

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-341

SCA EFiled: Sep 05 2024
03:29PM EDT
Transaction ID 74243219

STATE OF WEST VIRGINIA,

Respondent,

v.

CARLI R. REED,

Petitioner.

BRIEF OF RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

Mary Beth Niday (WV Bar # 9092)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: Mary.B.Niday@wvago.gov
Telephone: (304) 558-5830
Facsimile: (304) 558-5833

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction.....	1
Assignment of Error.....	1
Statement of the Case.....	2
Summary of the Argument.....	5
Statement Regarding Oral Argument and Decision.....	6
Standard of Review.....	6
Argument	6
I. The imposition of post-conviction credit for time spent on home confinement as a condition of bond is discretionary with the court. The circuit court did not abuse its discretion in failing to grant credit for Petitioner’s time spent after she pleaded guilty to involuntary manslaughter	7
A. Petitioner’s right to be free from double jeopardy was not violated.....	10
B. Petitioner’s right to equal protection was not violated	12
II. Petitioner’s pretrial home confinement was not penal in nature and cannot be considered the same as incarceration in a jail or a prison for the purpose of granting credit for time served	13
III. Petitioner’s sentence should stand because the circuit court properly considered Petitioner’s rehabilitation availabilities during sentencing and did not consider an impermissible sentencing factor	15
Conclusion	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Conner v. Griffith</i> , 160 W. Va. 680, 238 S.E.2d 529 (1977).....	4, 11
<i>Martin v. Leverette</i> , 161 W. Va. 547, 244 S.E.2d 39 (1978).....	12
<i>State ex rel. Blankenship v. Warner</i> , 241 W. Va. 362, 852 S.E.2d 309 (2018).....	12
<i>State ex rel. Day v. Silver</i> , 210 W. Va. 175, 556 S.E.2d 820 (2001).....	10
<i>State ex rel. Dunlap v. McBride</i> , 225 W. Va. 192, 691 S.E.2d 183 (2010).....	17, 18
<i>State v. Duke</i> , 200 W. Va. 356, 489 S.E.2d 738 (1997).....	16
<i>State v. Gerald R.</i> , No. 18-0814, 2019 WL 5092946 (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision)	14
<i>State v. Goodnight</i> , 169 W. Va. 366, 287 S.E.2d 504 (1982).....	6, 15
<i>State v. Head</i> , 198 W. Va. 298, 480 S.E.2d 507 (1996).....	15
<i>State v. Hughes</i> , 197 W. Va. 518, 476 S.E.2d 189 (1996).....	7, 13, 14
<i>State v. James</i> , 227 W. Va. 407, 710 S.E.2d 98 (2011).....	6
<i>State v. Jedediah C.</i> , 240 W. Va. 534, 814 S.E.2d 197 (2018).....	7, 8, 9, 13, 14
<i>State v. Lenhart</i> , No. 11-0599, 2012 WL 2914282 (W. Va. Supreme Court, Feb. 10, 2012) (memorandum decision)	13
<i>State v. Lott</i> , 170 W. Va. 65, 289 S.E.2d 739 (1982).....	17

<i>State v. Lucas</i> , 201 W. Va. 271, 496 S.E.2d 221 (1997).....	6
<i>State v. McClain</i> , 211 W. Va. 61, 561 S.E.2d 783 (2002).....	4, 12, 13
<i>State v. McGuire</i> , 207 W. Va. 459, 533 S.E.2d 685 (2000).....	7, 8, 14
<i>State v. Moles</i> , No. 18-0903, 2019 WL 5092415 (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision)	15
<i>State v. Ramsey</i> , No. 13-0333, 2014 WL 211951 (W. Va. Supreme Court, Jan. 17, 2014) (memorandum decision)	16
<i>State v. Redman</i> , 213 W. Va. 175, 578 S.E.2d 369 (2003).....	17
<i>State v. Reed</i> , No. 21-0227, 2022 WL 9931717 (W. Va. Supreme Court, Oct. 17, 2022) (memorandum decision)	2
<i>State v. Richard D.</i> , No. 13-1249, 2015 WL 7628835 (W. Va. Supreme Court, Nov. 23, 2015) (memorandum decision)	16
<i>State v. Ricketts</i> , 219 W. Va. 97, 632 S.E.2d 37 (2006).....	10
<i>State v. Shaw</i> , 208 W. Va. 426, 541 S.E.2d 21 (2000).....	16
<i>State v. Via</i> , No. 20-0743, 2022 WL 123200 (W. Va. Supreme Court, Jan. 12, 2022) (memorandum decision)	15
<i>State v. Walker</i> , 244 W. Va. 61, 851 S.E.2d 507 (2020).....	11
<i>State v. Watkins</i> , 214 W. Va. 477, 590 S.E.2d 670 (2003).....	15
<i>State v. Zackoski</i> , No. 20-0518, 2021 WL 3833719 (W. Va. Supreme Court, Aug. 27, 2021) (memorandum decision)	16

