IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA



STATE OF WEST VIRGINIA

VS.

KIRSTEN NICOLE WETZEL,

DEFENDANT.



CASE NO: 20-F-48
Judge: Shawn D. Nines

**AMENDED ORDER FOLLOWING MOTION HEARING**
(Denying Defendant's Motion to Clarify Sentence)

On the 9th day of March, 2022, came the State of West Virginia, by Thomas B. Hoxie, Prosecuting Attorney for Barbour County, West Virginia, and also came the Defendant, Kirsten Nicole Wetzel, in person and by counsel, Morris Davis, Esq., all for a hearing on Defendant's Motion to Correct Sentence. The Court previously issued an Order on or about July 1, 2022, thereafter, Defendant produced written objections to said Order. The Court now issues this Amended Order after considering said objections.

The Defendant previously entered a guilty plea to one misdemeanor count of Unlawful Taking of a Vehicle and was sentenced on July 30, 2021, to serve six months in jail, which was suspended and the Defendant was placed on unsupervised probation for one year, and the Court ordered that she must serve two-hundred and forty (240) hours of actual incarceration of that six-month sentence in the regional jail within six months from entry of the order. The Defendant was permitted to serve her sentence in increments being no less than twelve hours at a time.

The Defendant called Major Brian Clouser, Chief Correctional Officer, as a representative of the West Virginia Department of Corrections and Rehabilitation. Major Brian Clouser is employed at Tygart Valley Regional Jail. Major Brian Clouser produced copies of the Defendant's incarceration records for the Defendant's incarceration at Tygart Valley Regional Jail. Defense Counsel moved for the admission of the records, which the Court granted and ordered filed in the

court file. Major Brian Clouser testified that the Defendant has served a total of one-hundred and twenty (120) hours at the regional jail with no "good time" credit. Major Brian Clouser testified that the Defendant was not entitled to "good time" because the commitment order stated that she is to serve two-hundred and forty hours of actual incarceration of her six-month sentence. The Defendant was not a model inmate while at the regional jail, but did not have any violations that would prohibit her from receiving good time if she was entitled to it. Upon questioning by the Court, Major Brian Clouser testified that if an inmate entered the regional jail at 11:00 p.m. and left at 11:00 a.m. the next day, the inmate would be credited with serving two days even though the inmate only served twelve hours because the inmate was technically incarcerated on two different days.

The Court has reviewed the motion and in consideration of the testimony and proffers here today does make the following **FINDINGS OF FACT and CONCLUSIONS OF LAW**:

1. The Defendant was previously sentenced to two-hundred forty (240) hours of actual incarceration in the regional jail as part of her misdemeanor sentence for Unlawfully Taking a Vehicle.

2. West Virginia Code § 15A-4-17 Deduction from sentence for good conduct; mandatory supervision provides:

> (a) All adult inmates placed in the custody of the Commissioner of the Division of Corrections and Rehabilitation pursuant to a term of court-ordered incarceration for a misdemeanor or felony, 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: Provided, That nothing in this section shall be considered to recalculate the "good time" of inmates currently serving a sentence or of giving back good time to inmates who have previously lost good time earned for a disciplinary violation: Provided, however, That as of the effective date of the amendments to this section enacted during the regular session of the Legislature, 2021, an inmate who had good time calculated into his or her release date prior to October 21, 2020, is entitled to the benefit of the good time awarded or earned before that date, unless the good time was lost due to a disciplinary violation.

(b) The 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.

(c) 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, including any and all days in jail awaiting sentence which are credited by the sentencing court to his or her sentence pursuant to § 61-11-24 of this code, or for any other reason relating to the commitment. An inmate may not be granted any good time for time served either on parole or bond or in any other status when he or she is not physically incarcerated.

(d) An inmate sentenced to serve a life sentence is not eligible to earn or receive any good time pursuant to this section.

(e) An eligible inmate under two or more consecutive sentences shall be allowed good time as if the several sentences, when the maximum terms of the consecutive sentences are added together, were all one sentence.

(f) The commissioner shall promulgate disciplinary rules and policies. The rules and policies shall describe acts that inmates are prohibited from committing, procedures for charging individual inmates for violation of the rules, and for determining the guilt or innocence of inmates charged with the violations, and the sanctions which may be imposed for the violations. A copy of the rules shall be given to each inmate. For each violation any part or all of the good time which has been granted to the inmate pursuant to this section may be forfeited and revoked by the superintendent of the institution in which the violation occurred. The superintendent, when appropriate and with approval of the commissioner, may restore any forfeited good time.

(g) Each inmate, upon his or her commitment to, and being placed into the custody of, the commissioner, or upon his or her return to custody as the result of violation of parole under § 62-12-19 of this code, or supervised release under § 62-12-26 of this code shall be given a statement setting forth the term or length of his or her sentence or sentences and the time of his or her minimum discharge computed according to this section.

(h) Each inmate shall be given a revision of the statement described in subsection (g) of this section when any part or all of the good time has been forfeited and revoked or restored pursuant to subsection (f) of this section, by which the time of his or her earliest discharge is changed.

