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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0546

**Jamie Lynn Metheny,
Defendant Below, Petitioner,**

vs.

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



**Appeal from the Circuit Court of Harrison County
Honorable James A. Matish, Judge
Criminal Action No. 15-F-128**

PETITIONER'S BRIEF

Ryan C. Shreve (W.Va. Bar No. 13046)
Shreve Law Firm
Post Office Box 1645
Morgantown, West Virginia 26507
Telephone: (304) 276-1075
Facsimile: (304) 405-4134
r.shreve@shrevelawfirm.com
Counsel for Petitioner

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ASSIGNMENTS OF ERROR

1) The circuit court erred by extending the Petitioner's probationary period beyond five (5) years, and in doing so, imposing a harsher sentence in violation of *ex post facto* principles as articulated in Article III, Section 4 of the West Virginia Constitution.

STATEMENT OF THE CASE

This matter on appeal originates from the Circuit Court of Harrison County, West Virginia, in which an indictment alleging seventeen (17) counts of "Fraudulent Use of an Access Device" was returned against the Petitioner (Defendant Below) by the May 2015 term of the Harrison County Grand Jury. *See* JA at 5–13. Ultimately, the Petitioner plead guilty to a single count, count one, with the remaining counts dismissed per plea agreement, and the Petitioner was sentenced to a definite term of two (2) years, which the circuit court then suspended the sentence for a period of supervised probation for five (5) years from August 11, 2015. *See* JA at 14–16, 18–24. As such, the Petitioner's probation would expire, approximately, on August 11, 2020.

Following the imposition of probation, later in 2015 and in 2019, the Petitioner was found to be in violation of the terms and conditions of her probation but was returned to probation by the circuit court on two separate occasions. *See* JA at 68–72, 73–77. Subsequently, in early 2020 the Petitioner was found in violation for a third time by the circuit court. *See* JA at 84–88. However, on this occasion, while returning the Petitioner to probation supervision, the circuit court extended the Petitioner's period of probation for an additional year from August 11, 2015, for a total period of six (6) years. *See* JA at 86–87. Finally, the Petitioner was found in violation for a fourth time by the circuit court. *See* JA at 114–16. The circuit court again extended the Petitioner's period of probation, ruling that the circuit court was free to apply the updated version of West Virginia Code § 62-12-11 which allows for a period of probation to last up to seven (7) years—despite the fact that Petitioner was sentenced prior to the amendment of the code section. *See* JA at 116, 58–64.

Accordingly, the Petitioner now appeals seeking a reversal of the circuit court's extension of her probationary period, with remand to the circuit court with instructions to discharge the Petitioner from probation.

SUMMARY OF THE ARGUMENT

The circuit court below committed reversible error by extending the Petitioner's probationary period beyond five (5) years. The Petitioner was originally sentenced to five (5) years of probation pursuant to the version of West Virginia Code § 62-12-11 in effect at the time of her sentence (August 11, 2015), which allowed for a maximum period of five (5) years. By extending the Petitioner's period of probation beyond five years, the circuit court violated the prohibition against *ex post facto* sentences contained within Article III, Section 4 of the West Virginia Constitution.

This Court has held that a law “which *increases the punishment, lengthens the sentence or operates to the detriment of the accused*, cannot be applied to [a defendant].” Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980) (emphasis added). This Court also recently recognized that probation, in and of itself, is a punitive part of a sentencing structure and therefore cannot be considered as a separate remedy or condition from the sentence, for an analysis under *State v. Eden*¹. As such, the combination of these two principles must invariably result in the prohibition in extending a sentence of probation in an *ex post facto* manner. Accordingly, this Court should reverse the circuit court's extension of the Petitioner's probationary period, with remand to the circuit court with instructions to discharge the Petitioner from probation.

¹ See *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979) (holding that a sentencing court cannot impose a harsher sentence on a defendant for the same crime or crimes following an appeal or successful collateral attack).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3), Petitioner asserts that oral argument is necessary given that the dispositive issues have not been authoritatively decided and that, pursuant to West Virginia Rule of Appellate Procedure 18(a)(4), the decisional process would be significantly aided by oral argument.

