IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Supreme Court No.:23-277
Case No. 22-F-164
Circuit Court of Raleigh County

CORBETT MAURICE CARTER,

Defendant Below, Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

To be guilty of "escape," a person must 1) escape from lawful custody, or 2) escape from a lawful "alternative sentence confinement." Petitioner, who had received pre-trial bond with a home confinement condition, removed his ankle monitor and absconded.

Did Petitioner "escape" when 1) his bond released him from custody pending trial and 2) he was not serving an "alternative sentence confinement[?]"

STATEMENT OF THE CASE

A Raleigh County jury convicted Petitioner of felony escape in violation of W. Va. Code § 61-5-10.[1] Petitioner does not dispute the basic facts. The issue is whether violating home confinement, when it is a condition of pre-trial bond, implicates the escape statute.[2] Petitioner appeals because it does not. Therefore, the evidence is insufficient to sustain his conviction.

The State charged Petitioner with first-degree robbery and placed him on bond with electric monitoring.[3] Prior to the robbery trial,[4] the Home Confinement Office received an alert that Petitioner left his home without permission.[5] Later that evening, the police recovered the bracelet from a dumpster outside of the Little General in Johnstown.[6] Police later arrested Petitioner.[7]

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[1] A.R. 207.
[2] A.R. 145.
[3] A.R. 20.
[4] Here, Petitioner only appeals the escape conviction. He does not challenge anything related to the robbery.
[5] A.R. 138.
[6] *Id*.
[7] A.R. 139.

The State prosecuted Petitioner for felony escape from custody.[8] During the trial, Petitioner made a general motion for judgment of acquittal.[9] The court denied the motion, and the jury convicted Petitioner.[10]

SUMMARY OF THE ARGUMENT

Petitioner was released pre-trial on home confinement.[11] At that point, Petitioner had not been convicted of a felony and had not become an offender.[12] Moreover, Petitioner was not earning any credit for time served. Accordingly, when Petitioner absconded, his conduct did not amount to an escape.

To violate W. Va. Code § 61-5-10, one must be in custody.[13] Pre-trial bond is a *release* from custody[14]. When the legislature amended the escape statute to account for the Home Confinement Act, it explicitly limited its coverage to *post*-conviction home confinement.

This Court's precedent is clear: no matter how stringent the conditions, pre-trial home confinement is a release from custody and not the same as incarceration. When Petitioner absconded, no doubt he violated his bond, and he may be treated accordingly. But as a matter of law, violating pre-trial home confinement is not an escape.

STATEMENT REGARDING ORAL ARGUMENT

The Court has not, on the merits, decided whether West Virginia's escape statute applies to those who abscond from pre-trial home confinement issued as a bond requirement.[15] With the growth of home confinement, this issue has only grown more relevant, yet remains unresolved.

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[8] A.R. 116.
[9] A.R. 145, A.R. 207.
[10] *Id*.
[11] A.R. 221, *See* State's Exhibit 1.
[12] A.R. 214.
[13] *See* W. Va. Code § 61-5-10.
[14] W. Va. R. Crim. P. Rule 46.
[15] *See State v. McGill*, 230 W. Va. 85, 86, 736 S.E.2d 85, 86 (2012).

This Court has made clear pre-trial home confinement, which serves as a *release* from custody, is qualitatively different from a post-conviction sentence to home confinement, which serves as incarceration.[16] The legislature, also, distinguishes the two.[17]

Alarmingly, the personnel who implement home confinement do not uniformly embrace this distinction. The Raleigh County Sheriff's office gives the same warning to all home confinement participants whether they are on bond or serving a sentence.[18] The Court can use this case to resolve this issue and ensure that on-the-ground enforcement of home confinement matches what the legislature intended, and the Court has explained.

Petitioner therefore requests a Rule 20 argument and a signed opinion.

