

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Respondent herein;

v.

CARLI RENAE REED,

**Defendant Below;
Petitioner herein.**

**Case No. 24-341
Criminal Action No. 23-F-74 (Taylor County)
The Honorable Shawn D. Nines**

REPLY BRIEF OF PETITIONER CARLI RENAE REED

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Comes now the Petitioner, Carli R. Reed, by and through her counsel, Hunter B. Mullens, C. Brian Matko and Matthew L. Ervin of Mullens & Mullens, PLLC, and, pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, submits the following as the Petitioner's Reply Brief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner reiterates the need for oral argument in this case. This appeal involves issues involving assignments of error in the application of settled law and an unsustainable exercise of discretion by the trial court where the law governing that discretion is settled. As such, the Petitioner asserts that this appeal is appropriate for a Rule 19 argument.

REPLY ARGUMENT

I. Failure to provide Ms. Reed with credit for time served while on post-conviction home incarceration violated the Double Jeopardy and Equal Protection provisions of the West Virginia Constitution.

In its response, the State of West Virginia relies upon this Court's holding in *State v. Jedediah C.*, 240 W.Va. 534, 814 S.E. 2d 197 (2018) to argue that Ms. Reed is not entitled to credit for time spent on post-conviction home incarceration. However, the underlying facts and issues in *Jedediah C.* are different than the facts and issues present in the instant case, and are easily distinguishable from Ms. Reed's case. As such, the State of West Virginia's reliance upon *State v. Jedediah C.* is misplaced.

In *State v. Jedediah C.*, *supra.*, the Petitioner appealed the trial court's failure to credit Petitioner's time spent on pretrial bail pre-conviction. In that case, once the Petitioner was convicted, he sought to remain on home incarceration until sentencing. However, the trial court

denied the Petitioner's request and remanded Petitioner to jail pending sentencing. On appeal, the Petitioner sought credit for time spent on home incarceration prior to this conviction. In denying the Petitioner's appeal, the Court recognized its previous holding in *State v. Hughes*, that the West Virginia Home Incarceration Act¹ applies only to post-conviction situations and is penal in nature. The Court held:

[w]hen a person who has been arrested, but not yet convicted of a crime, is *admitted to pre-trial bail* with the condition that he be restricted to home confinement pursuant to West Virginia Code § 62-1C-2(c) (1992), *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, West Virginia Code §§ 62-11B-1 to -12* (1993). Therefore, *the time spent in home confinement when it is a condition of bail under West Virginia Code § 62-1C-2(c) does not count as credit toward a sentence subsequently imposed.*

See *State v. Jedediah C.*, 240 W.Va. at 538, 814 S.E. 2d at 201, *citing* Syl. Pt. 4, *State v. Hughes*, 197 W.Va. 518, 476 S.E. 2d 189 (1996).

The Court further recognized that the Home Incarceration Act only applies to "offenders," which are defined in the Act 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," and that the penal intent of the Act is reflected by the substantial restrictions enumerated in W.Va. Code § 62-11B-5 that are placed on the offender. See *State v. Jedediah C.*, 240 W.Va. at 537-538, 814 S.E. 2d at 200-201 *citing* *State v. Hughes*, 197 W.Va. at 527, 476 S.E. 2d at 198.

¹ In 1994, the West Virginia Legislature amended the Act and changed its name from the Home Confinement Act to the Home Incarceration Act.

In *State v. Hughes*, this Court examined the differences between home incarceration imposed as a condition of bail and post-conviction home incarceration. This Court, in describing home incarceration imposed as a condition of bail stated "the purpose of *pre-trial bail* is not to punish, but rather it acts as '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.'" *State v. Hughes*, 197 W.Va. at 528, 476 S.E. 2d at 199 *citing* W. Va. Code § 62-1C-2; *see State ex rel. Ghiz v. Johnson*, 155 W. Va. 186, 189, 183 S.E.2d 703, 705 (1971)(*citing Carr v. Sutton*, 70 W. Va. 417, 420-21, 74 S.E. 239, 240 (1912)) As such, home incarceration as a matter of pre-trial bail is not penal in nature.

However, in discussing home incarceration imposed as a condition of post-conviction bail, this Court, citing *State v. Long*, stated:

[t]he entire statutory scheme indicates that home confinement is designed to place substantial restrictions on the offender. A violation of these restrictions results in the offender being subject to incarceration under the penalties prescribed for the crime. The penal nature of home detention is recognized under W. Va. Code, 62-11B-9(b), as it provides credit for time spent in home confinement towards the imposition of any sentence following a violation of home confinement.

