IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0546

STATE OF WEST VIRGINIA,

Respondent,

v.

JAMIE LYNN METHENY,

Petitioner.

RESPONDENT'S BRIEF

Appeal from a July 10, 2020, Order
Circuit Court of Harrison County
Case No. 15-F-128

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ASSIGNMENTS OF ERROR

Petitioner, by counsel, contends that the circuit court erred by extending her probationary period beyond five years. (*See* Pet'r's Br. at 1).

STATEMENT OF THE CASE

On June 17, 2015, Jamie Metheny agreed to plead guilty to the felony offense of Fraudulent Use of An Access Device, as criminalized in West Virginia Code § 61-3C-13(c). (A.R. at 14). In exchange, the State agreed to seek dismissal of a handful of other felony charges and recommend the circuit court impose upon Petitioner a five-year period of probation in lieu of incarceration. (*See* A.R. at 14, 16).

The circuit court accepted the plea agreement and, on August 20, 2015, sentenced Petitioner to a determinate term of two years of incarceration. (A.R. at 19, 24). The court, in an act of leniency, suspended that sentence and placed Petitioner on supervised probation for a period of five years with an effective starting date of August 11, 2015. (A.R. at 20). Over the course of the next five years, Petitioner violated the terms of her probation several times; most recently, she was found in violation by order entered July 10, 2020. (A.R. at 116). Indeed, Petitioner admitted to the violation. (A.R. at 115). Rather than revoke her probation and require her to serve the remainder of her suspended prison sentence, the circuit court, again in an act of leniency, decided to extend Petitioner's probation for one additional year—from August 2020 to August 2021. (A.R. at 116).

Petitioner objected to this extension on the basis that it violated the probation statute in effect at the time her sentence was imposed, West Virginia Code § 62-12-11, which provided for a five-year maximum term of probation. The court heard arguments on this matter and ruled that it had the authority to order Petitioner to serve a total period of probation in excess of five years

under the amended version of West Virginia Code § 62-12-11, which became effective on June 28, 2017. (A.R. at 59-63). The written order provides:

> [Petitioner]'s period of supervised probation [shall] be extended to August 20, 2021, upon the terms and conditions of the Court's previous Order entered on August 20, 2015. Defendant counsel's objection to probation beyond five (5) years is noted for the record.

(A.R. at 116).

This appeal followed.

SUMMARY OF THE ARGUMENT

The circuit court lacked the authority to extend Petitioner's probation beyond five years because, at the time of Petitioner's sentencing on August 20, 2015, West Virginia Code § 62-12-11 provided that an individual's period of probation, "together with any extension thereof[,] shall not exceed five years." *Id.* While the Legislature amended that statute on June 28, 2017, to expand that time period to seven years, the statute in effect when Petitioner's probation was imposed clearly and unambiguously provided for a five year cap. Even if the statutory amendment *could* have been retroactively applied, there is nothing in the added language indicating that the Legislature *intended* for it to be retroactively applied. Syl. Pt. 1, *Myers v. Morgantown Health Care Corp.*, 189 W. Va. 647, 434 S.E.2d 7 (1993) ("A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute."). Consequently, it was improper for the current version to be retroactively applied to Petitioner's probationary term as the circuit court did below. (A.R. at 116) ("Jamie Lyn Metheny's[ ] period of supervised probation [shall] be extended to August 20, 2021, upon the terms and conditions of the Court's previous Order entered on August 20, 2015.").

West Virginia law is clear that a circuit court "exceeds its authority by imposing a sentence of probation beyond the statutory limitation, rendering such sentence void." Syl. Pt. 3, *State v.*

Cookman, 240 W. Va. 527, 813 S.E.2d 769 (2018) (interpreting and applying W. Va. Code § 62-12-11); *see also id.* at n.7 (noting that an improper extension of probation constitutes an illegal sentence). The statute in effect at the time sentence was imposed on August 20, 2015, imbued the circuit courts of this State with the power to impose a period of probation "not to exceed" five years, including "any extension thereof." W. Va. Code § 62-12-11 (effective through June 28, 2017). While the statute was amended in 2017 to permit the imposition of up to seven years of probation in lieu of a period of incarceration, that change did not occur until mid-2017, more than two years after Petitioner's sentence was imposed.

