IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 22-685

STATE OF WEST VIRGINIA,

Respondent,

v.

KIRSTEN NICOLE WETZEL,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the July 15, 2022, Order
Circuit Court of Barbour County
Case No. 20-F-48

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INTRODUCTION

This appeal comes before this Court because of the Petitioner's misunderstanding of the application of "good time" jail credit. The circuit court did not abuse its discretion by denying the Petitioner's Rule 35(a) motion to correct an illegal sentence in the underlying Barbour County Case No. 20-F-48 as memorialized in the court's final amended order entered July 15, 2022. The circuit court did not abuse its discretion because it did not impose an illegal sentence on the Petitioner nor did the court preclude the Petitioner from earning "good time" jail credit. Instead, the Petitioner agreed to and entered a guilty plea in which she consented to ten days of actual incarceration as a term of that guilty plea, thus precluding her from potentially earning "good time" credit. Moreover, the calculation, award, or forfeiture of "good time" in favor of inmates is a statutory power invested in the superintendent of the appropriate correctional facility, not the circuit courts. Because the Petitioner has failed to demonstrate the existence of reversible error, this Court should affirm the ruling of the circuit court.

ASSIGNMENTS OF ERROR

The Petitioner presents three assignments of error before this Court regarding the circuit court's denial of her Rule 35(a) motion to grant her "good time" jail credit:

1. The circuit court erred when it found that its sentence did not prohibit the [Petitioner] from receiving good time.

2. The circuit court did err when it found that the sentence rendered against the [Petitioner] was legal because the language of the order prohibited the [Petitioner] from receiving statutorily guaranteed good time credit.

3. The circuit court did err when it denied the [Petitioner's] motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure.

Pet'r's Br. at 1.

STATEMENT OF THE CASE

On November 5, 2020, a grand jury sitting in Barbour County, West Virginia handed down a two-count Indictment against the Petitioner. App. 1. In its indictment, the grand jury charged the Petitioner with one felony count of burglary[1] and one misdemeanor count of unlawful taking of a vehicle, commonly known as "joyriding.[2]" App. 1. The State and Petitioner agreed to a resolution of the matter, whereby the Petitioner agreed to plead guilty to the joyriding count in exchange for dismissal of the burglary count and an unrelated, pending misdemeanor case. App. 2. In the plea agreement the State agreed to a recommendation of six months of incarceration for the Petitioner, of which all but ten days of actual incarceration was to be suspended in favor of probation. App. 3.

On July 30, 2021, the parties appeared before the circuit court for entry of the agreed-upon plea. App. 4, 46. After placing the Petitioner under oath, the circuit court proceeded with the plea colloquy required under Rule 11 of the West Virginia Rules of Criminal Procedure, and this Court's guidance in *Call v. McKenzie.*[3] App. 4-5, 48-58. The circuit court accepted the Petitioner's plea and adjudged her guilty of joyriding. App. 5, 58. Immediately thereafter and without the objection of the parties, the circuit court proceeded to sentencing. App. 6, 58. The circuit court adopted the State's recommendation, sentencing the Petitioner to a term of incarceration of six months in the regional jail[4] and suspended all but ten days of the term of incarceration and imposed

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[1] West Virginia Code § 61-3-11(a).

[2] West Virginia Code § 17A-8-4.

[3] 159 W. Va. 191, 220 S.E.2d 665 (1975).

[4] Any person violating the provisions of this section is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars, or

a term of unsupervised probation for one year. App. 6. According to the circuit court's sentencing order entered on August 10, 2021, the Petitioner was ordered to serve ten days of "actual incarceration." App. 6, 77. During the sentencing phase of the July 30, 2021 hearing, the circuit court clearly and directly stated that the sentence – including the ten days' actual incarceration – "appear[ed] to be a fair agreement." App. 77. With regard to the plea and sentence, the circuit court directly stated to the Petitioner "[y]ou agreed to the plea agreement." App. 77. Instead of objecting to the circuit court's sentence, the Petitioner merely asked that the sentence of incarceration not begin on that date. App. 78. The circuit court agreed and left the matter of scheduling the ten days' incarceration to either the Petitioner or her counsel. App. 78. The circuit court memorialized its sentence via order and certified commitment order entered that same day. App. 4-6, 7. The certified commitment order specified that the Petitioner was to serve ten days' "actual incarceration" which the court specified may be served "on weekends." App. 7.