See State v. Hughes 197 W.Va. at 527, 476 S.E. 2d at 198 *citing State v. Long* 192 W. Va. 109, 111, 450 S.E.2d 806, 808 (1994) (footnote and citation omitted). *See also State v. Lewis*, 195 W. Va. 282, 285, 465 S.E.2d 384, 387 (1995) (referring to penal nature of Act in stating that "the imposition of a sentence of home incarceration is governed by the Home Incarceration Act")

In *State v. McGuire*, the Court, based upon its previous holdings in *State v. Hughes* held:

[p]ursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62-11B-1 to -12 (1997 & Supp. 1999), when an offender is placed on home incarceration as a condition of *post-conviction bail*, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated

in West Virginia Code § 62-11B-5, then the offender *is entitled to receive credit toward any sentence imposed for time spent on home incarceration*, whether or not the offender violates the terms and conditions of home incarceration and whether or not the order specifically references the Home Incarceration Act.

See Syl. Pt. 3, *State v. McGuire*, 207 W.Va. 459, 533 S.E. 2d 685 (2000).

In this matter, Ms. Reed was convicted on voluntary manslaughter on September 26, 2023 after the trial court accepted the plea deal in which she made an *Alford* plea to voluntary manslaughter. After conviction she was placed on continued home incarceration until her sentencing, which did not occur until March 28, 2024, approximately six (6) months after her plea was accepted. Subsequent to her conviction, Ms. Reed was an “offender,” as defined under the West Virginia Home Incarceration Act, upon the trial court’s acceptance of her plea deal. Further, the State has conceded that Ms. Reed was subject to all of the restrictions required by W.Va. Code § 62-11B-5. *See Respondent’s Brief*, pg., 9. Therefore, under this Court’s ruling in *State v. McGuire*, Ms. Reed would be entitled to credit for time served on home incarceration after her conviction.

However, as the State of West Virginia has pointed out in its response, after this Court’s decision in *State v. McGuire*, *supra*, the West Virginia Legislature enacted W.Va. Code § 62-11B-11(b), which provides that “[u]pon conviction of a person, the circuit court, magistrate court or municipal court may, in its discretion, grant credit for time spent on home incarceration as a condition of bail toward any sentence imposed, if the person is found to have complied with the terms of bail.” It is the State of West Virginia position that under W.Va. Code § 62-11B-11(b), the trial court had discretion to refuse to credit Ms. Reed with credit for the time served on post-conviction home incarceration. However, contrary to the State’s position, W.Va. Code § 62-11B-11(b) does not supersede Syl. Pt. 3 of *State v. McGuire*, *supra*, and Ms. Reed is still entitled to credit for the time served on post-conviction home incarceration.

As discussed in detail in Petitioner's Brief and above, the West Virginia Supreme Court of Appeals has consistently held that, under the West Virginia Home Incarceration Act, the time spent by an offender on post-conviction home incarceration, who is subject to all of the restrictions required by placed upon home incarceration W.Va. Code § 62-11B-5, is penal in nature. The passage of W.Va. Code § 62-11B-11(b) does not change the penal nature of post-conviction home incarceration when the offender is subjected to all restrictions under W.Va. Code § 62-11B-5. Since the home incarceration to which Ms. Reed was subjected to was penal in nature, failure to give her credit for the time served on post-conviction home incarceration would violate the Double Jeopardy and Equal Protections clauses of the West Virginia Constitution.

The State of West Virginia also cites *State v. Walker*, 244 W.Va. 61, 851 S.E. 2d 507 (2020) for the proposition that the penal nature of post-conviction home incarceration is contingent upon the type of sentence imposed. *See Respondent's Brief*, pg. 11. The State of West Virginia's interpretation of *State v. Walker* is incorrect. The Court has consistently stated that, under the West Virginia Home Confinement Act, home incarceration as a condition of bail is penal in nature. As stated above, in *State v. Hughes*, the Court stated:

[d]ue to the **penal nature** of the Home Confinement Act, West Virginia Code §§ 62-11B-1 to -12 (1993), when a circuit court, in its discretion, orders an offender confined to his home as a condition of bail, the offender must be an adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary or a juvenile adjudicated guilty 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.