Given this confession, there is no reason for this Court to address Petitioner's *ex post facto* challenge. *See In re Hey*, 192 W. Va. 221, 226, 452 S.E.2d 24, 29 (1994) ("If a case can be decided by the application of general law, a court should forego deciding it on constitutional grounds."). *Cf. State ex rel. Hinkle v. Skeen*, 138 W. Va. 116, 124, 75 S.E.2d 223, 227 (1953) ("The construction of a constitutional provision will be avoided where some other reasonable interpretation thereof may be found.").

STATEMENT REGARDING ORAL ARGUMENT

Given the confession of error discussed herein, the State does not believe oral argument is necessary. Because this matter involves the application of a narrow issue of settled law, a memorandum decision under Rule 21(d) is appropriate.

STANDARD OF REVIEW

"[T]he Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court." *Manchin v. Browning*, 170 W. Va. 779, 789, 296 S.E.2d 909, 919 (1982), *overruled on other grounds in State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625 (2013). Nonetheless, "[t]his Court is not obligated to accept the

State's confession of error in a criminal case. [It] will do so when, after a proper analysis, [it] believe[s] error occurred." Syl. Pt. 2, *State v. Nett*, 207 W. Va. 410, 533 S.E.2d 43 (2000) (quoting Syl. Pt. 8, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)).

"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); *see also State v. Duke*, 200 W. Va. 356, 362, 489 S.E.2d 738, 744 (1997) (applying Syllabus Point 4 in an appeal challenging a circuit court's ruling in a probation revocation proceeding).

ARGUMENT

A. The circuit court lacked authority to extend Petitioner's probation beyond five years and, under Syllabus Point 3 of *State v. Cookman*, the extension is void.

This case boils down to a simple, binary issue: If the pre-June 28, 2017 version of West Virginia Code § 62-12-11 applies to Petitioner's most recent extension of probation, then that extension is unlawful, and the circuit court exceeded its authority. If, on the other hand, the post-June 28, 2017 version applies, then the circuit court *did* have the authority to extend Petitioner's probation and the extension is proper. Petitioner contends that the version in effect at the time she was placed on probation—the pre-2017 version—applies. For the following reasons, the State concurs.[1]

West Virginia law is clear that "[p]ursuant to West Virginia Code § 62-12-11 (2014), a sentencing court exceeds its authority by imposing a sentence of probation beyond the statutory limitation, rendering such sentence void." Syl. Pt. 3, in part, *Cookman*, 240 W. Va. 527, 813

[1] As discussed in the following section, the State disagrees with Petitioner's argument that the extension violates *ex post facto*. Fortunately, that issue need not be addressed to resolve this appeal and award Petitioner the specific relief she seeks.

S.E.2d 769; *see also id.* at n.7 (noting that an improper extension of probation constitutes an illegal sentence).

A circuit court's authority to place an individual on probation is derived from West Virginia Code § 62-12-11. And, where a circuit court imposes a period of probation upon a defendant beyond that permitted under West Virginia Code § 62-12-11, that probationary period is unlawful and "void." Syl. Pt. 3, in part, *Cookman*, 240 W. Va. 527, 813 S.E.2d 769. Before June 28, 2017, that statute provided that the maximum term of probation, including any extensions, could not exceed five years. W. Va. Code § 62-12-11 (2014). The statute was amended in 2017 and the length was extended to seven years. *Id.* (eff. June 28, 2017). The imposition of probation in lieu of incarceration is unquestionably part of a circuit court's sentencing decision. *See Cookman*, 240 W. Va. at 531-32, 813 S.E.2d at 773-74; *State v. Short*, 177 W. Va. 1, 2, 350 S.E.2d 1, 2 (1986) (noting that an order of restitution imposed as part of probation constitutes a "punishment," and is subject to *ex post facto* protection); *see generally State v. Deel*, 237 W. Va. 600, 609, 788 S.E.2d 741, 750 (2016). Indeed, the circuit court expressly stated as much in its underlying Order. (A.R. at 116). When it extended Petitioner's probation beyond five years, it ordered that all other terms and conditions originally imposed on August 20, 2015, would remain in effect. (*Id.*).

In this case, Petitioner was placed on probation on August 20, 2015 (with an effective start date of August 11, 2015). (A.R. at 16, 20). The circuit court initially imposed a two-year period of incarceration upon her, but then suspended that sentence and, in lieu of that sentence, ordered her to serve five years of probation. (A.R. at 20). No one can dispute that the statutory limit that existed when Petitioner was placed on probation was five years. W. Va. Code § 62-12-11 (eff. until June 28, 2017).

