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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 24-341 – *State of West Virginia v. Carli R. Reed*

BUNN, Chief Justice, concurring in part and dissenting in part:

Below, when sentencing Ms. Reed to fifteen years' imprisonment for voluntary manslaughter, the circuit court refused to give Ms. Reed credit for the time she spent on bail—on home confinement—after her conviction and awaiting sentencing.[1] I would have affirmed this decision. The majority, instead, reverses the circuit court on those grounds and finds that the circuit court may not withhold time served when a defendant is on bail and subject to home confinement. In essence, the majority determines that a convicted defendant who is at home awaiting sentence, with some restrictions on her liberty but who is not in jail, is *entitled* to have that time spent at home count toward her sentence—no matter the sentence—as time served. I disagree and respectfully dissent. To the extent that the majority affirms the circuit court's denial of credit for time served on pretrial home confinement and finds no error or abuse of discretion regarding the court's sentence, I concur.

1. Factual Background: A brief recitation of the facts assists my analysis. The issues on appeal in this case began in October 2022, when this Court reversed and

[1] The majority's opinion confusingly discusses the Home Incarceration Act but refers to what the Legislature has deemed "home incarceration" as "home confinement," perhaps in an attempt to expand the effects of its opinion outside the confines of the Home Incarceration Act. *See* Maj. Op. n.8. However, I note that the circuit court never described Ms. Reed as subject to the Home Incarceration Act but instead described her release as "home confinement."

remanded Ms. Reed's previous conviction for the murder of her husband. While Ms. Reed awaited her second trial, the circuit court below ordered that, if she posted bond, she would be subject to the court's "standard terms and conditions of bond" listed in her 2020 arraignment order, as well as "Home Confinement, with electronic monitoring." She made bond on December 22, 2022, and was released from custody. During this period, Ms. Reed resided at her parents' home. While awaiting trial, her supervising officers apparently changed, as did, somewhat, the conditions to which she was subject. A December 2022 document entitled "Home Incarceration Electronic Monitoring Program" delineated her electronic monitoring agreement and was signed by a "home confinement officer." A January 2023 document signed by Ms. Reed and a probation officer instructed that she was required to stay home, but could attend daytime church services, with approval. A March 2023 document noted that she had "Rules and Regulations for Home Confinement," and was signed by Ms. Reed and a deputy sheriff who was the "home confinement officer." Those conditions included that she would have "free time" for five hours on Wednesdays "to get groceries, run errands, attend [doctor] appointments, etc. and anything else of that nature."[2] On September 26, 2023, Ms. Reed pled guilty via an *Alford/Kennedy* plea to voluntary manslaughter, which was punishable by three to fifteen years' imprisonment. The

[2] The majority notes that Ms. Reed "was denied this grace period," which Ms. Reed also contends in her brief. However, while the record reflects that the home confinement officer referenced in the December 22, 2022 agreement omitted the grace period by scratching it out, the March 2023 "Rules and Regulations for Home Confinement" signed by Ms. Reed does not have this provision marked out and the record includes a letter dated March 15, 2023, from Ms. Reed's home confinement officer unambiguously explaining the "free time."

circuit court allowed her to remain on post-conviction bond but noted again that she was on "home confinement as a condition of her bond." The court noted that it would not give her credit for time served on home confinement as a condition of her bond. The court never entered any Home Incarceration Act order pursuant to West Virginia Code § 62-11B-5, and thus never listed the mandatory conditions of home incarceration in a required court order, either before or after her conviction.

Before sentencing, Ms. Reed requested alternative sentencing—home incarceration—as well as credit for time served on her home confinement (both before and after her conviction). She argued that failing to give her time served as she requested would violate her double jeopardy rights. In her motion, she recognized that not all the restrictions in the Home Incarceration Act were contained in any *court* order, but she argued she met all the conditions required under the Home Incarceration Act, West Virginia Code § 62-11B-5, because "those additional restrictions were set forth in separate agreements[.]"

At sentencing on March 28, 2024, five months after her conviction, the court denied her motion for credit for time spent on home confinement and also denied her request for an alternative sentence. The court emphasized that it had previously told Ms. Reed that "she may not receive credit for that time spent on home confinement pre-conviction or post-conviction." The court's sentencing order documented that she pled guilty to voluntary manslaughter, which includes "the necessary element of 'the intent to kill.'" The court determined that this intent "[led] to conduct that the [c]ourt cannot take

lightly" and "cannot allow to be minimized simply by the passage of time" and that the killing would "continue to have ripple effects on countless family members for years to come." It further recognized that the crime involved violence and the use of a firearm and sentenced her to fifteen years' imprisonment.

