IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-685

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 REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities

Cases

Statues

I. REPLY TO RESPONDENT'S ARGUMENTS

The Petitioner would reply to the arguments presented in respondent's brief as follows:

A. **THE PETITIONER'S SENTENCE AS GIVEN DID DEPRIVE HER OF HER GOOD TIME**

B. **THE PETITIONER WAS NOT REQUIRED TO DO TEN DAYS INCARCERATION AS A TERM AND CONDITION OF PROBATION THEREFORE, SHE SHOULD BE AWARDED GOOD TIME CREDIT ON HER TEN DAY SENTENCE**

C. **THE CIRCUIT COURT DID HAVE THE AUTHORITY TO DISPOSE OF PETITIONER'S MATTER BY WAY OF A RULE 35(A) MOTION.**

D. **THE PETITIONER DID NOT BREACH HER PLEA AGREEMENT BY BRINGING HER RULE 35(A) MOTION BEFORE THE CIRCUIT COURT**

E. **THE PETITIONER HAS NOT CONFUSED GOOD TIME CREDIT WITH CREDIT FOR TIME SERVED.**

II. PETITIONER'S REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The Respondent fails to include a full account of Major Clowser's Testimony

In his statement of the case, the Respondent submits that: "Moreover, Clowser testified that with regard to the award of 'good time,' the sentencing order must be followed." Resp. Br. 4. Respondent does not include the testimony of Major Clowser that is adverse to his position. As will be more fully presented in the argument section of this brief, Major Clowser testified that the Petitioner was being denied her good time because of the language of the sentencing order. App. 90-91.

The Respondent fails to include that the plea the Petitioner entered into was non-binding

The Respondent includes in his statement of the case that the Petitioner took a plea in which the recommendation was ten days of actual incarceration. Resp. Br. 2. The Respondent, as will be discussed below, then argues that the Petitioner is somehow bound by that

recommendation. Resp. Br. 7-8. The Petitioner wishes to clarify to the Court that the plea agreement entered into by the Defendant was entered into under Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure. App. 2; 52. As will be argued below, this plea was non-binding.

The Respondent misstates the record as it relates to the plea agreement

The Respondent states: "The State and Petitioner agreed to a resolution of the matter, whereby the Petitionerf agreed to plea guilty to the joyriding count in exchange for dismissal of the burglary count and an unrelated misdemeanor case." Resp. Br. 2. The respondent is incorrect in this assertion. The case that the State agreed to dismiss was against the co-defendant and husband of the Petitioner. App. 2; 56. The case was not a separate and unrelated case, as this is the only interaction the Petitioner has ever had with the criminal justice system. P. Supp. App. 1-2.

III. ARGUMENT

A. THE PETITIONER'S SENTENCE AS GIVEN DID DEPRIVE HER OF HER GOOD TIME.

The Respondent argues that: "The Petitioner's Sentence as given did not deprive her of receiving 'good time' credit," and that any good time credit she would receive should be taken off the end of the aggregate sentence under W. Va. Code §15A-4-17(b). Resp. Br. 7. This argument fails because it clearly ignores the uncontroverted testimony of Major Clowser, the Representative of the West Virginia Division of Corrections and Rehabilitation.

As submitted by the Petitioner in her original brief and as put forth by the Respondent in his brief W. Va. Code §15A-4-17 and more specifically for the case at bar, W. Va. Code §15A-4-17(c), governs the grant of good time to inmates in the custody of the West Virginia Division of Corrections. Said code section 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." W. Va. Code §15A-4-17(c). Major Clowser testified that the grant of good time was dependent on the language of the sentencing order; that the Tygart Valley Regional Jail was following the Sentencing order when not awarding the Petitioner her good time; and he further testified that it was the specific language of the order that caused the Tygart's Valley Regional Jail not to give the Petitioner her good time saying:

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

A: Correct.

Q: And it was the—it was the way in which 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. App. 91

This uncontroverted testimony makes clear that the "240 hour" and "actual confinement" language was the reason the Defendant was being denied her good time credit. App. 91. As will be more fully argued below, the good time the Defendant was entitled to should have been taken off the ten day sentence not the six month sentence. Therefore, the Respondent's argument that the Petitioner's Sentence as given did not deprive her of good time should fail.

