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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0777

STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,

v.

DAVID HIRAM WALKER.,
Defendant below,
Petitioner.

RESPONDENT'S SUMMARY RESPONSE

Appeal from an August 21, 2019 Order
Circuit Court of Preston County, West Virginia
Case No. 17-F-42

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RESPONDENT'S SUMMARY RESPONSE

Respondent, State of West Virginia by counsel, Karen C. Villanueva-Matkovich, Deputy Attorney General, responds to the Petitioner's Brief. The State contends that Petitioner's sentencing was correctly determined by the circuit court and asserts that Petitioner was correctly denied credit for time served while on home confinement as a condition of probation. For the reasons discussed below, this Court should affirm the August 21, 2019, Order of the Circuit Court of Preston County, West Virginia.

I. STATEMENT OF THE CASE[1]

Petitioner, having pled guilty to Grand Larceny by False Pretenses, was sentenced on July 27, 2018, to one to ten years in a state correctional facility for his conviction. (Appendix Record (A.R.) at 10). The circuit court suspended the sentence and imposed probation for a period of three years, requiring Petitioner to report twice a month. (A.R. at 11). The circuit court also ordered that as a condition of probation, Petitioner would serve his first year on home confinement. *Id.*

Petitioner's probation was revoked on June 19, 2019. (A.R. at 1). Subsequent to Petitioner's revocation hearing, Petitioner filed a Rule 35(a) motion to correct illegal sentence. *Id.* During the Rule 35(a) motion hearing, Petitioner argued that he should receive credit for time served for time he spent on home confinement, from August 27, 2018 to June 19, 2019. (A.R. at 59-60). Relying on *State v. Jedediah C.*, 240 W.Va. 534, 814 S.E.2d 197 (2018), Petitioner asserts that the home confinement imposed as condition of probation equates to an alternative sentence

[1] It should be noted that Petitioner references in his argument the Home Confinement Agreement and the Rules and Regulations of Probation. (A.R. at 75-77). These documents are not contained in the record. Pet'r Br. at 1, 12. Furthermore, Petitioner included these additional documents in his appendix which is not in accordance with Rule 7 of the W.Va. Rules of Appellate Procedure. Inclusion of these documents is still pending review by this Court. Petitioner filed on October 9, 2019, a motion to supplement the record on appeal. The State filed its objection on October 18, 2019.

and is penal in nature. A.R. at 62-65. Thus, the circuit court was required to recognize the time spent on home confinement under W.Va. Code §62-11B-9(b) as qualifying for credit for time served against Petitioner's underlying sentence of one to ten years. *Id.* The circuit court disagreed with Petitioner's interpretation and found that "West Virginia Code §62-11B-9(b)'s requirement that defendants receive credit for time served on home incarceration only applies when a defendant is ordered to serve the sentence on home incarceration as an alternative sentence to another form of incarceration, and that defendants are not entitled to credit for time served on home incarceration if the home incarceration is a condition of probation." A.R. at 2. The Petitioner received 76 days of credit for time served. *Id.* The circuit court denied granting 237 days of credit for time served while on home confinement as a condition of probation. *Id.* This appeal followed.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is unnecessary pursuant to Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure. First, "the dispositive issue or issues have been authoritatively decided" by this Honorable Court. W. Va. R.App.P. 18(a)(3). Second, "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." W. Va. R.App.P. 18(a)(4). As such, this matter is ripe for disposition via Memorandum Decision under Rule 21 of the West Virginia Rules of Appellate Procedure.

III. ARGUMENT

The Petitioner in this case is appealing the denial of his Rule 35(a) motion to correct illegal sentence. Petitioner contends the failure of the circuit court to interpret W.Va. Code §62-11B-9(b) to allow for credit for time served while on home confinement as a condition of probation was erroneous and results in a violation of double jeopardy under both the federal and state

constitutions. Petitioner's Brief (Pet'r Br.) at 3-4. As discussed below, Petitioner's assignment of error is without merit.