(i)(1) An eligible inmate may receive extra good time in the sole discretion of the commissioner for meritorious service or performing extra assigned duties during emergencies; and

(2) In addition to the good time granted under subsection (c) of this section and that authorized by subdivision (1) of this subsection, an eligible inmate serving a felony sentence may receive up to 90 days good time per program for successfully completing an approved, but not required, academic or vocational program, which is not part of the inmate's required individualized reentry programing plan. The commissioner shall adopt a written policy to effectuate the purposes of this subsection.

(j) There shall be no grants or accumulations of good time or credit to any inmate serving a sentence in the custody of the Division of Corrections and Rehabilitation except in the manner provided in this section.

(k) Prior to the calculated discharge date of an inmate serving a sentence for a felony crime of violence against the person, a felony offense where the victim was a minor child, or a felony offense involving the use of a firearm, one year shall be deducted from the inmate's accumulated good time to provide for one year of mandatory post-release supervision following the first instance in which the inmate reaches his or her calculated discharge date. All inmates released pursuant to this subsection are subject to electronic or GPS monitoring for the entire period of supervision. The provisions of this subsection are applicable to offenses committed on or after July 1, 2013.

(l) Upon sentencing of an inmate for a felony offense not referenced in subsection (k) of this section, the court may order that 180 days of the sentence, or some lesser period, be served through post-release mandatory supervision if the court determines supervision is appropriate and in the best interest of justice, rehabilitation, and public safety. All inmates released pursuant to this subsection are subject to electronic or GPS monitoring for the entire period of supervision. The provisions of this subsection are applicable to offenses committed on or after July 1, 2013.

(m) The commissioner shall adopt policies and procedures to implement the mandatory supervision provided for in subsections (k) and (l) of this section which may include terms, conditions, and procedures for supervision, modification, and violation applicable to persons on parole.

(n) As used in this section, "felony crime of violence against the person" means felony offenses set forth in § 61-2-1 et seq., § 61-3E-1 et seq., § 61-8B-1 et seq., or § 61-8D-1 et seq. of this code, and the felony offenses of arson and burglary of a residence where an individual is physically located at the time of the offense as set forth in § 61-3-1 et seq. of this code.

(o) As used in this section, "felony offense where the victim was a minor child" means any felony crime of violence against the person and any felony offense set forth in § 61-8-1 et seq., § 61-8A-1 et seq., § 61-8C-1 et seq., or § 61-8D-1 et seq. of this code.

(p) The Division of Corrections and Rehabilitation, its commissioner, employees, agents, and assigns, shall be granted absolute immunity from liability from any claims or actions of any person serving, or who has served, a term of incarceration pursuant to § 62-12-26

of this code, for any matter or claim arising out of good time calculations or awards which may or may not have been awarded, given, removed, or taken which caused a person to be reincarcerated or to increase the expected term of his or her incarceration, which calculation, award, removal, taking, or reincarceration occurred prior to the effective date of the amendments to this section enacted during the regular session of the Legislature, 2021.

3. The West Virginia Supreme Court of Appeals has found: "As this Court recognized in Syllabus Point 6 of *State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783, a defendant is constitutionally entitled to credit for time served. **However, a defendant is not constitutionally entitled to good time credit. Rather, pursuant to W. Va. Code § 28–5–27(f), the award of good time credit is at the discretion of the warden.** Thus, this Court's prior statement that the Legislature must have intended to harmonize the application of these two very distinct aspects of calculating a sentence was simply incorrect." *State v. Eilola*, 226 W.Va. 698, 707, 704 S.E.2d 698, 707 (2010). (*Emphasis added.*)

4. Under West Virginia Code § 15A-4-17 section f, this Court has no discretion in the calculation of good time as the calculation and process is left to the Department of Corrections and Rehabilitation. The Court did previously consider that the Legislature amended the Code relating to good time after the opinion issued in *State v. Eilola*, 226 W.Va. 698 (2010); however, based on Defendant's objections, it is clear that further explanation is necessary. The amendments to the code relating to good time essentially (1) made good time a statutory right, and (2) mandated that the DOCR establish 'process' before good time can be denied (i.e. taken away/forfeited/sanctioned). More specifically as to the newly added procedures, the Legislature has given the commissioner the duty to promulgate disciplinary rules and policies under the code. The rules and policies they set shall describe acts that inmates are prohibited from committing, procedures for charging individual inmates for violation of the rules, and for determining the guilt or innocence of inmates charged with the violations, and the sanctions which may be imposed for

the violations. A copy of the rules is required under the rules and policies to be given to each inmate. For each violation any part or all of the good time which has been granted to the inmate pursuant to this section may be forfeited and revoked by the superintendent of the institution in which the violation occurred. The superintendent, when appropriate and with approval of the commissioner, may restore any forfeited good time as set forth under the Code section.