B. THE PETITIONER WAS NOT REQUIRED TO DO TEN DAYS INCARCERATION AS A TERM AND CONDITION OF PROBATION THEREFORE, SHE SHOULD BE AWARDED GOOD TIME CREDIT ON HER TEN DAY SENTENCE

The Respondent contends that the Defendant is not entitled to good time because she was required to do ten days pursuant to a term and condition of her probation. Resp. Br. 8. This argument fails because the record is devoid of any mention by the Court that the Petitioner was

to be incarcerated as a term and condition of her probation. Further, West Virginia code §62-12-9(b)(4) requires that the "the court shall make special findings that other conditions of probation are inadequate and that a period of confinement is necessary." (citations omitted). At the sentencing hearing, The Court made no mention that the ten days of incarceration to be done by the Petitioner was to be a term and condition of her probation; the court imposed the sentence saying:

> The Court: It's the Sentence of the Court that you be sentenced to a period of six months in the regional jail. It's further the sentence of the Court that you be sentenced to serve at least ten days of that in actual incarceration. App. 77.

The Court did not state that the ten days of actual incarceration was a term and condition of probation at the sentencing hearing or at the subsequent hearing on the Petitioner's Rule 35(a) motion. App. 77 Further, the Court made no findings as required by §62-12-9(b)(4) that other conditions of probation would be inadequate. In fact, it appears that the Court made the opposite finding on the record; stating before rendering the sentence that: "You don't have a history. **Your not prison material**. You're young. I don't think that you have been in a lot of trouble before." App. 75 (emphasis added) Further, the probation officer had submitted a bond report that gave the Petitioner a glowing endorsement. P. Supp. App. 1.

The record is devoid of any mention by the Court that the ten days at issue were to be served as a condition of probation. This matter came before the Court below on Petitioner's Rule 35(a) motion, which the subject of the instant appeal, and at no time at that hearing did the Court submit that the Defendant was not receiving her good time because she was serving time as a term and condition of her probation. App. 84-117. Counsel for the Petitioner submitted proposed exceptions and corrections to the order from that hearing to which the Court entered another

order, and at no time did the Court cite §62-12-9(b)(4) or otherwise mention that the Defendant was required to do ten days in jail as a term and condition of probation. App. 27-35 Further, the State cites §62-12-9(b)(4) in support of its position that the Petitioner was required to ten days in jail as a term and condition of probation; however, that is the first time that such an argument has been advanced by the state. App. 48-118. It was not advanced at all, at any point, below by any party. Id. In his brief, the Respondent is unable to cite to any portion of the record below in which the Court or the State advances the argument that the Respondent was serving the ten days required of her as a term and condition of her probation. The order from the hearing on Petitioner's rule 35(a) motion was entitled "Order Following Motion Hearing (Denying Defendant's Motion to Clarify Sentence)" yet no where in that order was it mentioned that the Defendant was to be incarcerated as a term and condition of probation. App. 14-21. Therefore, it is clear from the record that the Court was operating under the fact that she was not to be incarcerated as a term and condition of probation. Thus she should have been awarded her good time on her ten day sentence, not the six month sentence as the Respondent suggests.

C. The Petitioner did not bargain away or otherwise waive her right to receive good time; further such time is not waivable by the Petitioner.

The Respondent presents this issue to the Court as if the Petitioner took a binding plea or in some way knew that she would be sentenced to exactly what the state recommended stating: "The Petitioner got exactly what she bargained for. The plea agreement clearly stated that the Petitioner shall serve ten days of actual incarceration." Resp. B. 10. The Respondent ignores the fact that the Petitioner entered into a plea under Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure and that such a plea is not binding upon the Court.(legal Citations Omitted) App. 3 The Respondent then picks one small portion of the record where the Defendant acknowledges that she understands the ***recommendation*** of the State below. Resp. Br. 10 The

Respondent incorrectly submits that he knowledge of the state's recommendation binds the Petitioner to that recommendation stating that: "by accepting the state's plea offer requiring her to serve ten days of actual incarceration, the ten days' incarceration became a specific term and condition of probation that she must serve without the benefit of good time." Resp. Br. 10 However, the Respondent neglects to include the very next question in which the Court provides that such ***recommendation*** contained within the plea is **not** binding upon the Court:

> The Court: You understand that this is non-binding plea agreement, Ms. Wetzel? That means that recommendation from the state of West Virginia is just that, a recommendation and that the Court would have discretion as to your sentencing. Do you understand that? App. 2; 52.