ARGUMENT

The Due Process Clause of the United States and West Virginia Constitutions ensure that a defendant must be convicted of a crime with sufficient evidence.[19] "[T]hat no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."[20] The standard for sufficiency of the evidence is whether, "…after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[21]

The elements of an offense and whether there is sufficient evidence to support a conviction based on those elements are legal questions this Court review *de novo*.[22]

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[16] *See State v. Hughes,* 197 W. Va. 518, 528, 476 S.E.2d 189, 199 (1996)*; State v. McGuire*, 207 W. Va. 459, 461, 533 S.E.2d 685, 687 (2000); and *State v. Jedediah C.,* 240 W. Va. 534, 814 S.E.2d 197 (2018).
[17] W. Va. Code § 62-11B-4.
[18] A.R. 224.
[19] U.S. Const. amend. XIV; W. Va. Const. art. III, § 10; *see also Jackson v. Virginia*, 443 U.S. 307, 316 (1979).
[20] *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979).
[21] *Id*.
[22] See Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995).

Absconding from pre-trial home confinement violates a bond condition but cannot be an escape as a matter of law.

This case turns on the language of the felony escape statute, West Virginia Code § 61-5-10. This Court has determined that legislative intent is the guidepost and goal of statutory interpretation.[23] In *State v. Woodrum*,[24] this Court provided the test for statutory interpretation. First, the court determines whether the language of a statute is clear or ambiguous.[25] "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."[26] When interpreting a clear statute, the words in the statute are given "their ordinary acceptance and significance and the meaning commonly attributed to them" to preserve the Legislature's intent.[27] "A statute is ambiguous only if it is 'susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.'"[28] An ambiguous statute must be construed prior to being applied.[29]

The escape statute is not ambiguous and when applied to this matter, there is insufficient evidence to uphold Petitioner's felony escape conviction. Bond is a release from custody. Further, the legislature's amendment to the Home Confinement Act demonstrates its desire to specifically target post-conviction home confinement.

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[23] *See State ex rel. Morrisey v. Diocese of Wheeling-Charleston*, 244 W. Va. 92, 96, 851 S.E.2d 755, 759 (2020).
[24] *See State v. Woodrum*, 243 W. Va. 503, 845 S.E.2d 278 (2020).
[25] *See State v. Woodrum*, 243 W. Va. 503, 509, 845 S.E.2d 278, 284 (2020).
[26] *See* Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951); *State v. Woodrum*, 243 W. Va. 503, 509, 845 S.E.2d 278, 284 (2020).
[27] See *Mace v. Mylan Pharm., Inc.*, 227 W. Va. 666, 673, 714 S.E.2d 223, 230 (2011) (finding W. Va. Code § 56-1-1a(a) and (c) to be ambiguous) (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949)); *State v. Woodrum*, 243 W. Va. 503, 509, 845 S.E.2d 278, 284 (2020).
[28] *State v. Woodrum*, 243 W. Va. 503, 509, 845 S.E.2d 278, 284 (2020).
[29] *Id*.

The legislature and this Court both strictly distinguish pre- and post-conviction home confinement, and Petitioner asks the Court to ensure uniform, on-the-ground, respect for that distinction. Absconding from pre-trial home confinement may violate bond, but only post-conviction home confinement sentences are sufficiently incarcerative to trigger the escape statute.

1. **Petitioner cannot be guilty of escape because he was not in "custody" or subject to an "alternative sentence confinement."**

The magistrate court below released Petitioner from custody.[30] Petitioner had no conviction or sentence for his underlying robbery charge at the time of the trial below.[31] This Court must look to the escape statute to determine the meaning of "custody" and "alternative sentence confinement." The language of W. Va. Code § 61-5-10 provides that:

> Whoever escapes or attempts to escape by any means from the custody of a county sheriff, the director of the Regional Jail Authority, an authorized representative of said persons, a law-enforcement officer, probation officer, employee of the Division of Corrections, court bailiff, or from any institution, facility, or any alternative *sentence* confinement, by which he or she is lawfully confined, if the custody or confinement is by virtue of a charge or conviction for a felony, is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not more than five years; and if the custody or confinement is by virtue of a charge or conviction for a misdemeanor, is guilty of a misdemeanor and, upon conviction thereof, he or she shall be confined in a county or regional jail for not more than one year.[32] [Emphasis added].

