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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

KIRKPATRICK, Justice, concurring, in part, and dissenting, in part:

In this case, the Court is ostensibly asked to resolve whether the petitioner, who was placed on home confinement with conditions that, she contends, met or exceeded those set forth under the Home Incarceration Act, West Virginia Code §§ 62-11B-1 through -13 (the "Act"), is entitled to credit the time spent under home confinement against her sentence. She also contends that her sentence was illegal. Insofar as the majority concluded that her sentence was not illegal, I concur. In addition, I concur with the majority's *determination* that the circuit court was vested with, and did not abuse its, discretion in denying the petitioner credit for time spent on pre-trial home confinement. However, I disagree with the majority's reasoning on that front for the same reasons that form the basis of my dissent to its determination that the petitioner was entitled to credit for time spent on post-conviction home confinement. In short, the terms of the petitioner's home confinement were not memorialized in an order containing, at minimum, the conditions enumerated in the Act. Therefore, the facts of this case provide no justification for declaring West Virginia Code § 62-11B-11(b) (2001) unconstitutional as applied in certain scenarios. Furthermore, the majority's disregard of its precedent (and its own newly articulated syllabus point) requiring a home incarceration order that sets forth fully the conditions of the Act before credit will be awarded has imposed a laborious undertaking that adherence to precedent would have obviated. For these reasons, I respectfully dissent.

As recounted by the majority, the petitioner's case, in which she was charged with the first-degree murder of her husband, progressed in two stages. In the first stage, the petitioner was indicted for the first-degree murder of her husband in June 2020, a jury convicted her of second-degree murder, and this Court reversed that conviction in 2022 due to the circuit court's failure to instruct the jury on the petitioner's defense of accident. *See State v. Reed*, No. 21-0227, 2022 WL 9931717 (W. Va. Oct. 17, 2022) (memorandum decision).

Upon remand for a new trial, beginning the second stage, the circuit court set the petitioner's bond at $900,000 and directed that

> [i]f [the petitioner] posts bond, [the petitioner] **SHALL BE**:
>
> A) subject to the [c]ourt's standard terms and conditions of bond as set forth in [the petitioner's] *Arraignment Order* entered June 16, 2020;
>
> B) placed under supervision by the 19th Judicial Circuit Probation Office; and
>
> C) The [petitioner] **SHALL BE** placed on Home Confinement, with electronically [sic] monitoring.

The petitioner posted bond, and she was, therefore, placed on home confinement in December 2022.

In placing the petitioner on home confinement, the circuit court did not enter a home confinement order per se. Rather, the court's bond order referenced its June 16, 2020, arraignment order, which obligated the petitioner to comply with its bond terms requiring, in general, that she (1) appear for court as directed; (2) obey all laws; (3) not associate with criminals; (4) not enter establishments that sell alcohol by the drink; (5) not consume alcohol; (6) not carry or possess any guns or other lethal weapons; (7) report to her probation officer as directed by her probation officer, but at least monthly; (8) submit to random drug and alcohol tests; (9) not use or possess unprescribed controlled substances; and (10) not leave the state without permission. The arraignment order also advised the petitioner that "a violation of any of the above stated conditions may result in the revocation of the bond and further [c]ourt action which may include incarceration." The mandatory, statutory conditions required under the Act are discussed more fully below, but only the Act's requirements that she obey laws and, potentially, that she be advised of the penalties for violating the terms of her home confinement can be said to have been covered by this court order.[1] However, the Barbour County Probation Department, which oversaw the petitioner's home confinement, also provided the petitioner with approximately seventeen

[1] Arguably, the arraignment order advised the petitioner only of the penalties for violating the *bond terms*, since the arraignment order did not contain all of the Act's statutory conditions.

pages of documents containing terms and conditions at various points during the petitioner's home confinement.[2]

The petitioner eventually pled guilty, by *Alford*/*Kennedy* plea, to voluntary manslaughter, and she remained on post-conviction home confinement until sentencing. The circuit court sentenced her to fifteen years of incarceration in March 2024, and, though she sought it, the court denied her credit toward that sentence for the approximately fifteen months she spent on pre-conviction and post-conviction home confinement. The petitioner now contends that the court erred in denying her credit for time served on home confinement.[3]

The majority finds that the petitioner is entitled to credit for the time spent on home confinement post-conviction, deeming West Virginia Code § 62-11B-11(b)[4] unconstitutional as applied to her to the extent it is read to vest circuit courts with discretion to deny that credit where the terms of West Virginia Code § 62-11B-5 (2001), described

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[2] The petitioner's supervision was overseen, first, by Sarah Parks. Ms. Parks passed away in February 2023, however, and Deputy Gunnar Kennedy took over the petitioner's supervision beginning in March 2023. Although each officer provided the petitioner with their own documented rules, the rules implemented by each officer overlap in many respects, but they are not identical.

[3] As stated above, the petitioner also argues that her sentence was illegal, and I agree with the majority's resolution of that assignment of error.

[4] West Virginia 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."

below, have been imposed and fully met. In reaching this result, the majority ignores decades of this Court's precedent and the explicit mandate of West Virginia Code § 62-11B-5 itself.