2. Applicable Law: Post-conviction presentence release, the Home Incarceration Act, and sentencing considerations. Because my dissent is premised on when a defendant is constitutionally required to receive time served based on bail conditions, I first discuss a practical, everyday occurrence in the criminal justice system: a defendant's *post*-conviction release from custody before sentencing. Courts often release defendants from custody while charges are pending, and continue that release on bail after they are convicted, by plea or trial, but have not yet been sentenced. *See* W. Va. R. Crim. P. 46(c) (regarding release pending sentencing and recognizing that release pending sentencing is pursuant to W. Va. Code § 62-1C-1(b)).[3] However, a convicted defendant

[3] West Virginia Rule of Criminal Procedure 46(c), entitled "Release from custody," provides in full:

> *(c) Pending sentence and notice of appeal.* - Eligibility for release pending sentence or pending notice of intent to appeal or expiration of the time allowed for filing notice of appeal shall be in accordance with Chapter 62, Article 1C, Section 1(b), of the West Virginia Code of 1931, as amended. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant. The burden of establishing eligibility for bail under this subsection rests with the defendant.

seeking (or continuing) bail while awaiting sentencing has "[t]he burden of establishing that the defendant will not flee or pose a danger to any other person or to the community [and] [t]he burden of establishing eligibility for bail[.]" W. Va. R. Crim. P. 46(c).

The bail provisions the circuit court imposes on release may vary, but should be "the least restrictive condition or combination of conditions" that is "reasonably necessary to assure that person will appear as required, and which will not jeopardize the safety of the arrested person, victims, witnesses, or other persons in the community or the safety and maintenance of evidence." W. Va. Code § 62-1C-1a(a)(3).[4] West Virginia Code § 62-1C-1a(a)(3) provides potential conditions of bail, including "remain[ing] in the custody of a person[,]" participating in an electronic monitoring program, staying employed, not using drugs or alcohol, avoiding contact with a victim, and "[s]atisfy[ing] any other condition that is reasonably necessary to assure the appearance of the person as

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As the Rule notes, release after conviction pending sentencing is allowed pursuant to W. Va. Code § 62-1C-1(b), which provides, in relevant part, that

> Bail may be allowed pending appeal from a conviction, except that bail shall not be granted where the offense is punishable by life imprisonment or where the court has determined from the evidence at the trial or upon a plea of guilty or nolo contendere that the offense was committed or attempted to be committed with the use, presentment or brandishing of a firearm or other deadly weapon, or by the use of violence to a person.

[4] West Virginia Code § 62-1C-1a was amended, effective June 12, 2026. However, the statutory amendments do not affect these considerations, and I refer to the amended statute here.

required and to assure the safety of the arrested person, victims, witnesses, other persons in the community, or the safety and maintenance of evidence."

And, courts may also employ the Home Incarceration Act as a condition of bail.[5] The statute concerning bail conditions, W. Va. Code § 62-1C-1a(a)(3)(C), specifically contemplates that a condition of bail may be that the defendant "[p]articipate in home incarceration pursuant to [West Virginia Code] § 62-11B-1 *et seq*." The Act reiterates this option, as pursuant to the Act, "[a]s a condition of . . . bail . . . , a circuit court may order an offender confined to the offender's home for a period of home incarceration." W. Va. Code § 62-11B-4(a). If home incarceration is ordered, the order must include the detailed requirements listed in § 62-11B-5, including, but not limited to "[a] requirement that the offender be confined to the offender's home at all times" except under certain particular circumstances; notice of penalties of any violations of the terms and conditions; a requirement that the offender follow a schedule "prepared by the probation officer in circuit court cases," regarding when and where the offender may be absent; a requirement that the offender not commit another crime; and a requirement that the offender obtain approval to change residences. W. Va. Code § 62-11B-5. The order is not optional, but is a requirement of the Act: "[W]hen an order imposes home incarceration pursuant to the Act, the order

[5] The concept behind the Home Incarceration Act is simple: it provides courts with an alternative to jail or imprisonment at various points in a defendant's case. *See* W. Va. Code § 62-11B-4(a) ("As a condition of probation or bail or as an alternative sentence to another form of incarceration for any criminal violation of this code over which a circuit court has jurisdiction, a circuit court may order an offender confined to the offender's home for a period of home incarceration.").

must set forth fully and completely the mandatory requirements of West Virginia Code § 62-11B-5." *State v. McGuire*, 207 W. Va. 459, 464, 533 S.E.2d 685, 690 (2000).