Statutes

Home Incarceration Act, West Virginia Code §§ 62-11B-1 through 62-11B-13	7
West Virginia Code § 61-11B-5	7
West Virginia Code § 62-11B-2	4
West Virginia Code § 62-11B-5	7, 9
West Virginia Code § 62-11B-9	11
West Virginia Code § 62-11B-11	7, 8, 11
West Virginia Code § 62-12-13	3

Rule

West Virginia Rule of Appellate Procedure 18	6
--	---

INTRODUCTION

The circuit court justly sentenced Petitioner Carli Renae Reed to a determinate fifteen-year term of imprisonment and did not abuse its discretion in denying her request for credit for time spent pretrial and post-conviction on home confinement imposed as a condition of bail. Pursuant to the Home Confinement Act, the circuit court is vested with the discretion to grant such credit. Prior to pleading guilty to voluntary manslaughter, Petitioner was not yet considered an offender for purposes of the Act and, therefore, was not eligible for credit. After she pleaded guilty, Petitioner, as an offender under the Act, was subject to the statutory terms and conditions of release on home confinement and, therefore, was eligible to receive credit for such time. Her eligibility, however, did not equate to entitlement as the circuit court was statutorily vested with discretionary authority to impose credit but not obligated to do so.

The court properly considered the leniency Petitioner received by virtue of her guilty plea to voluntary manslaughter instead of murder and, thus, did not abuse its discretion in denying credit. Petitioner's sentence was within statutory limits and not based on any impermissible factor. Thus, this Court should not review her sentence.

As Petitioner fails to allege any claim that entitles her to appellate relief, this Court should reject Petitioner's claims on appeal and affirm the sentencing order of the Circuit Court of Taylor County.

ASSIGNMENTS OF ERROR

Petitioner raises three assignments of error in her brief:

1. The trial court erred in failing to give Ms. Reed credit for time served on home incarceration post-conviction. The terms of her home incarceration were penal in nature, and failure to provide her with credit against her sentence violated the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.
2. The trial court erred in failing to give Ms. Reed credit for time served on home incarceration pre-conviction. The terms of her home incarceration were penal in nature,

and failure to provide her with credit against her sentence violated the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.

3. The trial court erred in failing to give due consideration to Ms. Reed's right to rehabilitation. The trial court further erred by using an impermissible factor when determining her sentence, specifically referring to the fact that Ms. Reed was convicted of second-degree murder when that conviction was overturned due to errors made by the trial court.

Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner shot and killed her husband, Marcus Fagons, on August 15, 2019. *State v. Reed*, No. 21-0227, 2022 WL 9931717, at *1 (W. Va. Supreme Court, Oct. 17, 2022) (memorandum decision). In September 2020, a jury convicted Petitioner of second-degree murder and the circuit court sentenced her to forty years in prison. *Id.* at *3. This Court reversed Petitioner's conviction and sentence, finding that the circuit court abused its discretion "by failing to give Petitioner's requested accident instruction." *Id.* at *1. The matter was remanded to the Barbour County Circuit Court for a new trial. *Id.*

Following her direct appeal, Petitioner was released on December 22, 2022, on a \$900,000.00 cash bond with the condition of home incarceration with electronic monitoring. App. Vol. I, 5. The bond amount was based on the grievous nature of Petitioner's charge of murder "and the additional factor that the alleged crime was committed with a firearm." App. Vol. I, 4-5. A Special Prosecutor was appointed to handle Petitioner's case, and the State and Petitioner agreed to transfer venue to Taylor County due to the volume of publicity in Barbour County. App. Vol. I, 26-30.