Beginning with the terms of the Act, West Virginia Code § 62-11B-5 specifies that "[a]n order for home incarceration of an offender[5] . . . is to include, but not be limited to," nine discrete requirements enumerated in the statute. Summarized, and stated generically, the home incarceration order must (1) require the offender remain at home "at all times," except for when engaging in certain approved activities such as work, school, or worship; (2) advise the offender of the penalties for violating the order's terms and conditions; (3) require compliance with a schedule, "specifically setting forth" times an offender is allowed to leave his/her home and the locations the offender is allowed to be; (4) instruct an offender not to commit another crime; (5) require the offender to obtain approval before changing residences or the schedule specified in the order; (6) require the offender to maintain a working telephone; an electronic monitoring device, if required by the circuit court; and electric service, if a monitoring device is ordered; (7) require the payment of a home incarceration fee; (8) require the payment of a fee related to the West Virginia Community Corrections Fund; and (9) require the offender abide by other conditions set by the court. *Id.*

[5] Relevant here, an "offender" is an "adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary." W. Va. Code § 62-11B-3(3) (2001).

In recognition of the statute's mandate, our precedent has reflected the need for an order setting forth completely the restrictions contained in § 62-11B-5 before an offender is entitled to credit for time served on post-conviction home incarceration:

> Pursuant 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.

Syl. Pt. 3, *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000) (emphasis added); *see also id.* at 463, 533 S.E.2d at 689 (observing that in *State v. Hughes*, 197 W. Va. 518, 528, 476 S.E.2d at 189, 199 (1996), the Court "inferred that the order allowing for home incarceration must contain the numerous mandatory restrictive burdens enumerated within the Act so that the intent of the circuit court in granting home confinement pursuant to the provisions of the Act is clear"); *State v. Jedediah C.*, 240 W. Va. 534, 538, 814 S.E.2d 197, 201 (2018) ("[A]n order for home confinement must contain the mandatory, restrictive burdens set forth in West Virginia Code § 62-11B-5 so that the intent of the court in granting home confinement under the Act is clear."). The majority, too, in setting forth its new syllabus point, has specified that credit for time served on post-conviction home confinement is contingent on (1) home confinement that is subject to "terms and conditions which are set forth fully in the home incarceration order and encompass, at a minimum,

the mandatory, statutory requirements enunciated in West Virginia Code section 62-11B-5 (2001)" and (2) compliance with those terms and conditions. Maj. Op. Syl. Pt. 5.

In this case, the circuit court entered no order setting forth fully the mandatory, statutory requirements set forth in West Virginia Code § 62-11B-5.[6] Without verifying, the majority is content to rest on the parties' mere assertions that the requisite terms were nevertheless contained within the documents provided by the probation office and that the terms meet the requirements of the Act. That is a problem—a party's bare representation does not typically suffice for record evidence. *See Jedediah C.*, 240 W. Va. at 539–40, 540 n.20, 814 S.E.2d at 202–03, 203 n.20 (observing that, despite the State's failure to dispute that the terms of the petitioner's home confinement met the requirements of the Act, the petitioner failed to provide "sufficient evidence" to support that claim where he failed to provide a complete copy of those terms "for this Court's review"). Nor should a bare representation suffice to move this Court to declare a statute unconstitutional, as applied, considering that we are to exercise "due restraint" in considering the constitutionality of a statute. Syl. Pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); *see also* Syl. Pt. 5, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 210 S.E.2d 641 (1974) ("When it is not necessary in the decision of a case to determine a constitutional question, this Court will not consider or determine such question."); *cf. Freeland v. Marshall*, 249 W. Va. 151, 160,

[6] The petitioner acknowledges as much, informing the Court that the terms of her home confinement were "not specifically addressed in any order of the [c]ourt."

895 S.E.2d 6, 15 (2023) (noting that the State's confession of error does not absolve this Court "of its judicial duty to independently examine the error confessed to determine if the confession of error is meritorious").

Having undertaken the review of the terms of the petitioner's home confinement avoided by the majority, I conclude that the terms did not, in fact, meet or exceed those set forth in West Virginia Code § 62-11B-5. To start, the first statutory requirement mandates, in general, confinement to one's home "at all times except" for while working, seeking employment, obtaining medical treatment, attending school, attending a religious service, participating in work release, or engaging in other activities "specifically approved for the offender by the circuit court." *See id.* § 62-11B-5(1). It appears that the petitioner was, generally, required to be confined in her home save for these excepted absences; however, it *also* appears that she was afforded a weekly, hours-long period of free time to purchase groceries and run other errands. The petitioner's contrary assertion—which the majority blindly accepts—is unsupported by the various probation documents and the citation to the appendix record she supplies. The page of the appendix cited quotes testimony from a home incarceration supervisor employed in the probation office who did *not* testify that the petitioner was denied free time for errands. He did, though, testify that the petitioner was permitted the freedom to travel to her attorney's office and that the probation office—not the circuit court—also permitted the petitioner to transport her father to *his* medical appointments. These activities are not delineated exceptions to the statutory requirement that she be confined to her home "at all times," nor