What has remained the same, is the discretion that is given to the DOCR, The DOCR was charged with developing the added 'process' by setting up the disciplinary procedure, setting the sanctioning behaviors/violations, setting the amount of sanctions, etc; the DOCR still determines when and even if to institute disciplinary procedures in any particular case. It also remains that DOCR actually calculates the good time days, based on their policies. The DOCR even has the discretion to restore forfeited good time. In fact, this case may demonstrate that exact discretion, wherein a sentence set forth in hours is not given good time; the DOCR makes that determination through its policies, not the Circuit. The Circuit Court under the old Code and under the new Code does not have authority over good time.

5. The Court's sentence did not order/prohibit the Defendant to be denied good time; The sentence, as is always done, did not address the issues of good time.

6. The Defendant's motion effectively requests that the Court order the West Virginia Division of Corrections and Rehabilitation award her "good time," whether directly or by modifying the sentence.

7. The Court will not establish a policy of ordering the West Virginia Division of Corrections and Rehabilitation to award or not award "good time" to any inmate. The issue of good time, awarding, denying or calculating it, has historically been in the discretion of the West Virginia Division of Corrections and Rehabilitation. Any defendant can file a civil action against

the West Virginia Division of Corrections and Rehabilitation if that defendant believes they are being denied "good time" or being unlawfully confined. The issue at bar is much more akin to a habeas proceeding based on conditions of confinement, wherein the proper parties are the warden and the defendant and the proper venue is the location of incarceration[1].

8. Just as this Court would never explicitly order any defendant be denied good time, it likewise is very hesitant to order the West Virginia Division of Corrections and Rehabilitation to grant good time. A practice of ordering West Virginia Division of Corrections and Rehabilitation to grant good time in the sentencing circuit, whether explicitly or by amending a sentence under West Virginia Rules of Criminal Procedure Rule 35(a) or Rule 35(b), would inevitably result in every denial or dispute of good time being brought back before the sentencing circuit for correction or amendment.

9. The Court is not prohibiting the Defendant from receiving "good time" nor is it directing the West Virginia Division of Corrections and Rehabilitation to deny her "good time." Likewise it is not ordering the West Virginia Division of Corrections and Rehabilitation to grant Defendant good time; rather the Court defers to the West Virginia Division of Corrections and Rehabilitation on whether it determines Defendant is entitled to "good time" under the laws of West Virginia.

10. If the Defendant believes she should be receiving credit for "good time," then the Defendant should file a civil action against the West Virginia Division of Corrections and Rehabilitation.

[1] The Court notes in response to Defendant's objections that Rule 3(a) explicitly provides for and in practice results in the transfer of a habeas petitions **based on conditions of confinement** to the Circuit wherein a defendant is incarcerated Moreover, the Court clearly uses this as an analogy rather than directing a habeas action be filed

11. The Court's sentence of two-hundred forty (240) hours of actual incarceration is a just and fair sentence, and the Court sees no error in that sentence that needs corrected or clarified.

12. The Defendant's original Sentence Order required the Defendant to serve ten (10) days of actual incarceration. The Court changed that order because the Court had allowed the Defendant to serve her sentence as she saw fit in time frames no less than twelve hours and over the course of six months. A situation could arise where a Defendant could enter the regional jail at 11:00 p.m. and leave at 11:00 a.m. the next day and receive credit for serving two days, when in fact the Defendant served only half a day. For this reason, the Court modified the order from serving ten days of actual incarceration to two-hundred forty hours of actual incarceration.

13. Defendant was previously sentenced to serve six months in jail, which sentence was suspended and the Defendant placed on unsupervised probation for one year. The Court thereupon also ordered the Defendant must serve two-hundred and forty (240) hours of actual incarceration of that six-month sentence in the regional jail within six months from entry of the Sentencing Order. The Court now determines the Sentencing Order does not need to be corrected, changed, or clarified further.

14. The original commitment order as described above is correct and does not need to be modified or changed.

In so far as Defendant's motion requests the original sentence be changed or clarified further, the Court **DENIES** the Defendant's motion. The Court notes the Defendant's objections for the record.

At the hearing, the Defendant requested additional time to review her legal options. The Court **GRANTED** her request and **ORDERED** that this matter be set for any additional hearings after three months to allow the Defendant time to challenge the West Virginia Division of

Corrections and Rehabilitation's decision. The period of three months has now expired with no notice from Defendant of any filing involving the West Virginia Division of Corrections and Rehabilitation. The Court **FINDS/CONCLUDES** no additional hearings are needed. As such, the Court now issues this final written Order, officially making the findings/conclusions therein; the Court **ORDERS** Defendant finish serving any outstanding time remaining on her sentence within two (2) months from entry date of this Order.[2]

It is further **ORDERED** that the Circuit Clerk shall send certified copies of this Order to the following: Thomas B. Hoxie, Esq.; Morris Davis, Esq.; Probation Office; Superintendent Bryan Lanham at Tygart Valley Regional Jail; and the West Virginia Division of Corrections and Rehabilitation (1409 Greenbrier Street, Charleston, WV 25311).

ENTER: 07-15-2022

Shawn D. Nines

**SHAWN D. NINES, JUDGE**

[2] Which this Court believes again affords more time for Defendant to file against the West Virginia Division of Corrections and Rehabilitation if she deems appropriate.