Further, Petitioner asserts that the matter should be set for oral argument under West Virginia Rule of Appellate Procedure 20(a), as this case involves: (1) an issue of first impression, (2) an issue of fundamental public importance, and (3) a constitutional question regarding the validity of a court ruling. Alternatively, Petitioner asserts that the matter should be set for oral argument under West Virginia Rule of Appellate Procedure 19(a), as this case involves: (1) an assignment of error in application of settled law and (2) a narrow issue of law.

ARGUMENT

A. The Circuit Court Erred by Extending the Petitioner’s Sentence of Probation Beyond Five Years, Which Constituted a Reversible Abuse of Discretion.

The circuit court below committed reversible error by violating *ex post facto* principles in ruling it had the authority to extend the Petitioner’s sentence to a probationary period beyond five (5) years. This Court has held that sentencing decisions by circuit courts are reviewed “under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” *See State v. Deel*, 237 W.Va. 600, 788 S.E.2d 741, 746 (2016) (citing Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997) (*accord* Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011))). In this instance, the circuit court’s ruling violated constitutional commands, overriding the deference ordinarily allotted to the circuit court below.

i. Probation is a punitive part of a sentence, and therefore prohibited to be increased or altered in an ex post facto manner.

“Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which *increases the punishment, lengthens the sentence*

or operates to the detriment of the accused, cannot be applied to [a defendant].” Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980) (emphasis added). Later, this Court unambiguously reinforced the exacting prohibition against *ex post facto* punishment, and reiterated that:

It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

State v. Deel, 237 W.Va. 600, 788 S.E.2d at 746–47 (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)).

This Court has extensively examined misapplications of the prohibition against *ex post facto* punishments in *State v. Deel*. See *State v. Deel*, 237 W.Va. 600, 788 S.E.2d 741 (2016). In *Deel* the circuit court “corrected” its prior sentencing of a defendant when it realized the ten (10) year period did not comport with West Virginia Code § 62-12-11. *Deel*, 237 W.Va. 600, 788 S.E.2d at 745. The circuit court then modified the sentence to constitute five (5) years of probation, followed by twenty (20) years of extended supervised release. *Id.* This Court ultimately found the circuit court’s sentence untenable as, despite the arguments (and apparent agreement) to the contrary, supervised release is *not* part of a “civil remedy,” and is indeed punitive. *Id.* at 746–47. Accordingly, the utilization of supervised release was part and parcel with the underlying sentence as a whole. *Id.* Ultimately, this Court clarified and reversed a line of memorandum cases which incorrectly analyzed the *ex post facto* principles as articulated in *Deel*. *Id.* at 748–49.

Like the case in *Deel*, this Court recently addressed the relationship between probation and incarceration in terms of punishment and sentencing. See *State v. Varlas*, ____ W.Va. ____, ____ S.E.2d ____ (2020) (No. 19-0005; June 11, 2020). This Court overruled its memorandum decision in *State v. Workman* and held that a grant of probation by the circuit court is a part of the sentence,

and therefore part of the penalty prescribed by law. *Id.* at pg. 16–18, *see also State v. Workman*, No. 13-0133 (November 26, 2013) (memorandum decision). *Workman*, just as the memorandum decisions reversed in *Deel*, described probation as a distinct from the underlying sentence, and is a grace of the State—not a punitive addition. *Id.* at pg. 20. While *Varlas* was decided in the context of an *Eden*² challenge, the holding nonetheless correctly concludes that probation is part of a sentence, and not a parallel shadow separate from the sentence. *Id.* at 22–23. Therefore, this Court “prohibits a circuit court from imposing a longer term of probation or withholding probation entirely” as probation is a punitive part of the sentenced imposed. Syl. Pt. 4, *State v. Varlas*, ____ W.Va. ____, ____ S.E.2d ____ (2020) (No. 19-0005; June 11, 2020).

