

FILED
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2010

McHugh, Justice, concurring:

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

I agree with the holding of the majority opinion and concur only to address an aspect of the application of credit for time served to multiple indeterminate consecutive sentences that is necessary to a comprehensive understanding of the issue. As the majority opinion states, for purposes of determining parole eligibility, it is appropriate to apply the credit for prior time served to the aggregated minimum term of the multiple indeterminate consecutive sentences. In calculating the entirety of the aggregate term to be served, however, the ultimate result should be emphasized. In this case, the Appellant was entitled to 495 days of prior time served. Thus, the effective sentencing date was determined to be March 29, 2006, which is 495 days prior to the actual sentencing date of August 8, 2007. By altering the sentencing date in such manner, the Court is effectively crediting the time served against both the minimum aggregate sentence and the maximum aggregate sentence to establish a new term of incarceration which accurately reflects the time period during which the individual has already been incarcerated. This method does not provide double credit for the prior time served; it simply adjusts the aggregate term to acknowledge the prior time served. The duration of the aggregate sentence remains the same.

This result is consistent with jurisdictions which arrive at the same outcome, through application of statute or otherwise, by crediting the prior incarceration time against both the minimum and maximum sentence. *See State v. Tauiliili*, 29 P.3d 914, 917 (Hawaii 2001) (“The statutory language read in the context of the entire statute requires that presentence credit be applied to both the minimum and maximum imprisonment terms. In computing the terms of imprisonment, the circuit court properly applied Tauiliili’s presentence credit by deducting 853 days from both the minimum and maximum terms of his sentence. In its brief, the prosecution concedes that, pursuant to HRS § 706-671, credit for time served must be applied against the minimum term, as well as the maximum term of imprisonment.”); *Edwards v. Travis*, 802 N.Y.S.2d 519, 520 (N.Y. A.D. 2005) (finding that “parole eligibility and maximum expiration dates were properly calculated by crediting the 694 days against both the minimum and maximum sentences”); *Abitbol v. State*, 178 P.3d 415 (Wyo. 2008); *Doolittle v. State*, 154 P.3d 350 (Wyo. 2007).

The purpose of this computation is to attempt to place an in-custody criminal defendant unable to afford bail in the same position as his counterpart who has the financial means to post bail. *Nissel v. Pearce*, 764 P.2d 224 (Or. 1988).

Statutes giving credit for presentence time served were designed to ensure equal treatment for indigent and non-indigent defendants. An example will illustrate this point. Suppose that codefendants *A* and *B* commit a felony together. While they are awaiting trial, *A*, who has access to money, bails himself out of jail. But *B*, who is indigent, is unable to post security and

spends 180 days in jail before conviction. Both receive a two year prison term. If *B* is not credited for the 180 days spent in presentence confinement, she will spend two years and 180 days in custody while *A* will spend only two years so confined.

764 P.2d at 225-26 (footnote omitted). Similarly, in *Deweese v. State*, 444 N.E.2d 332 (Ind. App.1983), the court explained that credit for presentence time served was premised upon double jeopardy and equal protection guarantees. “The end result is that a defendant, because of time spent in jail awaiting trial, will not serve more time than the statutory penalty for the offense, and will not serve more time than a defendant who has the good fortune to have bail money.” 444 N.E.2d at 334; *see also* Neb. Rev. St. § 83-1,106(1) (1988); Ohio Adm. Code 5120-2-04(G) (2008).

Although the majority opinion does not explicitly state that the prior time served is being credited against both the minimum and maximum aggregate terms in the present case, that is the ultimate effect of shifting the period of potential incarceration by establishing an effective sentencing date of 495 days prior to the actual sentencing date.