Syl. Pt. 3, *State v. Hughes*, 197 W.Va. 518, 476 S.E. 2d 189 (1996) (Emphasis Added). As such, the State of West Virginia's position, that the penal nature of home incarceration under the West Virginia Home Incarceration Act is dependent upon the type of sentence imposed is incorrect.

A. Failure to provide Ms. Reed with credit for time served on post-conviction home incarceration is a violation of the double jeopardy protection of the West Virginia Constitution. W.Va. Code § 62-11B-11(b) does not supersede Ms. Reed's protections under the Double Jeopardy Clause of the West Virginia Constitution.

As with the United States Constitution, the West Virginia Constitution contains a prohibition against double jeopardy. *See W.Va. Constitution, Art. III, § 5.* "The constitutional prohibition of double jeopardy consists of three separate guarantees: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; (3) and it protects against multiple punishments for the same offense." *State ex rel. Day v. Silver*, 210 W. Va. 175, 178, 556 S.E.2d 820, 823 (2001). Failing to credit Ms. Reed with credit for time served on post-conviction home incarceration would violate the third guarantee provided by the double jeopardy clause.

In *Martin v. Leverette*, 161 W.Va. 547, 244 S.E. 2d 39 (1978), the West Virginia Supreme Court took the opportunity to look at whether a defendant is constitutionally entitled to credit for time spent in jail prior to trial and after trial awaiting sentence. In *Martin*, the trial judge failed to credit the Petitioner with time spent in jail both prior to his conviction and after his conviction while waiting sentencing. The State of West Virginia argued that under W.Va. Code § 61-11-24, the trial court had discretion in crediting the Petitioner for time served in jail while waiting for trial and after conviction while waiting for sentencing. W.Va. Code § 61-11-24, provides:

[w]henver 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 [magistrate] having jurisdiction of the offense, such person may, in the discretion of the court or justice [magistrate], be given credit on any sentence imposed by such court or justice [magistrate] for the term of confinement spent in jail awaiting such trial and conviction.

Notwithstanding W.Va. Code § 61-11-24², the Court in *Martin* held that the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable. Syl. Pt. 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E. 2d 39 (1978).³

Additionally, in *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529, (1977), the Court had the opportunity to review a matter in which the Petitioner was denied credit for time against his sentence while out on parole. In *Conner*, the Petitioner had his parole revoked and was returned to prison, without being given credit for the time spent out on parole. The Supreme Court, in finding that the Petitioner was entitled to credit against his sentence for time served while on parole, held “the failure to credit on the underlying sentence the time served on parole prior to the revocation of parole constitutes a multiple punishment for the same offense, and is a violation of the Double Jeopardy Clause of the *West Virginia Constitution, Article III, Section 5.*” Syl. Pt. 2, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529, (1977). The Court, in *Conner*, recognized that a parolee has substantial restraints on their freedom and that “[t]ime spent serving a sentence does not depend on the manner or location in which it is served. There are, to be sure, different degrees of confinement recognized in any penal system. The fact that some confinements are less

² In discussing W.Va. Code § 61-11-24, the Court has stated that while the statute suggests that a grant of credit is within the discretion of the sentencing court, it is clear that constitutional protections mandate that a person receive credit for any time served in jail or in prison. *See State v. Scott*, 214 W. Va. 1, 585 S.E.2d 1, 2003 W. Va. LEXIS 50 (W. Va. 2003), overruled in part, *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152, 2006 W. Va. LEXIS 143 (W. Va. 2006), overruled in part.

³ This holding was later expanded to include determinative sentences. *See State ex rel. Roach v. Dietrick*, 185 W.Va. 23, 25, 404 S.E.2d 415, 417 (1991).

restrictive than others should have no bearing in computing the time served on the sentence.” *Conner v. Griffith*, 160 W. Va. at 689, 238 S.E.2d at 534.

In this matter, as in *Martin v. Leverette*, the State of West Virginia is relying on a statute that clearly conflicts with Ms. Reed’s constitutional protections. As set forth above, and in Petitioner’s brief, the time Ms. Reed spent on post-conviction home incarceration was penal in nature. Under both *Martin v. Leverette* and *Conner v. Griffith*, the Court has made it clear that if an individual is subject to restrictions on their freedom that is penal in nature, they are entitled to have that time credited against any sentence imposed. Otherwise, the individual is being punished multiple times for the same offense. Since W.Va. Code § 62-11B-11(b) contradicts Ms. Reed’s rights under the double jeopardy clause, the statute is not applicable and Ms. Reed is entitled to credit for time spent on post-conviction home incarceration. As such, failure to credit her for time served while on post-conviction home incarceration is a violation of the protections afforded by the double jeopardy clause.