On July 10, 2020, just before Petitioner was set to terminate her five years of probation, the circuit court found Petitioner to be in violation of the terms of that probation and, in light of that violation, decided to extend her probationary term by one more year. (A.R. at 116). This ruling conflicts the text of the statute in effect at the time Petitioner was placed on probation, which permitted a maximum of five years, including all extensions. *See* W. Va. Code § 62-12-11 (eff. until June 28, 2017). While the statute was amended in 2017 to permit the imposition of up to seven years of probation in lieu of a period of incarceration, that change did not occur until mid-2017, more than two years after Petitioner's sentence was imposed and she was placed on probation. *See* W. Va. Code § 62-12-11 (current version). Following her violation, Petitioner was not placed on a "new" probationary period; she was still serving the term of probation imposed upon her under the terms of the statute in effect at the time of her sentencing in 2015. Because a circuit court "exceeds its authority by imposing a sentence of probation beyond the statutory limitation, rendering such sentence void," Syl. Pt. 3, in part, *Cookman*, 240 W. Va. 527, 813 S.E.2d 769, application of a version of the probationary statute that was not in effect when Petitioner was placed on probation is void.

This conclusion also finds support based upon cannons of statutory interpretation, the import of which creates a presumption that statutes do not apply retroactively unless such application is expressly written into the statute. Syl. Pt. 1, *Myers*, 189 W. Va. 647, 434 S.E.2d 7 ("A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute."). The amended version of § 62-12-11 contains no such language, nor is there any support in the wording of the statute implying that its new language was intended to be retroactively applied. Consequently, the pre-June 2017 version applies and the circuit court's

extension of Petitioner's probation was unlawful. Because the circuit court lacked the lawful authority to extend probation, its July 10, 2020 order is void. Syl. Pt. 3, *Cookman*, 240 W. Va. 527, 813 S.E.2d 769.

B. This Court should not reach Petitioner's *ex post facto* challenge.

The State agrees with Petitioner's position that the circuit court lacked authority to extend her probationary term beyond five years. The extension was unlawful under West Virginia Code § 62-12-11 (eff. until June 28, 2017) and *Cookman*. Notably, the Syllabus Point from *Cookman*—which unequivocally establishes that a sentencing court lacks authority to impose a sentence of probation beyond that prescribed by statute and that such a sentence is void as a matter of law—does not rest on *ex post facto* principles. Because this case may be resolved based upon statutory principles, there is no reason for this Court to address Petitioner's constitutionally-grounded claim (her *ex post* facto challenge). *In re Hey*, 192 W. Va. at 226, 452 S.E.2d at 29 ("If a case can be decided by the application of general law, a court should forego deciding it on constitutional grounds."). *Cf. State ex rel. Hinkle*, 138 W. Va. at 124, 75 S.E.2d at 227 ("The construction of a constitutional provision will be avoided where some other reasonable interpretation thereof may be found.").

C. In the alternative, the circuit court's ruling extending Petitioner's probation under the current version of West Virginia Code § 62-12-11 does not violate *ex post* facto principles.

This Court should not reach Petitioner's *ex post facto* challenge. Assuming purely for the sake of argument that this Court does reach that challenge, however, an extension of probation in this context does not violate *ex post facto* principles.

"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 him." Syl. Pt. 2, *Deel*, 237 W. Va. 600, 788 S.E.2d 741; Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W. Va. 292, 262 S.E.2d 885 (1980). Thus, statutes which increase a criminal sentence or criminalize conduct that was previously lawful may not apply retroactively. *See generally Deel*, 237 W. Va. at 606, 788 S.E.2d at 747 (observing that criminal, punitive penalties implicate *ex post facto* principles). Conversely, statutes which are regulatory in nature or those which do not lengthen a defendant's sentence, do not implicate *ex post facto* principles. For the following reasons, the amendment to West Virginia's probation statute, which became effective on June 28, 2017, falls within the latter group—not the former.

1. For the limited purpose of an *ex post facto* analysis, probation is an act of leniency; it is not a punitive part of a defendant's sentence.

It is well-established 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*, 52 W. Va. 500, 165 S.E.2d 90 (1968); *see Duke*, 200 W. Va. at 364, 489 S.E.2d at 746 (recognizing the same). Indeed, under West Virginia's probation statute, West Virginia Code § 62-12-3, the manner in which probation is awarded requires the suspension of the sentence itself:

> Whenever, upon the conviction of any person eligible for probation under the preceding section, it shall appear to the satisfaction of the court that the character of the offender and the 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, upon application or of its own motion, may ***suspend the imposition or execution of sentence*** and release the offender on probation for such period and upon such conditions as are provided by this article[.]