On September 26, 2023, Petitioner entered into a plea agreement with the State wherein she agreed to enter an *Alford* plea of guilty to voluntary manslaughter, a lesser included offense of murder, as charged. App. Vol. I, 34, 55, 59. The parties agreed that the sentencing enhancement

set forth in West Virginia Code § 62-12-13(b)(1)(C) was applicable because Petitioner committed the felony using a firearm. App. Vol. I, 35. Moreover, the parties agreed that Petitioner “shall not accept parole until serving one-third (1/3) of any sentence that the Court imposes.” App. Vol. I, 35, 56, 60. In exchange for Petitioner’s plea, the State agreed to make no recommendation concerning Petitioner’s parole when she became eligible for parole consideration. The agreement clarified, however, that the State would recommend that Petitioner be sentenced to the maximum sentence of fifteen years of imprisonment. App. Vol. I, 35.

By orders entered November 20, 2023, App. Vol. II, 542; App. Vol. I, 55-57, and May 29, 2024, App. Vol. II, 544; App. Vol. I, 59-61, the circuit court accepted Petitioner’s *Alford* plea and ordered that she “remain on post-conviction bond,” App. Vol. I, 61. The court further advised Petitioner that “she may not receive credit to time served . . . for any time that she serves on home confinement as a condition of her bond and [Petitioner] indicated that she understood.” App. Vol. I, 61.

Petitioner moved for alternative sentencing, seeking a sentence of home confinement. App. Vol. I, 74. Petitioner contended that with “the likelihood of receiving parole, it is likely that [she], with credit for time previously served, would, at a maximum, serve approximately an additional five (5) months.” App. Vol. I, 73. She argued that because she had completed educational courses while incarcerated, “there is nothing left in the prison system that would assist in any rehabilitation,” and that the services she required “can only be found outside of the prison system.” App. Vol. I, 74. In support of her request, Petitioner relied upon Dr. David Clayman’s opinion that she was at low risk to re-offend; that she had been attending bi-weekly counseling services “focus[ing] on stages of grief and in assisting [Petitioner] in developing distress tolerance, coping skills and tolerance”; and that she had “diligently followed all conditions placed upon her pre-

conviction home confinement[and] she [did] not miss[] any scheduled appointments[or] fail[] any drug screens.” App. Vol. I, 74-75, 79-80. Moreover, Petitioner “was a model prisoner” and had no previous criminal history. App. Vol. I, 75.

Petitioner also sought credit for the time spent on home incarceration as a condition of her bail. App. Vol. I, 84-96. Petitioner asserted that she was arrested on August 15, 2019, and remained incarcerated until her release to home confinement on December 22, 2023, for a total of 1,225 days. App. Vol. I, 85. She then remained on home confinement until she was sentenced on March 28, 2024, for a total of 461 days, or one year and three months, with six months of that time being spent post-conviction. App. Vol. I, 85. Petitioner argued that pursuant to West Virginia Code § 62-11B-2, she was entitled to credit for time spent on home incarceration because she complied with all the terms and conditions of her bail. App. Vol. I, 86-87. She contended that failure to award the credit for time served on home confinement violated the Double Jeopardy and Equal Protections Clauses of the West Virginia Constitution. App. Vol. I, 87-88. As legal support for her position, Petitioner relied upon this Court’s precedent, including *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977), and *State v. McClain*, 211 W. Va. 61, 561 S.E.2d 783 (2002), for the proposition that “credit for pre-trial incarceration was mandatory.” App. 88. She also asserted that post-conviction home incarceration as a condition of bail is penal in nature based on the number of restrictions imposed upon her. App. Vol. I, 90.

On March 28, 2024, Petitioner appeared for a sentencing hearing and the circuit court sentenced her to a determinate term of fifteen years of imprisonment. App. Vol. I, 135. The court denied Petitioner’s motion for credit for time spent on home confinement and noted that it cautioned Petitioner at the time bond was set that “she may not receive credit for that time spent on home confinement pre-conviction or post-conviction.” App. Vol. I, 135. The court also denied

Petitioner's motion for an alternative sentence for three reasons. App. Vol. I, 135. First, the court explained, it could not minimize Petitioner's "intent to kill" "simply [due to] the passage of time." App. Vol. I, 135. Second, Petitioner "already received substantial consideration in the current plea agreement which significantly reduced her possible sentence." App. Vol. I, 135. Third, "the underlying crime was one of violence involving [Petitioner's] use of a firearm." App. Vol. I, 135.