B. Failure to provide Ms. Reed with credit for time served on post-conviction home incarceration is a violation of the Equal Protection Clause of the West Virginia Constitution.

Art. III, § 10 of the West Virginia Constitution provides for the principle of equal protection. *See Gibson v. West Va. Dep’t of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991), overruled in part, *Neal v. Marion*, 222 W. Va. 380, 664 S.E.2d 721 (2008). (State’s constitutional equal protection principle is a part of the due process clause found in this section). Equal Protection means the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment. *Kyriazis v. University of W.Va.*, 192 W.Va. 60, 450 S.E. 2d 649 (1994). The equal protection clause is implicated when similarly situated persons are treated differently. *State v. McClain*, 211 W. Va. 61, 67, 561 S.E.2d 783, 789 (2002).

The Court has previously found that a defendant has a constitutional right, under both the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution, to credit for time served in jail before conviction. Syl. Pt. 6, *State v. McClain*, 211 W.Va. 61, 561 S.E. 2d 783 (2002). These rights were extended to defendants placed on home incarceration after a conviction under the West Virginia Home Incarceration Act. The reason behind the Court's decision in *State v. McGuire*, is that a person placed on home incarceration after a conviction is subject to numerous restrictions, and thus home incarceration under the West Virginia Home Incarceration Act is penal in nature. See *State v. Jedediah C.*, 240 W.Va. at 541, 814 S.E. 2d at 204 (*Justice Ketchum's dissent*) citing Syl. Pt. 3, *State v. McGuire*, 207 W.Va. 459, 533 S.E.2d 685 (2000).

As argued above and in Petitioner's Brief, the Court has consistently held that, as long as certain criteria are met, home incarceration under the West Virginia Home Incarceration Act is penal in nature. In *State v. Long*, 192 W.Va. at 111, 450 S.E. 2d at 808, this Court, in discussing the Home Incarceration Act, and in noting the penal nature of the Act stated: "[w]hen the legislature initially adopted the home confinement statute, it said that it was "... another form of incarceration" Failure to provide a defendant credit for time served on home incarceration that is penal in nature would violate the Equal Protection Clause, as the defendant is subject to substantial restrictions on their liberty for which the defendant is not receiving credit. Other defendants, who are incarcerated or who have substantial limits placed upon their liberty, are given credit against their sentence during the period of time that they are incarcerated.

II. Failure to provide Ms. Reed with credit for time served while on pre-conviction home incarceration violated the Double Jeopardy and Equal Protection provisions of the West Virginia Constitution.

In discussing credit for time served for pre-conviction home incarceration, the Court has stated:

[w]hen a person who has been arrested, but not yet convicted of a crime, is admitted to pre-trial bail with the condition that he be restricted to home confinement pursuant to West Virginia Code § 62-1C-2(c)(1992), 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, West Virginia Code §§ 62-11B-1 to -12 (1993). Therefore, the time spent in home confinement when it is a condition of bail under West Virginia Code § 62-1C-2(c) does not count as credit toward a sentence subsequently imposed.

Syl. Pt. 4. *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996). However, the Court went on to state that the penal nature of the Home Incarceration Act is reflected by the substantial restrictions imposed by W.Va. Code § 62-11B-5. *See State v. Hughes* 197 W.Va. at 527, 476 S.E.2d at 198.

In his dissent in *State v. Jedediah C.*, Justice Ketchum recognized that the Court's rulings with regard to pre-conviction home incarceration and post-conviction home incarceration, specifically that, even if the home incarceration met the restrictions set forth in W.Va. Code § 62-11B-5, pre-conviction home incarceration was not penal in nature, but post-conviction home incarceration, was penal in nature, constituted a distinction without a difference. As recognized by Justice Ketchum, the restrictions placed upon the Petitioner in *State v. Jedediah C.* pre-conviction were just as restrictive as those required by W.Va. Code § 62-11B-5. Since the restrictions placed upon the Petitioner were the effectively the same as those required by W.Va.

Code § 62-11B-5, those restrictions, even though the Petitioner was not yet convicted, should be deemed penal in nature as well. *State v. Jedediah C.*, 240 W.Va. at 541, 814 S.E. 2d at 204.