Thereafter on August 19, 2021, the parties appeared before the circuit court for a status hearing. App. 9. While the record is silent on the subject matter of the hearing, the circuit court entered an amended certified commitment order at the conclusion of the hearing. App. 8. The amended certified commitment changed the term of incarceration from ten days to 240 hours. App. 8. The change in the certified commitment order reflected the circuit court's stated desire that the Petitioner serve the full ten days/240 hours of actual incarceration. App. 7, 8, 77.

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confined in the county or regional jail not more than six months, or both. W. Va. Code § 17A-8-4(b).

On March 9, 2022 the parties appeared before the circuit court on the Petitioner's motion to clarify and correct her sentence under Rule 35(a)[5]. App. 14, 84. The Petitioner's stated position at the hearing was that she was entitled to "good time" on that ten days sentence. App. 84. The Petitioner asserted that since she had served five days of actual incarceration, she had satisfied the ten-day incarceration requirement. App. 84. In support of her motion, the Petitioner produced Major Brian Clowser from the Tygart Valley Regional Jail (TVRJ). App. 85. Major Clowser explained that "good time" is a function of the West Virginia Code where an inmate can receive day-for-day credit on a sentence. App. 89. Major Clowser confirmed that as of the hearing date, the Petitioner had served 120 hours of actual incarceration. App. 90. Moreover, Clowser testified that with regard to the award of "good time," the sentencing order must be followed. App. 90-91. In the Petitioner's case, the sentencing order required 240 hours of incarceration. App. 91.

On cross-examination by the State, Clowser stated that the Petitioner was a difficult, uncooperative inmate. App. 92-93. The Petitioner resisted complying with the directives of the sentencing order. App. 92. Specifically, on a day when the Petitioner reported to the TVRJ, she unilaterally decided to cut her stay short at the jail upon finding she was about to be moved to a quarantine section within the general population. App. 92-93. Major Clowser quoted the Petitioner as stating "I only want to do twelve [hours] if I have to go down there." App. 93. Further, Clowser described the Petitioner as "want[ing] to do what she wanted to do and not follow the rules of the institution . . . in far as housing goes." App. 93. There were no formal disciplinary proceedings instituted or violations found on the part of the Petitioner during her time at the TVRJ. App. 94-95.

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[5] The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence. W. Va. R. Crim. P. 35(a).

Prior to issuing a ruling, the circuit court bluntly informed the Petitioner, "I am not hesitant to tell you that this matter should have been over. . . [a]nd . . . had you done your ten days, it'd be done by now and you wouldn't be looking at another five days on top of that." App. 102-03. The circuit court noted that the Division of Corrections and Rehabilitation (DCR) was "the ones that get to decide" about the award of or forfeiture of "good time." App. 103. Further, the circuit court opined that if it started making "good time" considerations in its sentencing decisions and order that he would be setting up a situation where the DCR would not follow the sentencing order or be forced to ask for clarification of every sentencing order. App 103-04. Moreover, the circuit court stated that it amended its sentencing order to 240 hours of actual incarceration because the court wanted the Petitioner to serve that full amount of time. App. 104-05. The circuit court denied the Petitioner's Rule 35(a) motion to grant her five days' "good time" on her ten-day required sentence. App. 109. The circuit court memorialized its ruling via amended order entered July 15, 2022. App. 14-21. In the order, the circuit court specifically found that the court's sentence "did not order/prohibit the [Petitioner] to be denied good time; [t]he sentence, as is always done, did not address the issue of good time." App. 18.

It is from this Order that the Petitioner now appeals.

SUMMARY OF THE ARGUMENT

The Petitioner's assignments of error should fail. In sentencing the Petitioner to a sentence that included ten days/240 hours of actual incarceration, the circuit court neither imposed an illegal sentence nor deprived the Petitioner of the opportunity to earn "good time" jail credit. The Petitioner deprived herself of any potential "good time" credit because she specifically waived any claim to "good time" credit. During the plea negotiation process, the State offered the Petitioner a plea that required she serve ten days of actual incarceration. The Petitioner accepted the State's

offer and made a knowing and intelligent plea of guilty before the circuit court. Once the circuit court sentenced the Petitioner, she was obliged to serve ten days of actual confinement.

Further, the circuit court did not abuse its discretion by denying the Petitioner's Rule 35(a) motion to grant her "good time" credit on the ten-day actual confinement requirement. The award or forfeiture of "good time" credit is a statutory right of an inmate which is left to the discretion of the superintendent of the appropriate correctional facility. Circuit courts do not possess the authority to address "good time" credit issues at sentencing or at the Rule 35 stage. Circuit courts may, however, address "good time" credit issues for inmates only after the inmate has exhausted his or her internal administrative remedies on that issue within the correctional facility. The Petitioner, however, made no internal challenge to good time with any correctional facility.

Based upon the foregoing, it is clear that the circuit court committed no reversible error and did not impose an illegal sentence on the Petitioner. This Court should affirm the judgment of the circuit court in denying the Petitioner's motion for Rule 35(a) relief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. Standard of Review.

"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. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016) (citation omitted).

"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. 3, *State v. Georgius,* 225 W.Va. 716, 696 S.E.2d 18 (2010).

B. The Petitioner's sentence as given did not deprive her of receiving "good time" credit.

The circuit court did not deprive the Petitioner of receiving good time jail credit. The requirement that the Petitioner serve ten days of actual incarceration was a term and condition of probation that was permissible under statute and this Court's prior holdings and bargained for by the Petitioner. This Court should affirm the judgment and sentence of the circuit court.

With regard to the issue of deduction of time from an inmate's sentence, West Virginia Code § 15A-4-17 controls. It states, in part, "[a]ll 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, except those committed pursuant to § 25-4-1 *et seq.* and § 62-12-26 of this code, shall be granted commutation from their sentences for good conduct in accordance with this section . . . ." W. Va. Code § 15A-4-17(a). Further, the statute requires that "[t]he commutation of sentence, known as "good time", shall be deducted from the maximum term of indeterminate sentences *or from the fixed term of determinate sentences*. W. Va. Code § 15A-4-17(b) (emphasis added).

The plain language of the circuit court's sentencing order did not forbid the Petitioner from receiving "good time" jail credit. The circuit court sentenced the Petitioner to the statutory maximum of six months incarceration allowed by West Virginia Code § 17A-8-4, suspended all

but ten days of that incarceration, and imposed a term of one year unsupervised probation. As this Response argues more fully, *infra*, the Petitioner was not entitled to "good time" jail credit off of the requirement of ten days actual incarceration. First and foremost, the requirement of ten days actual incarceration was a term and condition of the unsupervised probation and not subject to "good time" jail credit. Second, the plain language of West Virginia Code § 15A-4-17(b) requires that the ten days of required incarceration would be credited and applied to the Petitioner's aggregate six month jail sentence if she were to be incarcerated for the entire six month sentence.

Based upon the foregoing, and as argued more fully, *infra*, the circuit court's sentence did not prohibit the Petitioner from receiving "good time" jail credit. This Court should affirm the sentence of the circuit court.

C. The circuit court did not commit reversible error in finding that the Petitioner's sentence was legal; the Petitioner was not entitled to good time for the ten days of actual incarceration ordered as it was a term and condition of her unsupervised probation.

Contrary to her assertion, the circuit court did not impose an illegal sentence on the Petitioner. Pet'r's Br. 1. The Petitioner specifically bargained for and accepted the sentence that she ultimately received, including serving ten days of actual incarceration. Further, the circuit court sentenced the Petitioner to incarceration under the appropriate statutory guideline and suspended the execution of that sentence in favor of unsupervised probation. The Petitioner failed to show any reversible error because she received exactly the sentence she bargained for and accepted in the plea agreement. The circuit court's order denying the Petitioner's Rule 35(a) motion should be affirmed.

According to this Court, "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. 3, *Georgius,* 225 W.Va. 716, 696 S.E.2d 18. Impermissible sentencing factors a circuit court

should not consider in sentencing include such matters as "race, sex, national origin, creed, religion, and socioeconomic status. *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision) (citation omitted).

Further, where the granting of probation is contemplated, this Court repeatedly has observed 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,* 152 W. Va. 500, 165 S.E.2d 90 (1968); *see also* Syl. Pt. 5, *State v. Metheney*, 245 W. Va. 719, 865 S.E.2d 461 (holding the same) (citing *Melton*); *State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004) (holding the same) (citing *Melton*). That holding clearly stands for the proposition that a defendant is not entitled to probation as a matter of law, but that the court may, in its discretion, grant probation to those it finds deserving of a more lenient punishment than incarceration. *State v. Varlas*, 243 W. Va. 447, 455, 844 S.E.2d 688, 696 (2020).

Moreover, where a plea agreement is involved, this Court has held, "When a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable 'right' inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." Syl Pt. 2, *State v. Blacka*, 240 W. Va. 657, 815 S.E.2d 28 (2018) (citation omitted); *see also* Syl. Pt. 4, *State v. Shrader*, 234 W. Va. 381, 765 S.E.2d 270, 272 (2014) (holding the same) (citation omitted); *see also* Syl. Pt. 4, *State v. Myers,* 204 W.Va. 449, 513 S.E.2d 676 (1998) (holding the same). Moreover, "[a] plea bargain is a contract, the terms of which necessarily must be interpreted in light of the parties' reasonable expectations." *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985) (quoting *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981)).

The Petitioner got exactly what she bargained for. The plea agreement clearly stated that the Petitioner shall serve ten days of actual incarceration. App. 2. The Petitioner and her counsel both signed the agreement. App. 3. Moreover, during the plea colloquy, the Petitioner stated to the circuit court that she understood the terms of the plea agreement:

> Q: [I]t says the State will recommend that you be sentenced to six months in jail, *but that you serve ten days of actual jail time* and the remaining sentence be suspended and you placed on probation. Is that your understanding?
>
> **A.** Yes, sir.

App. 52 (emphasis added). Understanding the terms of the plea agreement, the Petitioner answered affirmatively to the circuit court that she wished to go forward and accept the State's plea offer. App. 55.

Upon accepting the plea, the circuit court sentenced the Petitioner to the statutory maximum sentence allowed for her joyriding conviction, that of six months' confinement. App. 77; *see also* W. Va. Code 17A-8-4(b). The circuit court suspended that sentence in favor of one year of unsupervised probation, App. 6, but clearly stated that the Petitioner must serve ten days of actual confinement as outlined in the plea agreement that she accepted. App. 2-3, 77. Later on, the circuit court clarified that it required the Petitioner to serve 240 hours of actual confinement instead of ten days. App. 27. The circuit court made the confinement requirement 240 hours to ensure that the Petitioner served the full ten days/240 hours of incarceration and not receive credit for multiple days that she didn't serve. App. 105. 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. By attempting to serve less than the ten days' incarceration, the Petitioner is attempting to breach the plea agreement she made with the State.