In denying the motion for alternative sentencing, the court noted that as part of her plea agreement, Petitioner "waived her right to seek or accept parole" until after she serves "at least one third (1/3) of any sentence imposed by the Court." App. Vol. I, 135. The circuit court "specifically advised [Petitioner] that if she were to seek parole or take any action whatsoever to obtain parole prior to serving at least one-third (1/3) of her sentence, it could result in the plea agreement being set aside." App. Vol. I, 135. It is from this Order that Petitioner appeals.

SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion in not granting credit for time spent on home confinement as a condition of bail or in imposing sentence on Petitioner.

First, the circuit court properly exercised its statutorily-vested discretion and did not grant Petitioner credit for post-conviction time spent on home confinement as a condition of her bail. The court properly reasoned that Petitioner received leniency by virtue of her plea agreement with the State. Her constitutional double jeopardy and equal protection safeguards were not violated because her home confinement was not imposed as an alternative sentence and her financial condition did not factor into her ability to make bail.

Second, Petitioner was not considered an "offender" under the Home Confinement Act during her time spent on pretrial home confinement as a condition of bail and, so, she was not even eligible for credit. Moreover, the court was vested with the discretion to impose such credit and, based on the leniency she received by virtue of her plea, lawfully chose not to grant credit.

Third, Petitioner’s sentence was within statutory limits and not based on any impermissible sentencing factors. This Court should, therefore, not review her sentence. Nevertheless, the court heard testimony from Petitioner’s expert witness at sentencing and properly considered all rehabilitative opportunities available to Petitioner. Based on the leniency her plea afforded her, the court actively chose not to impose an alternative sentence. The court also did not impermissibly consider Petitioner’s history, including her prior conviction for second-degree murder that was overturned.

The Court should therefore affirm.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed, and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3), (4).

STANDARD OF REVIEW

This Court “reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) (quoting syl. pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)). Importantly, however, “[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

ARGUMENT

I. The imposition of post-conviction credit for time spent on home confinement as a condition of bond is discretionary with the court. The circuit court did not abuse its discretion in failing to grant credit for Petitioner’s time spent after she pleaded guilty to involuntary manslaughter.

Petitioner claims she is entitled to credit for the time spent on post-conviction home confinement and that the failure to award such credit violates due process and equal protection principles set forth in the West Virginia Constitution. Pet’r’s Br. 10-23. First, citing *State v. Jedediah C.*, 240 W. Va. 534, 814 S.E.2d 197 (2018), and *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000), Petitioner asserts that she was entitled to credit because the terms and conditions imposed for her release on bail to home confinement included those set forth in West Virginia Code § 61-11B-5. Pet’r’s Br. 20-21. Petitioner is mistaken: *McGuire* was superseded by statute, West Virginia Code § 62-11B-11(b)—as recognized by *Jedediah C.*—making the granting of post-conviction home confinement credit entirely discretionary with the court.

The Home Incarceration Act (“the Act”), West Virginia Code §§ 62-11B-1 through 62-11B-13, “applies only to post-conviction situations and is penal in nature.” *Jedediah C.*, 240 W. Va. at 537, 814 S.E.2d at 200 (citing *State v. Hughes*, 197 W. Va. 518, 526-27, 476 S.E.2d 189, 197-98 (1996)). This Court has held that the Act applies only 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 certain convicted juvenile offenders. *Id.* (emphasis in original). As Petitioner notes, this Court held in *McGuire* that “when an offender is placed on home incarceration as a condition of post-conviction bail,” under the Act, “if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and [include] 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.” 207 W. Va. at 464, 533 S.E.2d at 690 (footnote omitted). This entitlement to credit was not contingent on whether “the offender violate[d] the terms and conditions of home incarceration [or] whether or not the order specifically reference[d] the Home Incarceration Act.” *Id.*

As Petitioner fails to point out, however, the Legislature amended the Act in 2001 after the Court decided *McGuire* and the Act now explicitly states that “[u]pon conviction of a person, the circuit 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.” W. Va. Code § 62-11B-11(b) (emphasis added); *see also Jedediah C.*, 240 W. Va. at 539, 814 S.E.2d at 202 (stating that “the Legislature amended the Act, making it discretionary as to whether a circuit court grants credit to an offender for time spent on home incarceration.”). Petitioner seems to be relying on the overturned portion of *McGuire*, as cited in *Jedediah C.*, and requests this Court to find, pursuant to *McGuire*, that because the terms and conditions imposed upon her home confinement met the statutory requirements, the court abused its discretion in not granting credit. Pet’r’s Br. 19-20.

Like Petitioner, the petitioner in *Jedediah C.* was placed on home confinement solely as a condition of his pretrial bail. *Jedediah C.*, 240 W. Va. at 539, 814 S.E.2d at 202. Unlike Petitioner, however, the circuit court denied Jedediah C.’s request to continue home confinement after he pleaded guilty and he was remanded to jail pending sentencing. *Id.* Thus, Jedediah C. was not an “offender” for purposes of the Act because he never served time on post-conviction home confinement. *Id.* But “even if” the Act applied to the petitioner, the Court explained, it would have found that the circuit court’s denial of credit was not an abuse of discretion under West Virginia Code § 62-11B-11(b). *Id.* at 539-40, 814 S.E.2d at 202-03. The circuit court reasoned that Jedediah

C.’s “crimes of repeated sexual assault” against his child and two friends were heinous in nature and that he “benefited from his plea bargain to the extent that . . . it’s just not suitable to give him credit for home confinement spent on pre-trial release condition.” *Id.* The takeaway from *Jedediah C.* is that the circuit court has broad discretion to determine whether a grant of credit for time served on home incarceration is warranted.

In the instant matter, Petitioner was placed on home confinement as a condition of her pretrial bail and she remained on home confinement until her sentencing hearing. Thus, after she pleaded guilty, she was considered an offender for purposes of the Act. Pursuant to West Virginia Code § 62-11B-5, the terms and conditions imposed on Petitioner’s home confinement following her plea—post-conviction—included requirements that she be confined at her home except for noted exceptions, App. Vol. I, 11, 20-22; advised Petitioner her “[f]ailure to follow all rules . . . can and will result in [her] Home Confinement privileges being revoked immediately,” App. Vol. I, 12; advised Petitioner when she could leave her home and that she had to request permission beforehand to do so, App. Vol. I, 20-22; advised Petitioner that she was not to commit another crime during the period of home confinement, App. Vol. I, 11, 21; that she must report any change of address to her probation officer within twenty-four hours, App. Vol. I, 15; that she maintain a working landline telephone in her home and electric service, App. Vol. I, 15, 18-19; that she pay a home confinement fee and other fees to the court, App. Vol. I, 18-19; and that she abide by other conditions set by the court, App. Vol. I, 18-19.

Although Petitioner was subject to the requirements of Section 62-11B-5, the decision to grant credit remains within the discretion of the circuit court. Petitioner seems to equate “entitled to receive credit” with a mandatory right to credit. Pet’r’s Br. 21. That is simply not the case. While eligibility for credit requires meeting the statutory terms and conditions of Section 62-11B-5, the

circuit court still retains the authority to decide whether or not to award that credit. Here, the court opted not to award credit because Petitioner received “substantial consideration in the current plea agreement which significantly reduced her possible sentence.” App. Vol. I, 135. Petitioner was charged with murder, was convicted and sentenced to forty years of imprisonment for second degree murder, and following a reversal on appeal, subsequently pleaded to voluntary manslaughter, carrying only a fifteen-year term of imprisonment. App. Vol. I, 135. Though Petitioner’s former conviction and sentence was remanded for a new trial, the court did not consider the “passage of time” as a factor that would diminish the heinous nature of the crime. App. Vol. I, 135. This reasoning is essentially the same as what this Court found acceptable in *Jedediah C.* and, therefore, the circuit court did not abuse its discretion in denying credit for Petitioner’s time spent on post-conviction home confinement.

A. Petitioner’s right to be free from double jeopardy was not violated.

Petitioner argues that the double jeopardy clause requires that she be given credit for home incarceration that is qualitatively similar to incarceration. Pet’r’s Br. 21. As held by this Court, “[t]he 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, 178-79, 556 S.E.2d 820, 823-24 (2001); *see also State v. Ricketts*, 219 W. Va. 97, 102, 632 S.E.2d 37, 42 (2006). Petitioner’s argument relates to the third guarantee; she contends, because she was not given credit for time served on post-conviction home confinement as a condition of bail, she was punished twice for the same offense. Pet’r’s Br. 22. She also argues that the Legislature’s “adoption of W. Va. Code § 62-11B-11(b) does not negate the penal nature of the Home Incarceration Act, and any

individual who is subject to the restrictions set forth in W. Va. Code 62-11B-5 is entitled to receive credit against any sentence imposed.” Pet’r’s Br. 21.