Home confinement is not "custody" because Petitioner is released on pre-trial bond. Moreover, because it is "pre-trial," Petitioner has yet to be found guilty of a felony and has not yet incurred a "conviction."

[30] A.R. 124.
[31] A.R. 157.
[32] W. Va. Code § 61-5-10.

In accordance with Black's Law Dictionary, "[t]he effect on bail bond is to transfer the custody of the defendant from the officers of the law to the surety on the bail bond, whose undertaking is to redeliver the defendant to the legal custody at the time and place appointed in the bond."[33] Pre-trial bail is not punitive but "security for the appearance of a defendant to answer to a specific criminal charge before any court or magistrate at a specific time or at any time to which the case may be continued."[34] Here, albeit with electronic monitoring, Petitioner posted bond and was himself responsible for attending hearings.[35] It would be absurd to suggest he escaped from his *own* custody.

The magistrate granted Petitioner bond.[36] Bond is the release of a defendant from the custody of law enforcement while awaiting trial.[37] Simply put, after being released from custody, one cannot escape from custody.

2. **The legislature amended the Home Incarceration Act to ensure that defendants can only be guilty of escape from post-conviction home confinement.**

The Home Incarceration Act states that when a court has jurisdiction over a defendant, the court may release the defendant on home confinement as a condition of bail.[38] The legislature's intent is to distinguish post-conviction home incarceration from pre-conviction home confinement as a condition of bail or bond. The statute consistently distinguishes post-conviction incarceration from home incarceration as a condition of bail: "condition of probation or bail or as an alternative sentence to another form of incarceration."[39]

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[33] *Black's Law Dictionary*, 218 (West, 11th Ed. 2019).
[34] *State v. Hughes*, 197 W. Va. 518, 527–28, 476 S.E.2d 189, 198–99 (1996).
[35] A.R. 221-223.
[36] A.R. 124.
[37] W. Va. Code § 62-1C-1 *et. seq.*
[38] W. Va. Code § 62-11B-4.
[39] *Id*.

In 2005, the Legislature amended the Act to further clarify the distinction between pre-trial and post-conviction home incarceration. Subsection (d) of the Home Incarceration Act provides as follows: "When imposing home incarceration as a condition of bail, a magistrate shall do so consistent with guidelines promulgated by the Supreme Court of Appeals."[40] The use of "or" and amendment of the statute shows the Legislature's intent to distinguish home incarceration post-conviction from pre-conviction as a condition of bond.

Furthermore, the statute's definitions make the legislature's intent clear. The statute defines "offender" as "any adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary; or a juvenile convicted of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult."[41] The definition distinguishes a defendant released on pre-trial bond from a defendant that has been convicted of an offense. As applied to the escape statute, Petitioner cannot be guilty of felony escape because he is not in custody.

Therefore, Petitioner cannot be guilty of felony escape because home confinement as a condition of pre-trial release on bond is not an "alternative *sentence* confinement." [Emphasis added]. "Alternative sentence confinement" is an unambiguous phrase. When there is an unambiguous phrase in a statute, the Court applies the ordinary and commonly associated meaning.[42] Accordingly, "sentence" means "[t]he judgment that a court

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[40] W. Va. Code § 62-11B-4.
[41] W. Va. Code § 62–11B–3.
[42] *See Mace v. Mylan Pharm., Inc.*, 227 W. Va. 666, 673, 714 S.E.2d 223, 230 (2011) (finding W. Va. Code § 56-1-1a(a) and (c) to be ambiguous) (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949)); *State v. Woodrum*, 243 W. Va. 503, 509, 845 S.E.2d 278, 284 (2020).

formally pronounces after finding a criminal defendant guilty;"[43] "alternative" means "different from the usual or conventional;"[44] "confinement" is "[t]he act of imprisoning or restraining someone."[45] Taken together, "alternative sentence confinement" means a final judgment issued that results in the defendant's conviction and an unusual or unconventional imprisonment imposed upon the defendant. It has no application to any pre-trial conditions.

3. This Court has consistently distinguished pre-conviction home confinement as non-incarcerative because pre-trial, defendants are not offenders within the State's custody.