In this case, Ms. Reed was subject to the same restrictions prior to her conviction, as the restrictions imposed post-conviction. In both instances, pre-conviction and post-conviction, the restrictions placed upon Ms. Reed were in excess of the restrictions set forth in W.Va. Code § 62-11B-5. The conviction of Ms. Reed did not change the nature or the effect of the restrictions imposed upon her pre-conviction. Those restrictions have the same effect on her liberty both pre-conviction and post-conviction. Since Ms. Reed was subject to all restrictions set forth in W.Va. Code § 62-11B-5 prior to her conviction, her pre-conviction home incarceration should be considered penal in nature as well.

As argued above, since the restrictions placed upon Ms. Reed met all of the criteria of W.Va. Code § 62-11B-5, the post-conviction home incarceration is penal in nature and Ms. Reed is entitled to credit for time served on post-conviction home incarceration. Failure to provide credit for her time spent on post-conviction home incarceration would be a violation of Ms. Reed's rights under the Double Jeopardy Clause and Equal Protection Clauses of the West Virginia Constitution. Likewise, since Ms. Reed was subject to the same restrictions on home incarceration, both pre-conviction and post-conviction, Ms. Reed should be entitled to credit for time served on home incarceration prior to her conviction. The fact that she was not an "offender" as defined by the West Virginia Home Incarceration Act did not change the limits to her liberty placed upon her by the trial court pre-conviction.

In *State v. Long*, the Court, in discussing the West Virginia Home Incarceration Act, stated:

the entire statutory scheme indicates that home confinement is designed to place substantial restrictions on the offender. A violation of these restrictions results in

the offender being subject to incarceration under the penalties prescribed for the crime. The penal nature of home detention is recognized under W. Va. Code, 62-11B-9(b), as it provides credit for time spent in home confinement towards the imposition of any sentence following a violation of home confinement.

State v. Hughes 197 W.Va. at 527, 476 S.E. 2d at 198 citing *State v. Long* 192 W. Va. 109, 111, 450 S.E.2d 806, 808 (1994). While Ms. Reed's was not placed on pre-trial home incarceration subject to the West Virginia Home Incarceration Act, but subject to W.Va. Code 62-1C-2, the restrictions placed upon her were the same as those set forth in W.Va. Code § 62-11B-5. It is those restrictions which make the home incarceration penal in nature, and since Ms. Reed was subject to the same restrictions as those under the West Virginia Home Incarceration Act, her time spent on pre-conviction home incarceration should be considered penal in nature as well.

III. Ms. Reed's prior conviction for second-degree murder was vacated due to errors at trial. As such, it was impermissible for the trial court to take into consideration her vacated conviction when determining her sentence.

As set forth in Petitioner's Brief, the West Virginia Supreme Court of Appeals has previously held that a trial court, although it has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed, it may not rely on impermissible factors when determining a sentence. See *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 202, 691 S.E.2d 183, 193 (2010). This Court has recognized certain factors to be impermissible, such as race, sex, national origin, creed, religion and socioeconomic status. See *State v. Norman*, No. 21-0374, 2022 W. Va. LEXIS 507, 2022 WL 3931414 (W. Va. Aug. 31, 2022) (memorandum decision). However, the Court has never stated the above list is an exhaustive list of impermissible factors.

As discussed in Petitioner's Brief, the trial court, in sentencing Ms. Reed, took into consideration the fact that Ms. Reed had been previously convicted of second-degree murder in the death of her husband, Marcus Fagons. However, that conviction was overturned as a result of errors made by the trial court which had a significant bearing on the jury's verdict. *See State of West Virginia v. Carli Renae Reed, Case No. 21-0227 (memorandum opinion)*. As such, Ms. Reed's conviction for second-degree murder was vacated. The trial court's consideration of her overturned conviction is clearly impermissible, as legally, Ms. Reed was never convicted of second-degree murder. The trial court erred in considering Ms. Reed's prior conviction when determining her sentence, and the sentencing order should be vacated.

The Petitioner stands by the remainder of her argument set forth in Section III of Petitioner's Brief.

CONCLUSION

WHEREFORE, the Petitioner, Carli R. Reed, by and through her counsel, Hunter B. Mullens, C. Brian Matko, and Matthew L. Ervin of Mullens & Mullens, PLLC, respectfully pray that the Supreme Court of Appeals of West Virginia find that the Circuit Court of Taylor County, West Virginia committed error during the sentencing phase of the underlying matter, vacate the sentence imposed against Ms. Reed, remand the matter back to the trial court for sentencing, release the Petitioner from incarceration and any such further relief as justice requires.

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