In support of her argument, Petitioner cites to *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977), wherein this Court held that “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.” Pet’r’s Br. 22. Petitioner does not cite to any authority that holds, or even suggests, that post-conviction home confinement that was continued as a condition of pretrial bail is considered “punishment” for the purpose of a double jeopardy analysis. Petitioner was given the grace to remain out on bail until she was sentenced—another benefit to her pleading guilty to voluntary manslaughter. Moreover, the circuit court was statutorily vested with the discretion to determine whether to impose post-conviction credit, and carefully considered the specific facts of Petitioner’s case—including the nature of the crime and the benefit she received from her plea in determining that awarding her such credit was not appropriate.

Moreover, in Syllabus Point 3 of *State v. Walker*, this Court held that West Virginia Code § 62-11B-9(b) “permits a participant in a home incarceration program to receive credit for time served while incarcerated in his home only where the term of home incarceration was imposed as an alternative sentence to another form of incarceration.” 244 W. Va. 61, 851 S.E.2d 507 (2020). Thus, the penal nature of post-conviction home incarceration seems contingent upon the type of sentence imposed. Here, after the court accepted Petitioner’s plea, it continued her home confinement as a condition of bail. This continuation on bail was not an alternative sentence and, therefore, was not penal in nature; thus, she did not receive two punishments for the same crime. Section 62-11B-11(b) gives the circuit court an opportunity to extend grace, within its discretion,

in a situation where credit for time served may otherwise have been inappropriate. The court properly exercised its discretion and found Petitioner was not entitled to any more grace given the lenience received by virtue of her plea.

Because the circuit court did not abuse its discretion and Petitioner fails to allege a cognizable double jeopardy claim, Petitioner's argument on this point fails.

B. Petitioner's right to equal protection was not violated.

Petitioner argues that the equal protection clause is implicated by the facts of this case. Pet'r's Br. 21-23. Petitioner has not suggested any facts, however, that demonstrate a denial of equal protection. *See generally* syl. pt. 7, *State ex rel. Blankenship v. Warner*, 241 W. Va. 362, 852 S.E.2d 309 (2018) ("Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.").

Regarding sentencing and credit for time served, an equal protection issue arises "when two people receive a sentence for the same term of incarceration but one of those people actually serves a longer period of time in jail *simply because he or she is financially unable to post the bail* required to secure pretrial release." *McClain*, 211 W. Va. at 66-67, 561 S.E.2d at 788-89 (emphasis added); *see also Martin v. Leverette*, 161 W. Va. 547, 550, 244 S.E.2d 39, 41 (1978) ("The equal protection argument runs on the premise that an invidious discrimination based on wealth occurs where the indigent defendant, unable to obtain bail, stays in jail, while his wealthier counterpart is free on bond and, receiving the same ultimate sentence, will have served less total time since he had no jail time."). That situation, demonstrating an inequity because of economic disparity, did not occur here.

Petitioner's financial circumstance did not play any part in the terms of her pretrial bail. She was admitted to bail, and the term of home confinement as a condition of that bail was ordered to secure her appearance at future proceedings and to protect the community. More importantly,

this Court held in *Hughes* that though “the Double Jeopardy and Equal Protection Clauses” call for “time spent in jail either pre-trial or post-trial, [to be] credited on the sentence . . . [t]hat principle, however, is inapplicable where an individual has not been subject to incarceration or the equivalent thereof.” 197 W. Va. at 526 n.11, 476 S.E.2d at 197 n.11. As discussed in the previous section, Petitioner was not subject to a form of incarceration and, therefore, equal protection principles were not violated when the court did not grant credit for time spent on home confinement as a condition of bail. Therefore, the equal protection clause has no application here.

II. Petitioner’s pretrial home confinement was not penal in nature and cannot be considered the same as incarceration in a jail or a prison for the purpose of granting credit for time served.

Petitioner claims that she is entitled to credit for time served on home confinement as a condition of pretrial bail—as opposed to post-conviction bail—because “all of the restrictions required by W.Va. Code § 61-11B-5 were placed upon [Petitioner] during her pre-conviction home incarceration, her pre-conviction home incarceration must be considered penal as well.” Pet’r’s Br. 25. Yet, because Petitioner was placed on home confinement as a condition of pretrial bail, the nature of home confinement under the Act is inapplicable to her pre-trial home confinement. *See Jedediah C.*, 240 W. Va. at 537, 814 S.E.2d at 200 (“[T]he Act applies only to *post-conviction* situations.”) (emphasis added)).