Turning to sentencing, typically during the time between conviction and sentencing, the probation office prepares a presentence report pursuant to Rule 32(b) of the West Virginia Rules of Criminal Procedure. As we have recognized when considering the importance of a presentence report, the sentencing court "needs adequate, accurate information to fairly sentence the defendant." *State v. McDonald*, 250 W. Va. 532, 539, 906 S.E.2d 185, 192 (2023).[6] Due to the probation officer's investigation and the required elements of the presentence report, the report informs the court about the defendant in a fulsome way that may not be apparent when a court earlier grants bail alongside any accompanying release restrictions.

If a convicted defendant is released from custody and is on bail, but subject to a Home Incarceration Act order, West Virginia Code § 62-11B-11(b) permits the circuit court at sentencing, "in its discretion" to "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

[6] Pursuant to Rule 32 of the West Virginia Rules of Criminal Procedure, the report contains information important for the court to consider when determining an appropriate sentence including the defendant's history and characteristics (including her criminal, work, and education history) and her mental and physical condition.

with the terms of bail."[7] This discretion allows the court to determine if calculating time spent at home, pursuant to the Home Incarceration Act, and subsequently reducing the effective sentence is appropriate in light of the court's sentencing considerations, including adequately taking into account the offense conduct and any statutory sentencing requirements. The majority declares this statute unconstitutional, which I discuss more below.

With those concepts in mind, here the circuit court exercised its discretion and refused to give Ms. Reed credit for "time served" while on home confinement, and she admits that she was never subject to a court order issued pursuant to the Home Incarceration Act. Still, the majority reverses the circuit court's determination that Ms. Reed is not entitled to credit for time served post-conviction while awaiting sentencing at home and *requires* this time to be calculated as time served purportedly to avoid a violation of double jeopardy. The majority's opinion is unworkable and results from statutory and constitutional overreach.

[7] W. Va. Code § 62-11B-11(b) provides:

> Upon 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.

3. A defendant's release from custody on bail is not required to be included as time served on the defendant's sentence. As we have recognized, "[t]he Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, . . . prohibits multiple punishments for the same offense." Syl. Pt. 1, in part, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977). Certainly, it is well established that post-conviction, presentence *incarceration*—i.e., time spent at a regional jail awaiting sentencing—must be counted as time served by a defendant. *See State v. Slaughter*, 252 W. Va. 284, 288, 922 S.E.2d 284, 288 (2024) (recognizing the "constitutional mandate that criminal defendants receive credit for time served in jail while awaiting sentencing on the underlying offense"). The majority, in effect, contends that, no matter what they call it, both (1) post-conviction, presentence release from custody on home confinement and (2) post-conviction, presentence release from custody on home incarceration pursuant to West Virginia Code § 62-11B-1 *et seq*. are the equivalent of being in custody and incarcerated for double jeopardy purposes. In the majority's view, being incarcerated at the regional jail awaiting sentencing is the same as being *released* from custody and on bail awaiting sentencing. Here, Ms. Reed was residing at her parents' home, where she had certain freedoms including attending the church of her choice and going to her doctor. Based upon the facts of this case and many others, this comparison simply does not hold.

As the United States Court of Appeals for the First Circuit recognized, home confinement may "severely curtail[]" a defendant's movement, but "it cannot seriously be doubted that confinement to the comfort of one's own home is not the functional equivalent

of incarceration in either a practical or a psychological sense." *United States v. Zackular*, 945 F.2d 423, 425 (1st Cir. 1991).[8] The Supreme Court of Pennsylvania in *Commonwealth v. Kyle*, using similar comparisons, rejected the contention that a defendant was in custody and deserved credit for time served when the defendant was released on bond to home confinement with electronic monitoring pending appeal. 874 A.2d 12, 20-21 (Pa. 2005). The court explained that "[t]he reality here is that [appellee] was subject to the home confinement/electronic monitoring program as a condition of his release on bail. **Bail** is neither a form of, nor in any way synonymous with, custody or imprisonment; rather, it is a form of **release** from custody." *Id.* at 21 (quoting *Com. v. Chiappini*, 782 A.2d 490, 503 (Pa. 2001) (Castille, J., concurring and dissenting), *abrogated by Com. v. Kyle* (emphasis in *Chiappini*)). The *Kyle* court identified practical, yet meaningful "differences between confinement at home and incarceration[,]" similar to the *Zackular* Court's comparison:

> [W]hile at home, an offender enjoys unrestricted freedom of activity, movement, and association. He can eat, sleep, make phone calls, watch television, and entertain guests at his leisure. Furthermore, an offender confined to his home does

[8] The First Circuit in *United States v. Zackular* recognized that the defendant there "affirmatively sought the right to self-surrender," then sought to defer his prison term and seek credit for home confinement. 945 F.2d 423, 425 (1st Cir. 1991). The *Zackular* court acknowledged that giving the defendant credit for home confinement, where he was "confined to his residence prior to self-surrender" would result in "allow[ing] the defendant to choose the place and manner of his confinement." *Id.* This result would not only be inconsistent with federal law, "but would fly in the teeth of common sense." *Id.*

> not suffer the same surveillance and lack of privacy that he would if he were actually incarcerated.