A. Standard of review

A circuit court's ruling on a Rule 35 motion is reviewed under a three-pronged standard of review. Syl. pt. 1, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (quoting Syl. pt. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996)). The lower court's ruling is examined under "an abuse of discretion standard," while the underlying facts are analyzed under a clearly erroneous standard. *Id.* Questions of law are reviewed *de novo*. *Id.* A circuit court's decisions regarding sentencing matters will not be disturbed "so long as the appellant's sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles." *Id.* at 722, 696 S.E.2d at 24 (quoting *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 469, 487 (1995)); *see also* Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Interpretation of a statute is reviewed *de novo*. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. Petitioner has received all the credit for time served to which he is entitled.

Petitioner asserts that he was denied credit for time served for the time he spent on home confinement as a condition of probation. Pet'r Br. at 1. Petitioner argues that home confinement as a condition of probation or as an alternative sentence to incarceration should be treated equally with regard to receiving credit for time served. Pet'r Br. at 7-8. Therefore, under W.Va. Code §62-11B-9(b), Petitioner claims that he should receive credit for time served while he was on home confinement as a condition of probation. Pet. Br. at 8. Petitioner is incorrect.

To that point, the statutory language in Article 11B, Chapter 62 of the West Virginia Code is clear. W.Va. Code §62-11B-4, in specifically addressing home confinement, states:

> (a) As a ***condition of probation or bail or as an alternative sentence to another form of incarceration*** for any criminal violation of this code over which a circuit court has jurisdiction, a circuit court may order an offender confined to the offender's home for a period of home incarceration. (emphasis added).

This Court has held that, "'[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.' Syllabus Point 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384, (1970)." Syl. Pt. 2, *State ex rel. Daye v. McBride*, 222 W.Va. 17, 658 S.E.2d 547 (2007). The code section cited above is clear and not open to interpretation concerning the imposition of home confinement as a condition of probation or as an alternative sentence to incarceration. W.Va. Code §62-11B-4 sets forth three different situations where the court has discretion to impose home confinement: (1) as a condition of probation, (2) as a condition of bail, or (3) as an alternative sentence to another form of incarceration.

There is no question that criminal defendants who remain in custody before they are convicted and have had a sentence imposed are entitled to credit against that sentence equal to the time they spent in custody. *See State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002); *State ex rel. Roach v. Dietrich*, 185 W. Va. 23, 404 S.E.2d 415 (1991); *Martin v. Leverette*, 161 W. Va. 547, 244 S.E.2d 39 (1978); *see also* W. Va. Code § 61-11-24. However, Petitioner's claim does not merit the same treatment. Home confinement as a condition of probation is not truly confinement or custody; it is merely a condition of probation. This Court, among others, have concluded that home confinement as a condition of probation is not imprisonment and is not synonymous with incarceration. *See State v. Lewis*, 195 W.Va. 282, 465 S.E.2d 384 (1995)(Under

the probation statute, home incarceration is not considered the same as actual confinement in a county jail; rather, home incarceration in the context of the probation statute is essentially analogous to probation.)

Credit for time served on home confinement is required under W.Va. Code §62-11B-9(b) when:

> "...there is reasonable cause to believe that a participant sentenced to home incarceration by the circuit court has violated the terms and conditions of the court's order of home incarceration and the participant's participation was imposed as an alternative sentence to another form of incarceration, the participant is subject to the same procedures involving confinement and revocation as would a probationer charged with a violation of the order of home incarceration. Any participant under an order of home incarceration is subject to the same penalty or penalties, upon the circuit court's finding of a violation of the order of home incarceration, as he or she could have received at the initial disposition hearing: Provided, That the participant shall receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration." (emphasis added).

This Court has held "'[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.' Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)." Syl. Pt. 2, *King v. West Virginia's Choice, Inc.*, 234 W.Va. 440, 766 S.E.2d 387 (2014); see also Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. Pt. 2, *Eggleton v. State Workmen's Comp. Comm'r*, 158 W.Va. 973, 214 S.E.2d 864 (1975) ("Where a statute is plain and unambiguous, a court has a duty to apply and not to construe its provisions).

