might have been waived due to petitioner's failure to adequately raise this specific issue below, we also conclude that under the facts and circumstances of this case, the Fayette County Circuit Court did not abuse its discretion in sentencing. For these reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh