IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0502

STATE OF WEST VIRGINIA

v.

EDWIN MACK TAYLOR

SUMMARY RESPONSE OF RESPONDENT, STATE OF WEST VIRGINIA

Appeal from a May 15, 2018 Order
Circuit Court of Randolph County, West Virginia
Case No. 17-F-14

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SUMMARY RESPONSE OF RESPONDENT, STATE OF WEST VIRGINIA

The State of West Virginia, by counsel, Holly M. Flanigan, Assistant Attorney General, respectfully submits this Summary Response. Based upon the record and the well-established legal authority, this Court should affirm the Circuit Court of Randolph County's May 15, 2018, Order denying Petitioner's Rule 35 motion regarding credit for time served.[1]

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent includes the following additions and clarifications to Petitioner's Statement of the Case.

Edwin Taylor ("Petitioner") was arrested on September 16, 2016, on charges of (1) felony carrying a concealed firearm by a person prohibited from possessing a firearm; (2) misdemeanor possession of a firearm by person prohibited from possessing a firearm; and (3) misdemeanor possession of a controlled substance. (Appendix [App][2] 3-4; 16-17) These charges resulted in Magistrate Court Case Number 16-M42F-00194. (App 20) Petitioner was incarcerated on these charges from September 16, 2016, to September 28, 2016, when he was released on bond. (Transcript [Tr] 8)[3] That bond was never revoked during the course of the ensuing proceedings. (Tr 12) Thereafter, the February 2017 term of the Randolph County Grand Jury returned Circuit Court Case No. 17-F-14, a three-count indictment of Petitioner on the September 2016 charges.

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[1] Oral argument would not significantly aid the decisional process and therefore is not required in this case, as the facts and legal arguments are adequately presented in the briefs and appellate record. This matter is appropriate for resolution by memorandum decision.

[2] "Appendix" and "App" refer to the Appendix filed by Petitioner in this appeal.

[3] Petitioner included in the Appendix the transcript from the April 30, 2018, motions hearing. However, it is not consecutively paginated with the remainder of the Appendix. The State will thus referred to the transcript separately as "Tr" and cite the page numbers contained therein.

(App 3-5) Petitioner failed to appear for arraignment on March 6, 2017, a capias issued from magistrate court and he was later arraigned on March 16, 2017. (Tr 9-10)

On March 23, 2017, Petitioner was arrested on three new criminal charges: (1) grand larceny; (2) possession of a controlled substance; and (3) false information/interference with officer. (App 19) The grand larceny charge resulted in Magistrate Court Case No. 17-M42F-00254 and Circuit Court Case No. 17-B-86; the charges of possession and false information resulted in Magistrate Court Case No. 17-M42M-00566. (App 19-20; 39) Petitioner was unable to make bond on these charges and remained incarcerated thereon. (Tr 9-10)

On August 7, 2017,[4] Petitioner pled guilty to Count 1 of 17-F-14 for the offense of carrying a concealed firearm by a person prohibited from possessing a firearm. (App 6; 39) Pursuant to the plea agreement ("Agreement"), Petitioner also agreed to pay one thousand one hundred sixty nine dollars and eighty one cents ($1,169.81) as restitution in 17-B-86. (App 6-7) In exchange for Petitioner's plea of guilty, the State would dismiss Counts 2 and 3 of 17-F-14 as well as 17-B-86 and 17-M42M-00566. (App 6; 39) Although the Agreement was a universal plea resolving the criminal charges incurred in both September 2016 and March 2017, the Agreement itself was silent as to whether Petitioner would receive credit for time served on the charges from March 2017: 17-B-86 and 17-M42M-00566. (App 6-12; Tr 6-7)

Between the August 7, 2017, plea hearing and the October 10, 2017, sentencing hearing, the probation office prepared a Presentence Investigation Report ("PSI"), which reflected that Petitioner had been incarcerated 208 days. The PSI did not break down the days served on each

[4] Petitioner's Brief ("Petr. Br.") identifies the plea date as August 17, 2017. (Petr. Br. 4) However, the documents in the record reflect the plea hearing date as August 7, 2017. (App 6; 15; 19-20; 39; and 43)

charge. (App 15) According to the Inmate Time Sheet,[5] twelve of those days were served on the crime underlying Count 1 of 17-F-14. (Tr 7) At the October 10, 2017, sentencing hearing, the Circuit Court credited Petitioner with those twelve days of time served. Correspondingly, the Sentencing Order reflected twelve days credit. (App 44)

On March 15, 2018, Petitioner filed a Rule 35 motion seeking credit for additional time served.[6] (App 47) Specifically, Petitioner sought credit for the time served on the March 23, 2017, criminal charges. On April 30, 2018, the Circuit Court conducted a hearing on the motion. (Tr 1-15) Ultimately, the Circuit Court concluded Petitioner was not entitled to credit for time served from March 23, 2017, through October 10, 2017, in Case Nos. 17-B-86 and 17-M42M-00566 because those crimes were unrelated to the crime to which he pled guilty. (App 49; Tr 11; 12) Unsatisfied with this ruling, Petitioner appealed.

STANDARD OF REVIEW

This Court's three-pronged standard of review in an appeal from the denial of a motion made pursuant to W.Va. R. Crim. P. Rule 35 is as follows: the decision itself is reviewed 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 *de novo* review. *See,*

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[5]Based on the transcript of the Rule 35 motions hearing, it appears the jail time sheet was submitted as evidence. It was not, however, provided as part of Petitioner's Appendix in this appeal.

[6] Petitioner does not identify Rule 35 of the West Virginia Rules of Criminal Procedure as the rule governing either his Motion to Address Credit for Time Served (App 47) or his appeal. However, as this Court noted in its Scheduling Order, the issue in this appeal relates only to a Rule 35 motion to correct sentence. Rule 35(a) provides:

> (a) Correction of Sentence. 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.

e.g., Syl. Pt. 1, *State v. Tex B.S.*, 236 W.Va. 261, 778 S.E.2d 710 (2015); Syl. Pt. 1, *State v. Head,* 198 W.Va. 298, 480 S.E.2d 507 (1996).

ARGUMENT[7]

Petitioner's sole assignment of error asserts that the Circuit Court improperly denied him credit for time served between March 23, 2017, and October 10, 2017 in Case Nos. 17-B-86 and 17-M42M-00566. This claim is meritless, because that period of Petitioner's incarceration was on charges unrelated to the crime to which he pled guilty.

As an initial matter, this Court should decline to consider the issue raised in this appeal because it is not sufficiently briefed per the Rules of Appellate Procedure and the dictates of West Virginia jurisprudence. Rule 10 of the Rules of Appellate Procedure mandates that the brief must contain an argument exhibiting clearly the points of fact and law presented and citing the authorities relied on. W. Va. R. App. P. 10(c)(7)[2010]. Petitioner's brief does cite to the record; however, he offers no legal authority supporting his position and makes no legal argument based thereon. This Court has consistently held that issues presented for review but not supported with pertinent authority are not considered on appeal. *State v. Adkins*, 209 W.Va. 212, 544 S.E.2d 914 (2001); *Johnson v. Garlow,* 197 W.Va. 674, 478 S.E.2d 347 (1995)(holding that casual mention of issue in brief is cursory treatment insufficient to preserve issue on appeal). Thus, the Court should decline to review the matter. *Id.*

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[7] In addition to the matters set forth in this brief, "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 11, *State ex rel. Vernatter v. Warden, W. Virginia Penitentiary*, 207 W. Va. 11, 14, 528 S.E.2d 207, 210 (1999) (citing Syl. Pt. 3, *Barnett v. Wolfolk,* 149 W.Va. 246, 140 S.E.2d 466 (1965)).

Even if the Court decides to consider the issue, Petitioner's claim fails because he is not entitled to receive credit for time served on charges unrelated to those of which he is convicted. The statute addressing sentencing credit -West Virginia Code §61-11-24- states:

> Whenever any person is convicted of an offense in a court of this State having jurisdiction thereof, and sentenced to confinement in jail or the penitentiary of this State, or by a justice of the peace having jurisdiction of the offense, such person may, in the discretion of the court or justice, be given credit on any sentence imposed by such court or justice for the term of confinement spent in jail awaiting such trial and conviction.

W.Va. Code §61-11-24 (2014). Although the statute leaves it in the sentencing court's discretion whether to credit a defendant for time served prior to conviction, this Court's decision in *State v. Wears*, 222 W.Va. 439, 665 S.E.2d 273 (2008) establishes that a defendant is not entitled to credit toward his sentence for time served on charges unrelated to those of which he was convicted. In *State v. Wears*, the State voluntarily dismissed a defective indictment and subsequently indicted the defendant on the same charges of sexual assault and battery. After the voluntary dismissal and before the second indictment, the defendant remained incarcerated as a result of "other, unrelated charges." *Id.* at 444, 665 S.E.2d at 278. Wears was ultimately convicted of sexual assault and sought credit toward his sentence for time served on those unrelated charges. The lower court denied credit. On appeal, this Court upheld the circuit court's refusal to grant credit for time served on the unrelated charges, noting that "[a]ppellant should not be rewarded for his habitual criminal behavior. *See Echard v. Holland,* 177 W.Va. 138, 144, 351 S.E.2d 51, 57 (1986) (incarcerated defendant not entitled to credit for time served for offense committed after imposition of sentence on prior crime)." *Id.* at 445, 665 S.E.2d at 279. Thus, while a sentencing court may, in its discretion,

gift a defendant with time-served credit on unrelated charges, the sentencing court is by no means required to do so.[8]

Like in *Wears*, the sentencing court in the instant case gave Petitioner all the credit for time served to which he was entitled: twelve days. Petitioner pled guilty to Count 1 of 17-F-14. (App 6-12; Tr 7). Petitioner was incarcerated on that charge from September 16, 2016, to September 28, 2016, and he received credit toward his sentence for those twelve days. (App 44; Tr 7; 8). Nothing Petitioner adduced or argued at the motions hearing below altered this fact.

But Petitioner wants more than what he is entitled to by law; he wants to be rewarded for his habitual criminal behavior, and he seeks that reward via unsupportable assertions. Petitioner claims he was entitled to the additional time because the PSI showed 208 days of time served. (Petr. Br. 6) However, Petitioner offers no legal authority suggesting a probation officer's presentencing investigation report binds a sentencing court to its calculation of time served or trumps Inmate Time Sheets. Likely knowing no such authority exists, Petitioner attempts to bamboozle this Court by misrepresenting the prosecutor's statements during the motions hearing.

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[8] Since *Wears* was decided, numerous memorandum decisions have relied on its principles in limiting credit for time served on unrelated charges. *See State v. Williams*, No. 15-1009 at *2 (W. Va. Sept. 6, 2016) (Memorandum Decision) ("This Court has held that criminal defendants are not entitled to credit for time served on unrelated charges"); *State v. Greene*, No. 15-0402 at *4 (W. Va. June 21, 2016)(Memorandum Decision)(incarcerated defendant is not entitled to credit for time served on overlapping unrelated offenses); *State v. Bowers*, No. 13-0408 at *2 (W. Va. Jan. 17, 2014) (Memorandum Decision) ("Simply put, petitioner is not entitled to have time served credit applied to his current sentence for time spent incarcerated on unrelated charges."); *State v. Bragg*, No. 14-1248 at *5 (W. Va. Nov. 23, 2015) (Memorandum Decision) ("Despite petitioner's argument that he is entitled to time served regardless of his unrelated conviction, this Court has previously held that criminal defendants are not entitled to credit for time served in similar situations"); *State v. Wale*, No. 14-0276 at *2 (W. Va. May 18, 2015) (Memorandum Decision) (circuit court did not abuse its discretion in denying petitioner's motion for correction of sentence because petitioner sought to have credit for time served on unrelated charges applied to his current sentence); *State v. Rodeheaver*, No. 14-0270 at *2 (W. Va. May 18, 2015) (Memorandum Decision) ("This Court has held that criminal defendants are not entitled to credit for time served on unrelated charges.").

According to Petitioner's Brief, the prosecuting attorney told the Court that Petitioner should have been granted credit for time served in Case Nos. 17-B-86 and 17-M42M-00566 (Petr. Br. 7). What the transcript shows, however, is that the prosecuting attorney made no such statement. Instead, the prosecuting attorney informed the Court that the Agreement was a universal plea, that the State has in the past "indicated in the plea agreement that the State's not going to oppose credit for the additional time served...because it's a universal agreement," that the Agreement in Petitioner's case did not include that language, "[s]o essentially, it would be, I think, up to the Court as it relates to those additional days from March 23, 2017, to October 11, 2017." (Tr 7) And the Circuit Court, in its sound discretion, denied credit for that time.

Ultimately, the record in this case leaves no question Petitioner's arrest and ensuing incarceration on March 23, 2017, were on charges entirely unrelated to 17-F-14. (Tr 9-10)[9] Correspondingly, Petitioner is not entitled to credit for time served on those charges. *Wears*, 222 W.Va. 439, 665 S.E.2d 273. Therefore, although the Circuit Court *could* have gifted Petitioner with additional credit for time served in Case Nos. 17-B-86 and 17-M42M-00566, there was no legal requirement to do so.

For these reasons, the Circuit Court properly exercised its discretion in denying petitioner's Rule 35(a) motion, and it made no error of fact or law. This Court has explained that "[a]n appellant must carry the burden of showing error in the judgment of which he complains." Syl. Pt. 5, in part, *Skidmore v. Skidmore*, 225 W.Va. 235, 691 S.E.2d 830 (2010) (internal citations omitted); Syl. Pt.

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[9] Although Petitioner suggested at the motions hearing he was arrested on a capias in 17-F-14 (See Tr 9; 12; 13), the record demonstrates he was incarcerated from March 23, 2017, through October 10, 2017, exclusively on the new charges:

Court: "So on the 23rd of March, he wasn't arrested on a capias, he was arrested to satisfy a different element of criminal conduct?"

Probation Officer: Correct...

(Tr 10)

2, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973) (holding that "[o]n an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court."). Yet Petitioner here has not and cannot show error entitling him to appellate relief.

CONCLUSION

Petitioner has failed to demonstrate reversible error; the decision of the Circuit Court should be affirmed; and this appeal should be dismissed.

Respectfully Submitted,
STATE OF WEST VIRGINIA.
By counsel,

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