"Probation 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. 5, *State v. Metheny*, 245 W. Va. 719, 865 S.E.2d 461 (2021) (citation omitted). As a condition of any grant of probation, a circuit court may require a defendant "to serve a period of confinement in jail of the county in which he or she was convicted for a period not to exceed one third of the minimum sentence established by law." W. Va. Code § 62-12-9(b)(4); *see also* Syl. Pt. 4, in part, *State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002) ("When a minimum or indeterminate sentence is involved, then the maximum term of incarceration as a condition of probation is one-third of the express minimum or indeterminate sentence or six months, whichever is less."). Moreover, this Court has long recognized that plea agreements are contracts, opining that "[a]s a matter of criminal jurisprudence, a plea agreement is subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled." *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 192, 465 S.E.2d 185, 192. *Accord State v. Spade*, 225 W.Va. 649, 695 S.E.2d 879 (2010). As always, "[w]hen a conviction rests upon a plea of guilty, the record must affirmatively show that the plea was intelligently and voluntarily made with an awareness of the nature of the charge to which the plea is offered *and the consequences of the plea.*" Syl. Pt. 1, *Riley v. Ziegler,* 161 W.Va. 290, 241 S.E.2d 813 (1978) (emphasis in original).

The circuit court explained the terms of the plea agreement to the Petitioner, including the requirement that she serve ten days actual incarceration. App. 51-52. The Petitioner stated that she understood that term of the agreement. App. 52. The Petitioner, further, stated that she understood she could not later withdraw her plea if she was unhappy with the court's sentence. App. 52. Further, the circuit court stressed to the Petitioner that she did not have to plead guilty and the Petitioner stated her understanding. App. 54. In the end, after hearing the explanation of

the plea agreement, the Petitioner stated that she understood and wished to enter the plea of guilty. App. 55. At the conclusion of the plea colloquy, the circuit court specifically found that the Petitioner "freely, knowledgeably and voluntary" pled guilty to joyriding. App. 57.

Importantly, in refusing to follow the circuit court's lawful sentencing order, the Petitioner is in breach of her plea agreement. Because the Petitioner is in breach of her plea agreement by not serving ten days of actual incarceration, there are three possible outcomes available to her: 1) revocation of the term of probation by the State; 2) she may surrender her probation in favor of the six months incarceration; or 3) specific performance of the agreement, i.e. the Petitioner serves ten days of actual incarceration. *See State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 198, 465 S.E.2d 185, 198 (1995) ("There are two possible remedies for a broken plea agreement—specific performance of the plea agreement or permitting the defendant to withdraw his plea."); *see also State v. Conley,* 168 W.Va. 694, 285 S.E.2d 454 (1981) (holding the same); *State ex rel. Clancy v. Coiner,* 154 W.Va. 857, 179 S.E.2d 726 (1971) (holding the same).

The Petitioner bargained for a plea agreement that was conditioned upon probation and ten days of actual incarceration. Moreover, the only valid mechanism for the Petitioner to serve the ten days of incarceration was as a term and condition of her one-year unsupervised probation. The ten days of actual incarceration was well under the one-third term of incarceration permitted by West Virginia Code § 62-12-9(b)(4). As the Petitioner bargained for the sentence she received, and because it is a legal sentence, the Petitioner is contractually obligated by the terms of the plea agreement to serve ten actual days of incarceration. Most importantly, if for some reason that the Petitioner were to be recommitted to the regional jail for her six month sentence, the time spent incarcerated on the ten-day requirement, whether ten days or less, must be credited to the Petitioner per West Virginia Code § 15A-4-17(a).

The circuit court imposed a legal sentence on the Petitioner. She is entitled to good time off of the entire six month sentence, minus any time spent in pre-conviction incarceration as well as post-conviction incarceration. Based upon the foregoing, the Petitioner failed to demonstrate that the circuit court committed reversible error. This Court should affirm the circuit court's sentencing order.

D. The circuit court did not abuse its discretion in denying the Petitioner's Rule 35(a) motion to grant her good time credit as the circuit court was without authority to grant it.