Petitioner argues that the two sentences in W.Va. Code §62-11B-9(b) are to be read separately. Such a reading would result in the misapplication of the provision. It is clear that the sentences are to be read in conjunction with one another. The first sentence establishes that if a

participant who was placed on home incarceration as an alternative sentence violated the order, s/he would be subject to the same procedures involving revocation and confinement as *a probationer charged with a violation of the order of home incarceration.* Clearly, this sentence speaks directly to procedure in the case of a violation by a ***participant***, an individual who received home incarceration as an alternative sentence, not a ***probationer***. Furthermore, in the second sentence, the provision continues to refer to the participant. Petitioner erroroneously submits that the term "any" which precedes "participant" should be construed to modify and include all persons to whom home incarceration is imposed.

This Court has been guided by the principle espoused in *King v West Virginia's Choice, Inc.*, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." 234 W.Va. 440, 444, 766 S.E.2d 387, 391. The Legislature drew a distinction between those ordered to serve home incarceration as an alternative sentence, "participants," and those placed on home incarceration as a condition of probation, "probationers."

Here, Petitioner received a suspended sentence and was placed on probation for three years. (A.R. at 11). Petitioner was ordered to be on home confinement for the first year of probation. (A.R. at 11). Petitioner does not argue that his sentence fails to comport with the statute for Grand Larceny. Petitioner does not assert any claim that the circuit court abused its discretion or relied upon an impermissible factor in imposing his sentence. Nor does Petitioner question the revocation of his probation. However, Petitioner fails to recognize the difference between the imposition of home confinement as an alternative sentence to incarceration and home confinement as a condition of probation.

In accordance with W.Va. Code §62-11B-4, the court required home confinement as a condition of probation, not as an alternative sentence. At the hearing, the circuit court explained, based upon Petitioner testimony during sentencing:

THE COURT:	...the [c]ourt is going to suspend the execution of sentence and the [c]ourt is going to do as follows: the [c]ourt is going to put you on probation for a period of three years, all right?
THE DFENDANT:	Okay.
THE COURT:	As a ***condition of that probation***, the first year is going to be spent on home confinement, all right?
THE DEFENDANT:	Okay.
THE COURT:	And I know you've had some little hiccups with home confinement before--
THE DEFENDANT:	Yeah.
THE COURT:	--but, you know, it's—the [c]ourt believes in home confinement. All right?

(A.R. at 47-48)(emphasis added).

The record is clear that home confinement was imposed as a condition of probation. Nothing in the record points to Petitioner's home confinement imposed as an alternative sentence. The circuit court suspended Petitioner's sentence and placed the Petitioner on probation. (A.R. at 11). The circuit court did not impose home confinement as a substitute for Petitioner's confinement. The circuit court did not order Petitioner to serve his sentence on home confinement as an alternative to serving the sentence in the penitentiary.

Petitioner has failed to demonstrate that the circuit court imposed home confinement as an alternative sentence to incarceration. Petitioner is a probationer who violated his probation. Petitioner is entitled to no further credit. The circuit court did not abuse its discretion in denying Petitioner his requested relief, and, upon de novo review, this Honorable Court should not disturb the circuit court's ruling. Accordingly, Petitioner's claim that he has been denied credit for time served is entirely devoid of merit.

C. Petitioner has not been subjected to double jeopardy.

Petitioner raises a constitutional issue which exceeds the bounds of a Rule 35(a) challenge before the Court. Should the Court wish to address Petitioner's double jeopardy claim, Respondent asserts that Petitioner's claim is unfounded. Petitioner contends the denial of credit for good time regarding his time on home confinement while on probation equates to a second, unjust punishment. Pet'r Br. at 18-19. He argues that the court's action violates the double jeopardy protections under Article III, §5 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution. Pet'r Br. at 16. Petitioner is incorrect.

Petitioner attempts to shoehorn home confinement as a condition of probation into the constitutional prohibition of multiple punishments for the same offense. Such an argument is untenable. Petitioner's double jeopardy arguments have already been addressed by this Court in *Hargus* and *James*. Double jeopardy does not mean that there cannot be multiple punishments. *James*, 227 W. Va. at 420, 710 S.E.2d at 111 (finding that "it is well within the authority of the Legislature to intentionally prescribe multiple punishments for the same conduct"). "[T]he purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." Syl. Pt. 10, *James*, 227 W. Va. at 411, 710 S.E.2d at 102 (quoting Syl. Pt. 3, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996)). The strength of a double jeopardy claim is whether a defendant is facing multiple punishment for the same course of conduct. To determine if a particular statutory sanction constitutes punishment for double jeopardy purposes, courts should consider: (1) whether the statute serves solely a remedial purpose or serves to punish and deter criminal conduct and (2)

whether the Legislature tied the sanction to the commission of specific offenses. Syl. Pt. 4, *State v. Sears*, 196 W. Va. 71, 73, 468 S.E.2d 324, 326 (1996).