Id. (quoting *Com. v. Wegley*, 829 A.2d 1148, 1152 n.8 (Pa. 2003) (alteration in *Kyle*)). In other, succinct words: "[A]n individual who is released from custody cannot be said to be in custody." *Id.* at 21-22. I agree.

4. The Home Incarceration Act, when applied to defendants on bail and presentencing, is not penal in nature, and West Virginia Code § 62-11B-11(b) is not unconstitutional. West Virginia Code § 62-11B-11(b) provides the sentencing court with discretion to give a defendant on bail and released from custody, yet subject to the Home Incarceration Act, credit for time spent on home incarceration. I disagree with the majority's conclusion that this discretion is unconstitutional and violates double jeopardy principles. The majority concludes that, because this Court has previously determined that the Home Incarceration Act is "penal" in nature, credit for time served on home incarceration while on post-conviction bail is mandatory. However, the determination that the Act is penal emerges from a line of cases about another issue entirely. In finding the Act was penal, the Court initially interpreted one provision of the Act—the 1990 version of § 62-11B-9(b)—concerning a calculation of time served if a defendant was *sentenced* to home incarceration and subsequently violated the terms and conditions of home

confinement.[9] This analysis had nothing to do with an offender on post-conviction bail before she was sentenced.

Furthermore, the Legislature's grant of discretion to the circuit court clearly signals that, in the context of release on bail, home incarceration is not part of the penalty for the offense and thus is not penal in nature.[10] A defendant released from custody and participating in home confinement—or home incarceration—merely has an additional

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[9] In 1994, this Court considered whether the original version of the Home Incarceration Act (then called the Home Detention Act) was an alternative sentence permissible as a sentence for a conviction of second offense driving under the influence of alcohol. *State v. Long*, 192 W. Va. 109, 109, 450 S.E.2d 806, 806 (1994). The Court concluded that "home confinement" was an alternative sentence, and that "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." *Id.* at 111, 450 S.E.2d at 808. The *Long* Court noted that "the applicable portion" of § 62-11B-9(b) (eff. 1990) demonstrating that penal nature stated in part: "[T]he participant shall receive credit towards any sentence imposed after a finding of violation for the time spent in home confinement." *Id.* at 111 n.10, 450 S.E.2d at 808 n.10. However, subsection (b) in its entirety reveals that this subsection concerned when the "participant's participation" in "home detention" "was imposed as an alternative sentence to another form of incarceration" and provided that any subsequent violation of the home incarceration after sentencing would receive time served. W. Va. Code § 62-11B-9(b) (eff. 1990). While the Court carried forth and extrapolated this finding regarding the statute's penal nature in cases including *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996), *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000), and *State v. Jedediah C.*, 240 W. Va. 534, 814 S.E.2d 197 (2018), to the extent that the statutory language and intent of the Legislature indicates that the Home Incarceration Act is penal in nature, this interpretation of the statute should only apply to individuals *sentenced* to home incarceration pursuant to the Act.

[10] More practically, providing sentencing courts with discretion to consider whether presentence home incarceration should be considered time served also provides the court with adequate time to consider the presentence report and fashion an appropriate sentence for the defendant.

condition of bail that the court may take into account when considering sentencing. As we have recognized in other contexts, "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. . . ." *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011) (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983) (alterations in *James*)).[11] Here, the Legislature has indicated that home incarceration as a condition of bail is not penal.[12]

For these reasons, the Home Incarceration Act, when applied to offenders on bail, is not penal in nature, and giving discretion to a sentencing court to determine whether

[11] The majority inexplicably dismisses the Court's analysis in *State v. Walker*, which concerned whether a defendant sentenced to probation, with a condition of probation being one year of home incarceration, was entitled to time served on home incarceration after his probation was revoked. *State v. Walker*, 244 W. Va. 61, 65, 851 S.E.2d 507, 511 (2020). The *Walker* Court, in analyzing West Virginia Code § 62-11B-9(b) (2017), specifically noted that the Legislature does not provide for time served for all home incarceration participants upon a revocation of home incarceration after sentencing, but *only* if the home incarceration is imposed as an alternative sentence. *Id*.; *see also* Syl. Pt. 3, *id.* ("West Virginia Code § 62-11B-9(b) (2017) 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."). *Walker* thus reinforces the fact that home incarceration is not penal. As explained above and in *Walker*, it is not until a person is sentenced to home incarceration, pursuant to the Act, that the Legislature indicated such home incarceration is a penalty for a crime that would require a defendant to receive credit for time served on that sentence.

