

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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FROM THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
19th Judicial Circuit

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

Vs.)

KIRSTEN NICOLE WETZEL
DEFENDANT BELOW, PETITIONER

PETITIONERS BRIEF

MORRIS C. DAVIS, Counsel for Petitioner
West Virginia State Bar Identification No. 13191

The Nestor Law Office
1062 Harrison Avenue
Elkins, WV 26241
Phone: (304) 636-1001
Fax: (304) 636-2937
info@304lawyer.com

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I. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED WHEN IT FOUND THAT ITS SENTENCE DID NOT PROHIBIT THE DEFENDANT FROM RECEIVING GOOD TIME. (P.A. 32; 8)

B. THE CIRCUIT COURT DID ERR WHEN IT FOUND THAT THE SENTENCE RENDERED AGAINST THE DEFENDANT WAS LEGAL BECAUSE THE LANGUAGE OF THE ORDER PROHIBITED THE DEFENDANT FROM RECEIVING STATUTORILY GUARANTEED GOOD TIME CREDIT. (P.A 27; 89-94)

C. THE CIRCUIT COURT DID ERR WHEN IT DENIED THE DEFENDANT'S MOTION UNDER RULE 35(a) OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEEDURE (P.A 27.)

II. STATEMENT OF THE CASE

This is a matter in which the Defendant has been denied good time jail credit for which she is legally entitled because of language contained in her amended jail commitment Order.

The Petitioner was named in a two count indictment alleging violations of W. Va Code §61-3-11 (Burglary) and W.Va. Code §17A-8-4 (unlawful taking of vehicle). (A. 1) The Petitioner pled guilty to the violation of W.Va. Code §17A-8-4 (unlawful taking of vehicle) and the count alleging Burglary was dismissed with prejudice. (A. 2). The Court accepted the plea; the Defendant tendered full restitution to the victim; and the Defendant waived her right to a pre-sentence investigation report and the Court then proceeded to sentence the Defendant "to the West Virginia State Regional Jail for six (6) months. The Court Ordered that the Defendant shall serve ten (10) days of actual incarceration and the remaining sentence shall be suspended and the Defendant placed on unsupervised probation for one year. The Defendant may serve the ten days in jail on the weekends, but the ten days shall be served within six months from the entry of this order." (PA. 6.)

The Defendant tendered full restitution in the amount of \$7,000 to the victim at the time of the hearing. Id. Thereafter, the Court entered a final jail commitment order that provided that the Defendant be committed to the custody of the of the Commissioner of Corrections for “Six (6) months in the WV State Regional Jail, suspended, Defendant must serve ten (10) days in actual incarceration within six (6) months, may serve jail time on weekends.” (P.A. 7.) After this Order was entered, with **no notice or formal hearing upon the record**, the Circuit Court amended the language of final jail commitment order to provide that the Defendant be committed to the commission of corrections for a period of “Six (6) months in the WV State Regional Jail, suspended, Defendant must serve a total of 240 hours in actual incarceration within six (6) months, may serve jail time in increments of less than 12 hours.”¹ (P.A. 8) The aforementioned amendment was made after a teleconference. (P.A. 9) At this teleconference, Counsel for the Defendant objected to the amendment of the Order because it was likely to result in the denial of the Defendant’s good time credit. (P. A. 9; 100.) When the Defendant served a portion of her sentence she did not receive good time credit for the time which she spent incarcerated. Id. In order to invoke her right to statutory good time credit filed a motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure to correct her sentence. (P.A. 9) It is this issue the Defendant seeks relief for by way of this appeal.

At the hearing for her Rule 35(a) Motion the Defendant called Major Brian Clowser, the Chief correctional officer at the Tygart Valley Regional Jail. (P.A. 85) Mr. Clowser had been directed by superintendent of the Tygart’s Valley Regional Jail to appear to the hearing in his stead in response to a Subpoena Duces Tecum requesting the appearance and production of

¹ Counsel for the Petitioner will submit that the commitment order of the Defendant was amended after a phone conference. Counsel was not aware that said hearing was not transcribed until he requested a transcript of said hearing and representation was made that one could not be produced because no record of said hearing was kept.

documents relating to the Defendant's credited incarceration time. (P.A. 86) Major Clowser appeared as the representative for the Division of Corrections and Rehabilitation and produced inmate recap reports, which denoted the time the Defendant came in and when she was released, as well as, the credit she received for that time. (P.A. 88; 36-43) .When asked if the Defendant was receiving good time credit Mr. Clowser answered as follows:

By Mr. Davis:

Q: and so, Sir, as I look these documents, I see that they even note that the Defendant is not being awarded any good time Credit.