The argument that the Petitioner bargained away her good time via plea agreement or otherwise waived her right to good time fails because the recommendation set forth by the State below was not binding upon the Court and the Petitioner was informed of the same by the Court. As shown above, the record below does not support, in any way, that the Defendant entered into some form of binding plea or otherwise waived her right to good time.

The argument that the Petitioner bargained away her good time via plea agreement or otherwise waived her right to good time further fails because she would not have been able to waive her good time, even if she had wanted to. This Court has previously found that "The provisions of West Virginia Code § 28-5-27 solely govern the accumulation of 'good time' for inmates."[1] *State ex rel. Valentine v. Watkins, 208 W. Va. 26, 32.* The Court would be without the authority to accept or enforce such wavier because those rights are not the purview of the Court, but the legislature.

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[1] §28-5-27 was repealed by act 2018, c. 107, eff. July 1 2018 and recodified as W. Va. §15A-4-17

D. The Circuit Court did have the authority to Dispose of Petitioner's matter by way of a Rule 35(a) Motion.

The Respondent argues that "The Circuit Court did not abuse it's discretion in denying Petitioner's Rule 35(a) motion to grant her good time credit as the Circuit Court was without authority to Grant it." Resp. Br. 13. This argument misstates the position of the Petitioner. The core of what the Petitioner was asking the Court to do was to make a finding that the Petitioner had served all the time required of her, and that the sentencing order was illegal because it was written in such a way as to deny the Petitioner her good time. In the proceedings below and on appeal the Petitioner has primarily argued that it was the sentencing order that was unlawfully denying the Petitioner her good time credit. Pet. B. 10, App. 99.

The Respondent further argues that W. Va. Code §15A-4-17 makes the grant of good time entirely dependent on the good conduct of the inmate. Resp. Br. 14. This argument ignores the plain language of W. Va. Code §15A-4-17(c); the statue which should grant the Petitioner good time. Said statue provides, in pertinent part: "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…" W. Va. Code §15A-4-17(c). Under this statutory scheme it is clear that an inmate is supposed to receive good time solely by virtue of the fact that they are an "adult inmate placed in the custody of the Commissioner of the Division of Corrections." W. Va. Code §15A-4-17(a). Now to be sure, good time can be taken away under W. Va. Code §15A-4-17(f) for violations of the "rules and policies," promulgated by the commissioner. W. Va. Code §15A-4-17(f), However, in taking the good time credits "minimum due process standards must be accorded prisoners with respect to their statutorily created good time credits" and that a prisoner is entitled to good time credit absent some

"recorded history of misconduct." *State ex rel. Gillespie v. Kendrick*, 164 W. Va. 599, 608, 265 S.E.2d 537, 542 (1980). In the instant case, Major Clowser testified that the jail never any disciplinary action filed against the Petitioner; nor had the jail sought to take any good time away from her. App. 94-95. Further Petitioner does not claim that she is entitled to good time under any other provision than W. Va. Code §15A-4-17(c); thus the Respondent's arguments about other provision of W. Va. Code §15A-4-17 that grant good time are irrelevant.

The Respondent further argues that the Petitioner is not entitled to relief because she has not exhausted her administrative remedies. Resp. B. 16. The Respondent cites to *State ex rel. Fields v. McBride* 216 W. Va. 623 (2004) as the principle authority for his argument. However, the *Fields* case is distinguishable from the instant issue because the fields case dealt with a petitioner for a writ of habeas corpus, an extraordinary remedy. 216 W. Va. 623 (2004) In the fields case this Court noted that "[t]he existence of an administrative appeal is as important in determining the appropriateness of extraordinary remedies, such as [habeas,] prohibition and mandamus, as is the existence of an alternate avenue of judicial relief." Id. Citing *Cowie v. Roberts*, 173 W.Va. 64, 67, 312. Further, from the testimony of Major Clowser; specifically, the testimony about the fact that plain language of the Order was the cause of the denial of good time. App. 90-91. it is almost certain that any administrative proceeding would have been futile and "[t]he doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility." Syl. pt. 1, *State ex rel. Bd. of Educ. of Kanawha County v. Casey*, 176 W.Va. 733, 349 S.E.2d 436 (1986). Further, the Respondent cites *State v. Cartagena*, No. 21-0695, 2022 WL 14805736 (W. Va. Oct. 26, 2022) in support of this argument. However, no where in the *Cartagena* case which the respondent cites is there any