Therefore, by utilizing the holding and logic of *Varlas* in combination with the longstanding and universal holding articulated in Syllabus Point 1 of *Adkins* and other “decisions of this Court so well known that their citation may be dispensed with,”³ extending a period of probation of a defendant whom was sentenced prior to an amended version of West Virginia Code § 62-12-11 allowing for a longer period of probation violates the prohibition against *ex post facto* punishment as articulated in Article III, Section 4 of the West Virginia Constitution. To not adopt this logical and consistent combination of sound holdings would be violative of the prime holding in *Adkins* regarding *ex post facto* applications of law, and would allow a change in law which “increases the punishment, lengthens the sentence or operates to the detriment of the accused” to be applied to a criminal defendant. Syl. Pt. 1, *Adkins* 164 W.Va. 292, 262 S.E.2d 885.

² *See supra* note 1.

³ *State v. Deel*, 237 W.Va. 600, 788 S.E.2d at 746–47 (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)).

ii. Applying Varlas and Adkins, the extension of the Petitioner's probation beyond five years is prohibited by the prohibition against ex post facto punishment.

Turning to the case *sub judice*, at the time of the Petitioner's crime, her guilty plea, and her sentencing, West Virginia Code § 62-12-11 provided, in pertinent part, that:

The period of probation together with any extension thereof shall not exceed *five years*. Upon the termination of the probation period, the probation officer shall report to the court the conduct of the probationer during the period of his or her probation, and the court may thereupon discharge the probationer or extend the probation period. . .

See W. Va. Code § 62-12-11 (2015).

It was during the 2017 session of the West Virginia Legislature that West Virginia Code § 62-12-11 was amended to change the maximum time frame for probation from five years to seven years. *See* W. Va. Code § 62-12-11 (2017); SB 41 (West Virginia Acts (2017)). This amendment became effective on June 29, 2017, ninety days from its passage on March 31, 2017. SB 41 (West Virginia Acts (2017)).

Petitioner's third and fourth revocation proceedings occurred after this amendment became effective. *See* JA at 84–87, 114–16. As such, in crafting a sentence/remedy after the circuit court found violations of probation had occurred, the circuit court reasoned that due to the change in law, it now had the power to increase the Petitioner's probationary term to seven years. JA at 58–59. The circuit court also compared this to the imposition of supervised release (perhaps an allusion to the memorandum decisions decided before *Deel*). JA at 59 (Transcript at 13).

However, the circuit court's ruling violates the principles of *Adkins* coupled with the holding in *Varlas*. The extension of the Petitioner's probation did indeed have the effect of (1) "increasing her punishment," (2) "lengthening her sentence" and (3) "operating to her detriment"—all key facets of the holding in *Adkins*. Therefore, this Court should reverse the orders of the circuit court extending the Petitioner's probationary period beyond five years and remand

the matter to the court below with instructions to discharge the Petitioner from probation supervision.

CONCLUSION

Wherefore, for the reasons set forth above, the Petitioner, Jamie Lynn Metheny, prays that this Honorable Court enter an Order reversing the orders of the circuit court below, with instructions to proceed as ordered by this Court.

Respectfully Submitted,
By Counsel,



Ryan C. Shreve (W.Va. Bar No. 13046)
Shreve Law Firm
Post Office Box 1645
Morgantown, West Virginia 26507
Telephone: (304) 276-1075
Facsimile: (304) 405-4134
r.shreve@shrevelawfirm.com
Counsel for Petitioner

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing "Petitioner's Brief" to be served on November 6, 2020 via U.S. Mail to the West Virginia Attorney General's Office, Appellate Division, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301.


Ryan C. Shreve (W.Va. Bar No. 13046)
Shreve Law Firm
Post Office Box 1645
Morgantown, West Virginia 26507
Telephone: (304) 276-1075
Facsimile: (304) 405-4134
r.shreve@shrevelawfirm.com
Counsel for Petitioner