W. Va. Code § 62-12-3 (emphasis added). Consistent with this plain language, this Court has recognized that an award of probation is predicated upon the suspension of the underlying sentence. *See generally State v. Farrell*, No. 18-1130, 2020 WL 5240389, at *2 (W. Va. Supreme

Court, Sept. 3, 2020) (memorandum decision) ("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[.]" (internal quotation omitted) (quoting *Duke*, 200 W. Va. at 364, 489 S.E.2d at 746)); *Larry B. v. Ballard*, No. 16-0720, 2017 WL 3873248, at *1 (W. Va. Supreme Court, Sept. 5, 2017) (memorandum decision) ("[T]he circuit court suspended the sentences imposed for counts nine, seventeen, twenty-one, thirty-three, thirty-five, and thirty-six and ordered that petitioner be placed on probation for five years following the completion of his term of incarceration."); *Duke*, 200 W. Va. at 362, 489 S.E.2d at 744 (outlining the factors a court should consider when revoking probation and describing the scenario "[w]hen a circuit court contemplates revoking a defendant's probation and imposing a sentence or executing a suspended sentence . . . ."); *see also Duke*, 200 W. Va. at 363, 489 S.E.2d at 745 ("[B]ecause the sexual assault probation period had not yet expired when the defendant tested positive for marijuana use, the circuit court properly revoked his probation and reinstated his previously suspended sentence of one to five years for third-degree sexual assault.").

As this law confirms, Petitioner's placement on probation was the result of (1) the suspension of her criminal sentence and (2) a grant of leniency from the circuit court. Against this backdrop, it is clear that the extension of an individual's probation beyond the probationary term originally awarded does not implicate *ex post facto* principles. It is not punitive and, contrary to Petitioner's narrow assignment of error, does not result in a "harsher" sentence. For these reasons, the Court properly applied the current version of the statute given that this statute was in effect at the time Petitioner committed her violation and at the time the court decided to extend her probationary term. (A.R. at 114-16). That statute imbues the circuit courts of this State with the authority to extend an individual's period of probation to up to seven years. W. Va. Code § 62-

12-3 (eff. June 28, 2017). Petitioner's total probationary term is now six years—well below the statutory cap. For these reasons, Petitioner's *ex post facto* challenge fails.

2. The narrow *Varlas* opinion does not control the outcome here.

Petitioner's reliance on *Eden* and *Varlas* is misplaced. Petitioner contends that this Court held in *Varlas* that "a grant of probation by the circuit court is a part of the sentence, and therefore part of the penalty prescribed by law." (Pet'r's Br. at 4-5). Such a claim does not square with the *Varlas* opinion. In fact, this Court clearly explained in *Varlas* that probation shall be considered part of a criminal sentence "**[f]or the limited purpose of an *Eden* analysis**[.]" *State v. Varlas*, 844 S.E.2d 688, 694 (W. Va. 2020) (emphasis in original).

An "*Eden* analysis" involves a claim by a petitioner that he or she received a harsher sentence after successfully pursuing an appeal. *Varlas*, 844 S.E.2d at 691-92 (summarizing *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979)). To be sure, that analysis, while an important part of this Court's jurisprudence, has no application to this case as *Eden* and *Varlas* deal solely with an issue not present here: whether an individual who seeks and receives appellate relief may be constitutionally subjected to a harsher penalty upon remand. *See id.* The salient point for purposes of this appeal is that the language in *Varlas* could not be more clear: this Court expressly chose ***not*** to adopt an expansive view of probation. *Varlas*, 844 S.E.2d at 694 (majority opinion); *id.* at 699 (Armstead, C.J., dissenting, joined by Hutchison, J.).

CONCLUSION

This Court should grant Petitioner relief by vacating the lower court's July 10, 2020 order on the basis that the circuit court lacked authority to extend her probation under West Virginia Code § 62-12-11 (eff. until June 28, 2017) and *Cookman*. Petitioner should no longer be serving

probation. As a result of the foregoing conclusion, this Court should not reach Petitioner's *ex post facto* challenge.

Respectfully Submitted,

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Respondent,

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CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, January 7, 2021, and addressed as follows:

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