were they "other activities specifically approved for the offender by the circuit court." *Id.* Further, the very same documents the petitioner asks this Court to conclude establish that she was subject to the mandatory, statutory requirements undercut the veracity of her statement that she was denied the weekly free time. In one document, her probation officer informed her that she "will be allotted free time after your check in [on Mondays at 4:00 p.m.] until 8:00 p.m." Another document provides that "[e]very Wednesday is your free time from 3:00 P.M. to 8:00 P.M. this time is meant for you . . . to get groceries, run errands, attend [d]r. [a]ppointments, etc. and anything else of that nature." These additional liberties, particularly as they were not "specifically approved for the offender by the circuit court," mean that the petitioner was not confined to her home "at all times," besides those few permissible freedoms.

Further, the record reveals other deviations from the Act that, while perhaps less significant than the additional freedom of movement she was afforded outlined above, nevertheless demonstrate that the terms of her home confinement were less restrictive than West Virginia Code § 62-11B-5 permits. For instance, the statute requires that an offender obtain approval from his/her probation officer "*before* the offender changes residence or the [specific] schedule" to which the offender is required to abide. *See id.* § 62-11B-5(5) (emphasis added). To satisfy this requirement, the petitioner points to a requirement imposed by her probation officer that states, "I will report any change of address, place of employment, or telephone number to my probation officer **within 24 hours**." In other words, the petitioner was not required to obtain approval *before* changing her residence;

rather, and less onerously, she was free to change her residence without any such prior approval, and the identified restriction requires no notification, whether prior or after, of a change in her schedule. As such, this identified restriction does not meet the requirements of the statute.

West Virginia Code § 62-11B-5 also required the petitioner to maintain a working phone, an electronic monitoring device, and electric service. *Id.* § 62-11B-5(6). The petitioner acknowledges that "[t]here were no provision [sic] in any document related to [her] home incarceration that required electric service." She submits, instead, that "it was known" that the petitioner was staying at a residence that had electric service. As a final example, West Virginia Code § 62-11B-5(8) requires, in effect, the payment of a fee related to the West Virginia Community Corrections Fund. Claiming that this condition was met, the petitioner points this Court, first, to a requirement that she pay all court-ordered costs, fines, restitution, or attorney's fees in the circuit clerk's office. This is not a requirement that she pay the fee itself, only a requirement speaking to *where* she must pay any court-imposed fees. She also points to a requirement that she pay home incarceration fees; however, those fees are required under West Virginia Code § 62-11B-5(7). The fees required by the subsequent subsection are different, and it is not at all clear that this requirement was imposed upon her, nor does the petitioner point this Court to where the circuit court "consider[ed] the person's ability to pay in determining the imposition and amount of the fee," which the statute provides for and which would enable this Court to ascertain whether the fee was, in fact, imposed. *Id.* § 62-11B-5(8).

The restrictive nature of the Act's specific home incarceration conditions has given rise to our conclusion that the Act is penal. *Jedediah C.*, 240 W. Va. at 537–38, 814 S.E.2d at 200 ("[T]he penal intent of the Act is reflected by the substantial restrictions enumerated in West Virginia Code § 62-11B-5 that are placed on the offender.") Thus, for home confinement to constitute a *punishment*, and therefore be proscribed under the Double Jeopardy Clause contained in the West Virginia Constitution if not accompanied by credit, home confinement's conditions must, at least, meet the requirements set forth in § 62-11B-5. *See* Syl. Pt. 1, in part, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977) ("The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution . . . prohibits multiple *punishments* for the same offense. (Emphasis added.)). Before the majority declared West Virginia Code § 62-11B-11(b) unconstitutional as applied to the petitioner under double jeopardy principles, it should have ensured that the statute actually was unconstitutional *as applied*. Here, the terms of her home confinement did not meet those required by the statute, so it did not amount to a punishment, and the majority did not need to reach the issue of whether West Virginia Code § 62-11B-11(b) was, consequently, unconstitutional as applied to her. *See In re Tax Assessments*, 158 W. Va. at 230, 210 S.E.2d at 643, Syl. Pt. 5. This case did not present the issue that the majority decided and could have been resolved under *McGuire*:

> Thus, the fact remains that the order imposing home incarceration as a condition of post-conviction bail "fail[s] to cover all the requirements imposed by the Act." . . . Accordingly, the lower court did not err in refusing, in its discretion, to grant the Appellant credit on her sentence for time spent on home incarceration as a condition of post-conviction bail.

McGuire, 207 W. Va. at 465, 533 S.E.2d at 691 (quoting *State v. McGuire*, 200 W. Va. 832, 839, 490 S.E.2d 912, 928 (1997)); *see also Hughes*, 197 W. Va. at 528, 476 S.E.2d at 199 (finding that the "absence of [the Act's] substantial restrictions" in pre-trial home confinement scenario did not require time spent on home confinement as a condition of pre-trial bail be credited toward subsequently imposed sentence). For these reasons, I respectfully dissent.