It is true that a defendant is constitutionally entitled to credit for time served while incarcerated. *See McClain*, 211 W. Va. at 66, 561 S.E.2d at 788 (acknowledging that a defendant is constitutionally entitled to “credit for time spent in jail, either pre-trial or post-trial”); *see also State v. Lenhart*, No. 11-0599, 2012 WL 2914282, at *2 (W. Va. Supreme Court, Feb. 10, 2012) (memorandum decision) (“[Petitioner’s] time spent in jail before conviction must be credited

against all terms of incarceration to a correctional facility imposed in his criminal case.”). But Petitioner was not incarcerated.

This Court has never characterized home confinement ordered as a condition of pretrial bail to be a form of incarceration akin to time spent in prison or jail. In fact, this Court held that pretrial bail is not penal in nature, “but rather . . . acts as security for the appearance of a defendant to answer to a specific criminal charge . . . at a specific time or at any time to which the case may be continued.” *State v. Gerald R.*, No. 18-0814, 2019 WL 5092946, at *3 (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision) (internal quotations omitted) (first citing *Jedediah C.*, 240 W. Va. at 538, 814 S.E.2d at 201; then citing *Hughes*, 197 W. Va. at 527-28, 476 S.E.2d at 198-99). This Court has also held that home confinement as a condition of pretrial bail “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.” *Id.* (quoting syl. pt. 2, *Jedediah C.*, 240 W. Va. 534, 814 S.E.2d 197).

Because Petitioner’s home confinement as a condition of pretrial bail was not penal in nature, but rather put in place to secure her appearance at court proceedings, she is not constitutionally entitled to credit for that time. *See* syl. pt. 2, *McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (quoting syl. pt. 4, *Hughes*, 197 W. Va. 518, 476 S.E.2d 189). The restrictions placed on Petitioner’s movement were necessary given the nature of the criminal offense for which she was charged—the murder of her husband. Thus, Petitioner has not demonstrated that the circuit court abused its discretion in denying pretrial credit.

III. Petitioner's sentence should stand because the circuit court properly considered Petitioner's rehabilitation availabilities during sentencing and did not consider an impermissible sentencing factor.

Finally, Petitioner argues that the circuit court abused its discretion in failing to consider Petitioner's options for rehabilitation in determining her sentence and improperly considered her previous conviction of second-degree murder that was overturned. Pet'r's Br. 26-33. Petitioner is simply wrong as the court properly considered Petitioner's request for an alternative sentence to enable her to seek rehabilitation.

A circuit court acts entirely within its discretion when imposing a sentence that is within statutory limits and not based on any impermissible factors. *See* syl. pt. 4, *Goodnight*, 169 W. Va. 366, 287 S.E.2d 504. This Court has historically respected a circuit court's discretion in sentencing. *See State v. Watkins*, 214 W. Va. 477, 482-83, 590 S.E.2d 670, 675-76 (2003) (“[A] trial court’s discretion during the sentencing phase of a criminal proceeding [is] a critical component of the process.” (citing *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring))). This deference is because “[c]ircuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.” *Head*, 198 W. Va. at 306, 480 S.E.2d at 515 (Cleckley, J. concurring). Therefore, because the circuit court sentenced Petitioner squarely within statutory parameters and with no regard to impermissible factors, her sentence is not subject to appellate review.

This Court has enumerated several impermissible sentencing factors including “race, sex, national origin, creed, religion, and socioeconomic status[.]” *State v. Via*, No. 20-0743, 2022 WL 123200, at *3 (W. Va. Supreme Court, Jan. 12, 2022) (memorandum decision) (quoting *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Supreme Court, Oct. 11, 2019)

(memorandum decision)). Despite repeated pleas by petitioners, this Court has, to date, failed to expand on this list. As none of these impermissible factors were pled by Petitioner in this matter, the circuit court's order should be affirmed.