The Court has harmoniously applied the legislature's distinction of home confinement as a condition of pre-trial bond and post-conviction sentence in crediting time served.[46] The Court has consistently distinguished pre-trial home confinement as not being sufficiently incarcerative to require credit for time served.[47] "[P]ursuant to West Virginia Code § 62–1C–2(c), the home confinement restriction is not considered the same as actual confinement in a jail, nor is it considered the same as home confinement under the [Home Confinement] Act."[48]

In *Hughes*, the Court determined the petitioner was not an "offender" as he was released on pre-trial bail.[49] A person convicted of a crime qualifies as an "offender."[50]

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[43] *Black's Law Dictionary*, 1636 (West, 11th Ed. 2019).
[44] Meriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/alternative (last accessed Aug. 16, 2023).
[45] *Black's Law Dictionary*, 373 (West 11th Ed. 2019).
[46] *See State v. Hughes,* 197 W. Va. 518, 528, 476 S.E.2d 189, 199 (1996)*; State v. McGuire*, 207 W. Va. 459, 461, 533 S.E.2d 685, 687 (2000); and *State v. Jedediah C.,* 240 W. Va. 534, 814 S.E.2d 197 (2018).
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *State v. Hughes,* 197 W. Va. 518, 528, 476 S.E.2d 189, 199 (1996).

Furthermore, the Court opined since the lower court released him on pre-trial bail, he was not subject to the "numerous restrictive burdens" the Act intended offenders to be subjected to under post-conviction home confinement.[51]

Even when the conditions of pre-trial home confinement are as stringent as post-conviction home confinement, this Court determined that there is no entitlement for credit for time served.[52] In *McGuire*, the circuit court order provided Petitioner to be electronically monitored, administered by a Probation officer, and Petitioner could only leave her house for approved activities.[53] This Court determined that stringent conditions are proper because the purpose of bail is to "secure the appearance of a defendant to answer to a specific criminal charge."[54]

As a matter of law, Petitioner did not and could not commit felony escape. While awaiting trial for first-degree robbery, the magistrate court released Petitioner on home confinement as a condition of pre-trial bond.[55] While awaiting trial, Petitioner absconded by cutting off his ankle monitor. The State improperly charged Petitioner with felony escape because Petitioner is not an "offender" under the Home Confinement Act.

This Court has consistently distinguished home confinement as a condition of pre-trial bond and post-conviction home confinement. In applying this Court's logic, Petitioner does not qualify as an "offender" because a jury had not convicted Petitioner of the underlying offense at the time he absconded from bond.[56] Previously, the Court held that it is within the discretion of lower courts to issue restrictions upon defendants that ensure

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[51] *State v. Hughes,* 197 W. Va. 518, 528, 476 S.E.2d 189, 199 (1996).
[52] *See State v. McGuire*, 207 W. Va. 459, 461, 533 S.E.2d 685, 687 (2000); *See also State v. Jedediah C.,* 240 W. Va. 534, 814 S.E.2d 197 (2018).
[53] *State v. McGuire*, 207 W. Va. 459, 461, 533 S.E.2d 685, 687 (2000).
[54] *Id*.
[55] A.R. 157.
[56] A.R. 207.

that defendants appear for hearings while released on bond.[57] Conditions of bond may be stringent, however, home confinement as a condition of pre-trial bond does not constitute incarceration, no matter the restrictions.[58] In keeping with precedent of this Court, Petitioner did not escape because he was not in custody.

CONCLUSION

This Court and legislature are in harmony with regards to the distinction between home confinement as a condition of bond and home confinement as an alternative sentence confinement. Bond releases a defendant from custody. The magistrate court released Petitioner from custody and Petitioner absconded. When drafting the escape statute, the legislature did not intend to subject those released from custody to the escape statute as demonstrated by the Home Incarceration Act.

Respectfully Submitted,
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[57] *State v. McGuire*, 207 W. Va. 459, 461, 533 S.E.2d 685, 687 (2000).
[58] *State v. Jedediah C.,* 240 W. Va. 534, 814 S.E.2d 197 (2018).