[12] While the majority supports its conclusion by comparing home confinement and home incarceration to parole conditions, the statutes at issue and this Court's precedent demonstrate that the two serve different purposes. *See generally Jett v. Leverette*, 162 W. Va. 140, 247 S.E.2d 469 (1978) (discussing the significance of parole in the context of a defendant's rehabilitation and good conduct after an initial period of confinement).

to provide time served while on bail to a sentence does not offend double jeopardy principles.

5. In the facts before this Court, the Act was not invoked, and the majority's opinion is unworkable in practice. Lastly, the Act is not even at issue in the case before this Court, but its application here is manufactured by the defendant and erroneously perpetuated by the majority. The circuit court never entered a Home Incarceration Act order, which—as the majority acknowledges in its new syllabus point—is *required* for a court to even begin to consider whether to grant a defendant time served under the Home Incarceration Act while on post-conviction bail.[13] Instead, here, assorted supervising officers determined Ms. Reed's release terms and conditions, which changed over time. While the majority emphasizes its conclusion that the Act is penal in nature, the Act was never applied by the circuit court in this case.

Moreover, the majority's invocation of the State Double Jeopardy Clause in this circumstance, where a defendant is subject to assorted home confinement officers' terms and conditions and there is no court-issued Home Incarceration Act order, is

[13] To this extent, the majority's new Syllabus Point 5 does not reflect the facts or issue in this case. The new Syllabus Point *requires* a "home incarceration order" that fully sets forth the terms and conditions that include, at a minimum, the statutory requirements in the Home Incarceration Act. However, Ms. Reed was never subject to a Home Incarceration Act order. *See State v. McGuire*, 207 W. Va. 459, 464, 533 S.E.2d 685, 690 (2000) ("[W]hen an order imposes home incarceration pursuant to the Act, the order must set forth fully and completely the mandatory requirements of West Virginia Code § 62-11B-5.").

impractical at best. The effect of this case, ill-conceived and misapplied syllabus point notwithstanding, means that circuit courts will now have to perform difficult—if not, at times, impossible—calculations and comparisons if they require a defendant to be on home confinement but have not themselves issued a Home Incarceration Act order with the required restrictions pursuant to West Virginia Code § 62-11B-5. The majority opinion thus requires a sentencing court in similar circumstances (i.e., a post-conviction defendant on home confinement, but no Home Incarceration Act order) to consider and determine the conditions imposed by home confinement officers—often deputy sheriffs in the executive branch of the county government that may change supervisees and conditions over time. The court must then compare these restrictions to each of the detailed requirements of the Home Incarceration Act in West Virginia Code § 62-11B-5 during the time that the defendant was on post-conviction bail and must grant the defendant credit for time served on home confinement if the terms and conditions match.

However, this identified difficulty is not the only problem with the majority's approach. The Pennsylvania Supreme Court also noted a potential unintended consequence of requiring courts to credit defendants with time served at home as if the defendants were held in jail. *Kyle*, 874 A.2d at 22. The *Kyle* Court noted that

> requiring sentencing courts to credit time spent at home as if it were the equivalent of incarceration may well lead trial courts to simply deny release on bail at all. Incarceration in an institutional setting is different in kind, not in mere degree, from "confinement" to the comforts of one's home. Sentences . . . can be designed to punish, to rehabilitate, and to teach lessons and personal responsibility. . . . Trial courts are vested

> with considerable discretion concerning release before trial and pending appeal. Once trial courts recognize the unintended windfall that would result from permitting conditional release on bail in an instance such as this one, they might be less likely to grant such requests. One of the benefits of home monitoring is the flexibility it affords the defendant and the court. If a court is to be required to pretend that such release is a period of incarceration, it may determine that actual incarceration, rather than bail release, is the only way to ensure service of an appropriate punishment.

Id. I am also concerned that the majority's opinion that strips the circuit courts' discretion in this regard will lead to refusal to release defendants to home confinement while awaiting sentencing.

In sum, I would have affirmed the circuit court's exercise of discretion in refusing to give Ms. Reed credit for time served on home confinement while she awaited sentencing, as that is what the statutes, rules, and our caselaw support. For all these reasons, I respectfully dissent.