Petitioner requested an alternative sentence in the form of home confinement. An alternative sentence such as home confinement is a grace of the sentencing court. “[T]he decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court’s discretion.” *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997). Accordingly, the decision of the circuit court to deny home confinement will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion. *See* syl. pt. 3, *State v. Shaw*, 208 W. Va. 426, 541 S.E.2d 21 (2000); *see also State v. Richard D.*, No. 13-1249, 2015 WL 7628835, at *3 (W. Va. Supreme Court, Nov. 23, 2015) (memorandum decision) (citing syl. pt. 3 of *Shaw*, 208 W. Va. 426, 541 S.E.2d 21, and concluding that the circuit court did not abuse its discretion in denying “petitioner’s request for alternative sentencing”); *State v. Ramsey*, No. 13-0333, 2014 WL 211951, at *1 (W. Va. Supreme Court, Jan. 17, 2014) (memorandum decision) (citing syllabus pt. 3 of *Shaw*, 208 W. Va. 426, 541 S.E.2d 21, and finding “no abuse of discretion in the circuit court’s denial of petitioner’s request for probation or alternative sentencing”). The circuit court was correct in refusing to reduce Petitioner’s sentence to home confinement and did not abuse its discretion here.

As this Court has noted, to vacate the lower court’s decision not to grant an alternate sentence, a “palpable abuse of discretion” must be found. Syl. pt. 3, *Shaw*, 208 W. Va. 426, 541 S.E.2d 21. “[P]etitioner’s desire for a different outcome—probation—does not establish a ‘palpable abuse of the court’s discretion.’” *State v. Zackoski*, No. 20-0518, 2021 WL 3833719, at *2 (W. Va. Supreme Court, Aug. 27, 2021) (memorandum decision). Moreover, “[a] trial court

has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed.” *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 202, 691 S.E.2d 183, 193 (2010); *see State v. Lott*, 170 W. Va. 65, 68, 289 S.E.2d 739, 742 (1982) (“[M]erely because one qualifies for probation consideration does not mean that probation must be awarded.”).

The facts of this case demonstrate that Petitioner shot and killed her husband. At sentencing, Petitioner offered the testimony of Dr. Clayman, a clinical and forensic psychologist, who opined that Petitioner was a low risk to reoffend. App. Vol. I, 148. His assessment was based in part on Petitioner’s lack of a prison disciplinary record, App. Vol. I, 153, and the fact that “she has expended all the things that were available” to her in form of rehabilitation, App. Vol. I, 158. Dr. Clayman also testified, however, that psychological testing revealed scores within the normal range and he did not diagnose her with any mental conditions or disorders. App. Vol. I, 158. This is all counter-indicative to Petitioner’s *need* to seek rehabilitation. Though the circuit court did not specifically acknowledge the rehabilitation opportunities in its sentencing order, it is clear that the court, after hearing the testimony regarding rehabilitation, ultimately determined that imposition of a term of imprisonment was appropriate because Petitioner had already received leniency through her plea bargain. This does not constitute an abuse of discretion.

“Clearly, a trial judge needs to consider the issue of rehabilitation in making its sentencing decisions. But those decisions are not to be made in a vacuum separate from the relevant facts that weigh on this serious issue and its attendant consequences on the community at large.” *State v. Redman*, 213 W. Va. 175, 180-81, 578 S.E.2d 369, 374-75 (2003). “[T]he right to rehabilitation does not remove discretion from the court to consider an appropriate sentence for a convicted felon.” *Id.* at 181, 578 S.E.2d at 375 (internal quotation marks omitted).

Likewise, the court mentioning Petitioner's prior conviction for second-degree murder did not constitute an impermissible sentencing factor. As Petitioner notes, Pet'r's Br. 32, "[a] trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed." *Dunlap*, 225 W. Va. at 202, 691 S.E.2d at 193. The court was clearly aware of Petitioner's procedural history and did not have to ignore it. It is clear from the record that the court considered all the evidence presented and simply made a comparison, again, that Petitioner received leniency in her plea bargain as she was before convicted of a harsher offense. But for Petitioner's plea, she would have stood trial for the much harsher offense of murder. For these reasons, Petitioner has failed to demonstrate the circuit court abused its discretion in sentencing her to fifteen years of imprisonment.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court affirm the sentencing order of the Circuit Court of Taylor County.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Mary Beth Niday

Mary Beth Niday (WV Bar # 9092)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: Mary.B.Niday@wvago.gov
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-341

STATE OF WEST VIRGINIA,

Respondent,

v.

CARLI R. REED,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 5th day of September 2024, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individual via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

Hunter B. Mullens
C. Brian Matko
Matthew L. Ervin
Mullens & Mullens, PLLC
9 North Main Street
PO Box 95
Philippi, WV 26416

/s/ Mary Beth Niday
Mary Beth Niday
Assistant Attorney General