The circuit court was correct to deny the Petitioner's Rule 35(a) motion seeking five days' "good time" credit for her required 10 days/240 hours of actual incarceration. Simply stated, circuit courts do not have jurisdiction to calculate, award or take away "good time" credit to inmates. As the Petitioner failed to demonstrate any reversible error on the part of the circuit court, this Court should affirm its ruling.

With regard to the issue of deduction of time from an inmate's sentence, West Virginia Code § 15A-4-17 controls. It states, in part, "[a]ll 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, except those committed pursuant to § 25-4-1 *et seq.* and § 62-12-26 of this code, shall be granted commutation from their sentences for good conduct in accordance with this section . . . ." W. Va. Code § 15A-4-17(a). Further, the statute requires that "[t]he commutation of sentence, known as "good time", shall be deducted from the maximum term of indeterminate sentences *or from the fixed term of determinate sentences*. W. Va. Code § 15A-4-17(b) (emphasis added).

In her brief, the Petitioner asserts that she is due five days/120 hours of good time credit on the circuit court's sentence of actual incarceration. Pet'r's Br. 8-9. Moreover, the Petitioner's

further assertion is that she is entitled to "good time" merely by the fact of her incarceration. The plain language of West Virginia Code § 15A-4-17 belies her claim. As this Court has stated numerous times, "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *State v. Smith*, 243 W. Va. 470, 844 S.E.2d 711 (2020) (citation omitted); *see also* Syl. Pt. 6, *State v. Mills*, 243 W. Va. 238, 844S.E.2d 99 (2020) (citation omitted) (holding the same); Syl. Pt. 5, *State v. McGilton*, 229 W. Va. 554, 729 S.E.2d 876 (2012) (citation omitted) (holding the same).

The plain language of West Virginia Code § 15A-4-17 makes two points abundantly clear. First, "good time" is conditioned upon an inmate's "good conduct." W. Va. Code § 15A-4-17(a). Moreover, nowhere in the text of the statute does it convey a circuit court with the jurisdiction to grant or take away an inmate's good time, particularly in the context of sentencing decisions. W. Va. Code § 15A-4-17(a) through (p). The text of the statute does, however, grant the commissioner of the DCR authority over good time. Among those specific grants of authority to the commissioner is to promulgate disciplinary rules and policies (W. Va. Code § 15A-4-17(f)), *to give extra, discretionary good time based on meritorious service or extra work details performed by the inmate* (W. Va. Code § 15A-4-17(i) (emphasis added)), and to adopt policies and procedures to implement the mandatory supervision of inmates convicted of felony crimes of violence against the person or with the use of a firearm and deduct good time in order to facilitate the supervision (W. Va. Code § 15A-4-17(m)). Further, the Legislature immunized the DCR's commissioner and employees from claims arising out of the failure to award good time for inmates serving incarceration under violations of West Virginia Code § 62-12-26. W. Va. Code § 15A-4-17(p).

Consistent with the grant of authority under West Virginia Codes §§ 15A-4-17 and 61-11-24, the DCR Commissioner has periodically issued Policy Directives governing "good time." *See generally* Supp. App. 1-18. The policy directives reiterate the language of West Virginia Code §

15A-4-17, Supp. App. 2-3, 5, and outlines the policy in calculating "good time." Supp. App. 2, 6-7 ("To calculate an inmate's minimum discharge/final release date . . . a computer based program shall calculate the earliest possible date he/she can expire the sentence(s) taking into consideration . . . jail credit [and] good time . . . ."). Moreover, the Policy Directives describe how good time is deducted. Supp. App. 2, 5 ("Good time shall be deducted from . . . the fixed term of determinate sentences . . . ."). Importantly, the Policy Directives clearly state that good time credit may be forfeited by inmates by the facility superintendent as a disciplinary sanction. Supp. App. 3, 7 ("Good time may be forfeited and revoked by the facility Superintendent according to the rules of discipline promulgated and approved by the Commissioner.").