A: Correct.

Counsel for the Defendant then proceeded to question Major Clowser as to the reason why the Defendant was not being awarded any good time Credit. In Response Mr. Clowser answered as follows:

Q: And so it's—it's the policy of the jail to generally give good time credit to misdemeanor detainees and felony detainees, is that correct?

A. Well it depends on the sentencing. We have to follow the Sentencing Order.

Q. Okay.

A. and Sentencing Order is what, I mean, we have to follow that, What—Whatever the Circuit Court or Magistrate Court—

Q. and so in this specific instance, were you following the sentencing Order when you did not give Ms. Wetzel her good time Credit?

A. Correct.

Q. and it was— it was the way which in the order that requires actual incarceration and that she serve 240 actual hours, is that correct?

A. Yes, in the Order is says to serve 240 actual hours

The Circuit Court thereafter denied the Rule 35(a) Motion of the Defendant on the basis that the Defendant was not constitutionally entitled to good time credit and that the award of good time credit is solely at the discretion of the Warden and the policies of the DOCR. (P.A. 31-32). That the “Court’s Sentence did not order/prohibit the Defendant to be denied good time.” (P.A. 32); and that the sentence formerly rendered by the Court was “Just and fair and the Court sees no error in that sentence that needs to be corrected or clarified. (P.A. 34). The trial Court’s denial of the Defendant’s Rule 35(a) motion and the failure to credit the Defendant good time credit is the subject of this petition.

SUMMARY OF ARGUMENT

The Circuit Court erred when it denied the Defendant’s rule 35(a) Motion because the Testimony of the representative of the West Virginia Division of Corrections and Rehabilitation did show that the Defendant was being denied her statutorily guaranteed good time Credit because of the language in the jail commitment order. (P.A. 32; 8; 89-94) This denial of good time credit rendered the sentence of the Defendant illegal. (P.A 27; 8; 6) Therefore, the Court did err when it denied the Defendants Motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure. (P.A 27.)

III. STANDARD OF REVIEW

The Standard of Review for denial of a Rule 35(a) motion has been previously set forth by this Court as follows:

In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review

the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review.

Syl. pt. 1, State v. Head, 198 W.Va. 298, 480 S.E.2d 507 (1996).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for argument under Rule 19 of the West Virginia Rules of Appellate procedure because the Circuit Court's refusal to correct an illegal sentence is in contravention of well settled law.

V. ARGUMENT

A. THE CIRCUIT COURT ERRED WHEN IT FOUND THAT ITS SENTENCE DID NOT PROHIBIT THE DEFENDANT FROM RECEIVING GOOD TIME.

The Court below made the finding that: "The Court's Sentence did not Order/prohibit the Defendant be denied good time; the Sentence, as is always done, did not address issues of good time." (P.A. 32) This finding is not supported by the record below.

This Court reviews findings of fact associated with Motions under Rule 35(a) of the West Virginia Rules of Criminal procedure under the clearly erroneous standard. This Standard is as follows:

A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record

viewed in its entirety.” *Syl. Pt. 1, In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

When the Court applies the standard of review to the instant case it is clear that the Court erred. The Exhibits entered in the hearing upon the Defendant’s Rule 35(a) motion show that the Defendant was not being awarded good time. (P.A.36-42). Officer Clowser further testified that the Defendant was not receiving good time (P.A. 89). As to why this was occurring, Officer Clowser’s uncontroverted testimony made clear that the Defendant was not receiving good time credit because of the Sentencing Order. (P.A. 91) Officer Clowser clearly answered in the affirmative that he was following the sentencing order when not awarding the Defendant good time credit because it required that she serve “actual incarceration,” and that she serve “240 actual hours,” (P.A. 91). There is nothing in the record to suggest to support the Courts finding did not have an effect on the Defendants denial of good time. The Court may not have intended that the Defendant be denied good time; however, despite any intention of the Court, the record shows that the language of the Order did cause the West Virginia Division of Corrections and Rehabilitation officials to deny the Defendant her good time. Therefore, the Court did err in finding that the Court’s Order did not deny the Defendant her statutorily guaranteed good time credit.

B. THE CIRCUIT COURT DID ERR WHEN IT FOUND THAT THE SENTENCE RENDERED AGAINST THE DEFENDANT WAS LEGAL BECAUSE THE LANGUAGE OF THE ORDER PROBHITED THE DEFEDANT FROM RECEIVING STATUTORILY GUARANTEED GOOD TIME CREDIT.