suggestion that the petitioner in that case ever sought any administrative remedy before he brought his motion under rule 35(a) of the West Virginia rules of criminal procedure.

E. The Petitioner did not breach her plea agreement by bringing her Rule 35(a) motion before the Circuit Court

The Respondent argues that the Defendant has in some way breeched her plea agreement by filing her motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure. Resp. Br. 9. This argument ignores the fact that the Defendant sought, and was granted, leave of the Court to serve her sentence outside of the time previously filed by the Court. Pet. Supp. App. 16-17. The order granting Petitioner leave of Court was, in fact, agreed by the state below. Id. Therefore, any assertion that the Petitioner has breached her plea agreement is not correct.

F. The Petitioner has not confused good time credit with credit for time served.

The Respondent argues that the Petitioner implies that she is entitled to good time regardless of "any other factor, such as behavior or agreement." Resp. Br. 17. As has been argued above, there is nothing to suggest in the record to suggest that the Petitioner had undertaken any course of action that caused the regional jail to seek a forfeiture of her good time credit. App. 94-95. Further, as has been argued above, the Petitioner did not agree to waive her good time, as the plea that the Petitioner entered into was non-binding, and that there was no effort on the part of the jail to file any disciplinary action or otherwise take away the good time credit of the Petitioner.

The Respondent further argues that the Petitioner has confused good time credit for credit for time served. Resp. Br. This mischaracterizes Petitioner's argument. While it is true this Court has previously held that there is no constitutional right to good time credit because good time credit is created by the legislature. However, there is a constitutional right to the due process of law. This Court has recognized that good time credit is "a valuable liberty interest

protected by the due process clause." State ex rel. Gillespie v. Kendrick, 164 W. Va. 599, 604, 265 S.E.2d 537, 540 (1980). Further, this Court has recognized once the legislature creates the right to good time the due process clause is most certainly implicated stating:

> But the State having created the right to good time . . . the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated . . . . *State ex rel. Gillespie v. Kendrick*, 164 W. Va. 599, 604, 265 S.E.2d 537, 540 (1980) (quoting: *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975-76, 41 L.Ed.2d 935 (1974))

because the West Virginia legislature has created the statutory right to good time credit it is clear that the protections contained within the due process clause of West Virginia constitution prevent individuals being denied their good time credit without the due process of law. In this setting, the law requires that when calculating a sentence "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," To deny the Petitioner this time would deny her the constitutionally required due process of law.

IV. CONCLUSION

For the Reasons set forth above, the Respondent's arguments should fail. The Petitioner submits that the plain language of the sentencing order was illegal because Major Clowser testified that it was the reason the Petitioner was being denied her good time credit. The Petitioner was not required to do the ten days of incarceration as a term and condition of

probation. The argument that the Defendant was required to do the ten days as a term and condition of incarceration was never advanced by the State or the Court in the record of the proceedings below. The Petitioner did not waive or otherwise agree to a denial of her good time credit. The circuit court had the ability to dispose of this matter by way of Petitioner's Rule 35(a) Motion, but it erroneously chose not to. Therefore, Respondent's arguments should fail.

V. PRAYER FOR RELEF

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.

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CERTIFICATE OF SERVICE

I, Morris C. Davis, Counsel for the Petitioner, hereby certify that I have duly served a true copy of the foregoing: **Petitioner's Reply Brief.** upon the State of West Virginia by the West Virginia Supreme Court of Appeals Electronic filing service as follows:

R. Todd Goudy
Attorney General for the State of West Virginia

Given under my hand this 27th day of February, 2023.

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