In the past, this Court has recognized the DCR Commissioner primacy over matters regarding "good time." "Rather, pursuant to West Virginia Code § 28-5-27(f)[6], the award of good time credit is at the discretion of the warden." *State v. Eilola*, 226 W. Va. 698, 707-08, 704 S.E.2d 698, 707-08 (2010). Thus, good time credit is a statutory privilege enjoyed by inmates that is conditioned on good behavior. The facility superintendent retains the discretion to take away good time credit as a punishment for violations and, likewise, to restore the credit as a reward. *See State v. Coles*, No. 13-0149, 2013 WL 5476375, at *2 (W. Va. Supreme Court, Oct. 1, 2013) (memorandum decision). This Court has held "the accumulation of good time is dependent upon the prisoner's behavior or 'good conduct' while incarcerated." *State ex rel. Gordon v. McBride,* 218 W.Va. 745, 749, 630 S.E.2d 55, 59 (2006) (citing *State ex rel. Valentine v. Watkins,* 208 W.Va. 26, 32, 537 S.E.2d 647, 653 (2000)). Further, "[i]n addition to encouraging rehabilitation, it rewards the obedient." *Id.* (citing *State ex rel. Valentine,* 208 W.Va. ta 32, 537

[6] When *Eilola* was decided, West Virginia Code § 28-5-27(f) controlled the award of good time. The Legislature amended the Code in 2018 and replaced § 28-5-27 with § 15A-4-17.

S.E.2d at 653). In keeping with the "carrot-and-stick" duality of "good time," inmates can also earn extra good time for taking additional education classes while incarcerated. *See generally* Supp. App. 8-18.

As a further recognition of the DCR's prime authority over the grant or revocation of "good time," this Court recognized and required inmates to follow an internal grievance process to address "good time" complaints. *See* Syl. Pt. 3, *State ex rel. Fields v. McBride*, 216 W. Va. 623, 609 S.E.2d 884 (2004)[7] ("The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act."). Federal courts, also, recognize that "good time" issues are matters where the appropriate correctional agency holds authority. *See, e.g. United States v. Pratt*, 821 F. Appx. 200, 202 (4th Cir. 2020) (declining to address petitioner's entitlement to additional good time credits "because she has failed to exhaust her administrative remedies and has not challenged the calculation or award of such credits by the Bureau of Prisons"); *Locklear v. Stansberry*, 126 F. App'x 153 (4th Cir. 2005) (affirming district court's dismissal of petitioner's federal habeas action based on Bureau of Prison's computation of good time credits for failure to exhaust administrative remedies); *Crum v. Bureau of Prisons*, No. CIV.A. 5:08-CV-00090, 2009 WL 1470472, at *3 (S.D.W. Va. May 22, 2009), *aff'd*, 364 F. App'x 818 (4th Cir. 2010) (affirming magistrate judge's finding in PF & R that appellant failed to exhaust his administrative remedies with respect to his claim that he has been denied 305 days of good time credit).

[7] In *Fields*, the petitioner filed a writ of habeas corpus under this Court's original jurisdiction seeking, *inter alia*, the restoration of "good time" he claimed was improperly taken by the warden. *Id.* at 624, 609 S.E.2d at 885.

The plain language of West Virginia Code § 15A-4-17 makes clear that the Petitioner was not entitled to good time on the ten day incarceration requirement. The statute requires only that good time be deducted from the end of the fixed term of the Petitioner's six-month determinate sentence. W. Va. Code § 15A-4-17(b). This means that once the Petitioner is sentenced to the regional jail for the entire six month term of incarceration, the DCR is obliged to track the accumulation of good time and deduct it from the end of the sentence. Any pre-conviction credit for time served or post-conviction time spent incarcerated by the Petitioner on the instant conviction is, then, credited to the six-month sentence.