As noted above, The record below shows that the Defendant was being denied her good time credit because of the plain language of the commitment order entered by the Court below. A review of W.Va. Code § 15A-4-17 shows that the Defendant is entitled to good time credit under the laws of the State of West Virginia. Specifically, W. Va. Code § 15A-4-17(a) provides, in

pertinent part, that: “All adult inmates placed in the custody of the Commissioner of the Division of Corrections and Rehabilitation pursuant to a term of court-ordered incarceration for a misdemeanor or felony...shall be granted commutation from their sentences for good conduct in accordance with this section.” (Citations Omitted). W. Va. Code § 15A-4-17(c) further provides that: “Each eligible inmate committed to the custody of the commissioner and incarcerated in a facility pursuant to that commitment shall be granted one day good time for each day he or she is incarcerated.”

From the record in this matter, it is clear that the Defendant should have been granted one day good time credit for every day that she was incarcerated because she was an “adult inmate placed in the custody of the Commissioner of the Division of Corrections and Rehabilitation pursuant to a term of court-ordered incarceration for a misdemeanor.” W. Va. Code § 15A-4-17(a)

The denial of the Defendant’s good time credit by virtue of language in the sentencing order renders the entire sentence illegal because the Circuit Court was without the legal authority to deny the Defendant her good time. “The provisions of West Virginia Code § 28–5–27 (1992) solely govern the accumulation of ‘good time’ for inmates.”² *State ex rel. Valentine v. Watkins*, 208 W. Va. 26, 32, 537 S.E.2d 647, 653 (2000) Further, “Good time credit is a valuable liberty interest protected by the due process clause, W. Va. Const. art. III § 10.” *Syl. pt. 2, State ex rel. Gillespie v. Kendrick*, 164 W.Va. 599, 265 S.E.2d 537 (1980). Further, the Court below cannot legally deny the Defendant her good time credit because “Commutation of time for good conduct is a right created by the Legislature...” *Syl pt. 8 Woodring v. Whyte*, 161 W. Va. 262, 264 (1978). In the Order denying the Defendant’s motion the Court erroneously relied

² § 28–5–27 (1992) was repealed by Repealed by Acts 2018, c. 107, eff. July 1, 2018 and recodified as W. Va. § 15A-4-17

on *State v. Eilola* to stand for the proposition that the “award of good time credit is at the discretion of the warden.” 226 W. Va. 698, 707, 704 S.E.2d 698, 707 (2010) This is problematic for two reasons. First, *State v. Eilola* is distinguishable on the facts from the instant case. *Eilola* dealt primarily with how periods of pretrial incarceration are credited against multiple sentences for the purposes of determining a parole eligibility date. *Id.* This case dealt only tangentially with good time credit. *Id.* To the extent that it did, in fact, deal with good time credit; it only dealt with whether good time credit should be applied to consecutive sentences. *State v. Eilola*, 226 W. Va. 698, 707, 704 S.E.2d 698, 707 (2010). In the case at bar, The Defendant has not been convicted more than one crime for which she could serve multiple sentences, and the Defendant is not convicted of a crime that involves a parole edibility date. Thus, the instant appeal is distinguishable from *Eilola*. Second, this case is distinguishable from *Eilola* because It is the Plain language of the Sentencing order that is causing the DOCR officials to deny the Defendant her good time. Further, as noted above, Officer Clowser , the representative of the “Warden,” testified that the Defendant was not being given good time because of the plain language of the Order, and that no disciplinary actions had been filed against the Defendant; nor did the jail officials attempt to take away the good time credit of the Defendant. (P.A 91;. 94-95). This Court has previously held that Good time credit is designed to advance the goal of improved prison discipline. *State ex rel. Bailey v. State Div. of Corrections*, 584 S.E.2d 197, 213 W.Va. 563 (2003). Because the Defendant had no disciplinary infractions that caused the jail officials to seek any loss of good time, she should have been awarded good time credit. According, The question of whether or not the sentence was legal is a question of law. When the Court applies the relevant standard of review it is clear that the Court erred in finding that the sentence was not illegal. The sentence was illegal

because the Defendant was denied good time credit that she was legally entitled to by because of the plain language of the sentencing order.

**C. THE CIRCUIT COURT DID ERR WHEN IT DENIED THE
DEFENDANT'S MOTION UNDER RULE 35(a) OF THE WEST
VIRGINIA RULES OF CRIMINAL PROCEEDURE**

Rule 35(a) of the West Virginia Rules of Criminal Procedure provides in pertinent part that : “The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner.” As shown above, in section A ,The Defendant was not given good time because of the language of the Sentencing Order. This denial of good time credit renders the sentence issued against the Defendant Illegal, as Shown in section B. Therefore, because the sentence was illegal the Court had a duty to correct the order under rule 35(a).