This Court has "recognized that probation is a privilege of conditional liberty bestowed upon a criminal defendant through the grace of the circuit court." *State v. Duke*, 200 W.Va. 356, 364, 489 S.E.2d 738, 746 (1997). Consequently, "[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).

The Legislature has bestowed upon the court discretion to impose probation if appropriate. W.Va. Code §62-12-3. See also State v. Simon, 132 W.Va. 322, 348, 52 S.E.2d 725, 738 (1949)(concluding that "the matter of suspending sentence or placing the defendant on probation was within the discretion of the trial court.) Moreover, the Legislature has extended the court's discretion to modify probation by allowing home confinement as a condition of probation. W. Va. Code §62-11B-1, et seq.

The circuit court made Petitioner's probation part of the original sentence. *See* W.Va. Code §62-11B-4. As such, probation should not be considered an additional penalty. An analogous analysis arises regarding extended supervised release. When it comes to extended supervision, the Legislature has made it part of the original sentence. *James*, 227 W. Va. at 420, 710 S.E.2d at 111. As such, the extended supervision is not an additional penalty, rather "it is part of a single sentencing scheme arising from the . . . original conviction." *Hargus*, 232 W. Va. at 743, 753 S.E.2d at 901.

The law articulated in *Hargus* and *James* is clear that there is one (1) sentence imposed that may include multiple penalties as part of one (1) sentencing scheme established by the Legislature. The sentence may include fines, incarceration, and even extended supervision.

Having multiple prongs to a sentence does not mean that the sentence violates double jeopardy. *See also United States v. Serrapio*, 754 F.3d 1312 (11th Cir. 2014)(The Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, in common parlance, be described as punishment; the Clause protects only against the imposition of multiple criminal punishments for the same offense, and then only when such occurs in successive proceedings. U.S.C.A. Const.Amend. 5.) Having multiple prongs to a sentence does not mean that the sentence violates double jeopardy.

Here, the probation ordered by the circuit court is analogous to extended supervised release. Probation, like extended supervised release, requires Petitioner to comply with various conditions such as restitution, treatment for substance abuse, and reporting requirements. Another similar aspect is that probation extends the time Petitioner is subject to the court's oversight. In contrast, however, probation occurs before Petitioner serves any time incarcerated in jail; whereas extended supervised release occurs after a period of incarceration. The circuit court, in this case, ordered additional conditions to Petitioner's probation. Petitioner was required to undergo an evaluation for mental health and substance abuse and undergo any recommended treatment. (A.R. at 48). Petitioner was ordered to report to his probation officer "at least twice a month". *Id.* These conditions of probation were "in addition to all the terms set forth in Preston County Probation Office's terms and conditions of probation". *Id.* The circuit court fashioned an appropriate sentence, given the facts presented in Petitioner's case.

The circuit court explained to Petitioner:

> "[T]he court believes in giving you this opportunity. The [c]ourt believes that the prior judge and the prosecutor and your attorney worked out a tremendous deal for you. I mean, it was a tremendous deal. You had a few hiccups, but based on the fact that was presented to the [c]ourt here today that you're a different person today, the [c]ourt is going to give you another chance."

(A.R. at 49). To the extent that Petitioner would be required to serve additional time incarcerated for a violation of the probation imposed, Petitioner would be serving his original sentence. Therefore, it is not a violation of Petitioner's double jeopardy rights. As such, Petitioner's claim should be denied and the decision of the circuit court to deny credit for good time for Petitioner's time spent on home confinement while on probation should be affirmed.

IV. CONCLUSION

Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests this Honorable Court to affirm the August 21, 2019, Order of the Circuit Court of Preston County, namely, denying Petitioner's Motion to Correct Illegal Sentence and finding that Petitioner is not entitled to credit for time served for the days spent on home confinement as a condition of probation.

Respectfully submitted,
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