Further, as the Petitioner seeks to address the issue of "good time," she was obliged to do so through the administrative grievance process within the DCR. The record does not indicate that she did so. As the circuit court was without the authority to grant the Petitioner the five days/120 hour good time she sought, the circuit court was correct in denying her Rule 35(a) motion. *See State v. Cartegena*, No. 21-0695, 2022 WL 14805736, at *2 (W. Va. Supreme Court, October 26, 2022) (memorandum decision) (affirming circuit court's denial of awarding good time to petitioner under Rule 35(a)).

Based upon the foregoing, the Petitioner failed to show that the circuit court committed any reversible error. As such, the Petitioner is not entitled to relief from this Court and the circuit court's sentencing order should be affirmed.

E. The Petitioner has confused "good time credit" with credit for time served.

In her brief, the Petitioner asserted that "[a] review of [West Virginia Code] § 15A-4-17 shows that the [Petitioner] is entitled to good time credit . . . ." Pet'r's Br. 6. By implication, the Petitioner asserts that she is entitled to "good time" by virtue of the fact of incarceration regardless of any other factor, such as behavior or agreement. In this assertion, the Petitioner is mistaken.

The Petitioner has confused "good time" with "credit for time served." The two are very different. Credit for time served arises when a defendant is incarcerated prior to conviction. As such, according to this Court, all pre-conviction time spent in jail must be credited to the defendant and the failure to do so violates constitutional double jeopardy principles. *See* Syl. Pt. 6, *State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002) ("The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable."); *see also* Syl. Pt. 2, *State v. Taylor*, 243 W. Va. 20, 842 S.E.2d 224 (2020) (holding the same); *State v. Hite*, No. 17-0757, 2018 WL 4944413, at *1 (W. Va. Supreme Court, Oct. 12, 2018) (holding the same). Credit for pre-conviction incarceration is a requirement. This credit against an inmate's sentence may not be forfeited for any reason.

"Good time," however, is not a constitutional entitlement for criminal defendants. *See Eilola*, 226 W. Va. at 707, 704 S.E.2d at 707 (stating "a defendant is not constitutionally entitled to good time credit. Rather . . .the award of good time credit is at the discretion of the warden.") (internal citation omitted); *see also SER Valentine,* 208 W.Va. at 32, 537 S.E.2d at 653 (holding that the accumulation of good time is dependent upon the prisoner's behavior or "good conduct" while incarcerated; *Woodring v. Whyte,* 161 W.Va. 262, 275, 242 S.E.2d 238, 246 (1978) (holding that in addition to encouraging rehabilitation, the reward of good time rewards the obedient). "Good time" jail credit is a statutory creation which is not an absolute entitlement. It may be lost through an inmate's misdeeds while incarcerated.

As has been argued in this Response, *supra*, the statutory right to "good time" is not an absolute right. The right to "good time" may forfeited as an act of punishment by the correctional

facility superintendent for an inmate's bad behavior (*see* Supp. App. 3, 7; *Coles,* 2013 WL 5476375 at *2). The Petitioner specifically bargained for and pled guilty to joyriding under West Virginia Code § 17A-8-4. The Petitioner signed a plea agreement requiring her to spend ten days of actual incarceration in the regional jail. She stated that she understood the agreement and asked the circuit court to accept the agreement, which the court did. The Petitioner's guilty plea was knowing and intelligently tendered. Moreover, the ten days actual incarceration is properly construed as a term and condition of the Petitioner's one-year unsupervised probation.

Based upon the foregoing, the Petitioner failed to show the existence of reversible error by the circuit court. This Court should affirm the circuit's court's denial of the Petitioner's Rule 35(a) motion.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Barbour County, West Virginia should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-685

STATE OF WEST VIRGINIA,

Respondent,

v.

KIRSTEN NICOLE WETZEL,

Petitioner.

CERTIFICATE OF SERVICE

I, R. Todd Goudy, do hereby certify that on the 6th day of February, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below:

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