The abuse of discretion standard has been formulated by this Court: “In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.” *Wal-Mart Stores E., L.P. v. Ankrom*, 244 W. Va. 437, 454, 854 S.E.2d 257, 274 (2020) (Citing: *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995)).

When the Court Examines the foregoing errors alleged by the Defendant it is clear that the Court abused it's Discretion. The Court wholly disregarded the exhibits entered at the hearing and the testimony of Officer Clowser. The Exhibits entered in the hearing upon the Defendant's Rule 35(a) motion show that the Defendant was not being awarded good time credit. (P.A.36-42). Officer Clowser further testified that the Defendant was not receiving good time (P.A. 89). As to why this was occurring, Mr. Clowser's uncontroverted testimony made clear that the Defendant was not receiving good time credit because of the Sentencing Order. Officer

Clowser clearly answered in the affirmative that he was following the sentencing order when not awarding the Defendant good time credit because it required that she serve “actual incarceration,” and that she serve “240 actual hours,” (P.A. 91). This is a very important factor because it is dispositive as to the question of whether or not the sentence of the Defendant is actually illegal. The Court further denied the Defendant relief because it did not want to adopt a policy of ordering the West Virginia Division of Corrections and rehabilitation to award good time. (P.A. 32; 103-104) . The Court can adopt it’s own polies, but it cannot adopt policies that deny criminal defendant’s statutory rights like good time credit, as happened in the instant case. Further, the Court stated that it was without the authority to order the West Virginia Division of Corrections and rehabilitation to give the Defendant good time. This was clearly incorrect because the West Virginia Rules of Criminal Procedure were promulgated by the West Virginia Supreme Court of Appeals and said rules “ are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction,” and “have the force and effect of law.” *State v. Wallace*, 205 W. Va. 155, 160, 517 S.E.2d 20, 25 (1999). Therefore, there is no doubt that the Court below could have Ordered the West Virginia Division of Corrections and Rehabilitation to award the Defendant good time credit because the record clearly shows that she was unlawfully being denied said credit. Therefore, it is clear that the Court did not give adequate consideration to the testimony of Major Clowser, a very important factor, and relied on improper factors in concluding that it did not want to institute a policy of ordering good time and that it could not order the West Virginia Division of Corrections and Rehabilitation to award the Defendant good time Credit that she was unlawfully being denied. (P.A. 103-106) Therefore, it is clear that the Court erred in denying the Defendant’s Motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure.

VI. Conclusion

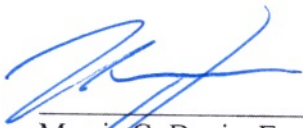
The Trial Court erred by finding that the language of the Sentencing order did not prohibit the Defendant from receiving good time credit. The Court further erred in finding that the sentence ordered by the Court was legal because the sentence denied the Defendant of her statutory right of good time credit. Therefore, the Court erred in denying the Defendant's Motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure, and the defendant has thereby been harmed; thus, she is entitled to relief from this Court

VII. PRAYER FOR RELIEF

The Petitioner respectfully prays that this Court enter an Order directing the lower Court to remove the "actual confinement" and "240 hour," language from the sentencing and commitment order. Alternatively, this Court could enter an order directing the lower Court to enter an order finding that she has completed all of the incarceration required of her to satisfy her sentence.

WHEREFORE, for the foregoing reasons, your petitioner respectfully prays that that this petition for appeal be granted.

Kirsten Wetzel
Petitioner,
By Counsel



Morris C. Davis, Esq. #13191
The Nestor Law Office
1062 Harrison Avenue
Elkins, WV 26241
Counsel for Petitioner

CERTIFICATE OF SERVICE DOCKET NO. 22-685

I, Morris C. Davis, Counsel for the Petitioner hereby certify that I have duly served a true copy of the foregoing: PETITIONER'S BRIEF and PETITIONER'S APPENDIX upon the Court by and the parties by the West Virginia Supreme Court of Appeals E-Filing System as follows:

R. Todd Goudy, Esq.
Asst. Attorney General
Office of the Attorney General
1900 Kanawha Blvd. East
State Capitol Building 6. STE 406
Charleston, WV 25301

Given under my hand this 21st day of December, 2022.



Morris C. Davis, Esq.
WV Bar No. 13191
The Nestor Law Office
Tel: (304) 636-1001
Fax:(304) 636-2970