

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia v. Edward C. Frazier

No. 12-0849 (Jackson County 11-F-104) · No. No. 12-0849 (Jackson County 11-F-104) · Decided May 24, 2013

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed Edward C. Frazier’s sentence for possession with intent to deliver a Schedule III controlled substance. The court held that the sentence was within statutory limits and that the circuit court acted within its discretion in denying credit for 538 days spent on home incarceration as a condition of bail. The court also rejected Frazier’s challenge based on the differing sentence imposed on his codefendant.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per curiam; Chief Justice Brent D. Benjamin; Justice Robin Jean Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Allen H. Loughry II
JURISDICTION	West Virginia
DECIDED	May 24, 2013
DOCKET	No. 12-0849 (Jackson County 11-F-104)
DISPOSITION	affirmed
PROCEDURAL POSTURE	Frazier appealed from the Circuit Court of Jackson County's order sentencing him after his guilty plea to possession with intent to deliver a Schedule III controlled substance. He challenged the denial of credit for 538 days spent on home incarceration as a condition of bail and the one-to-five-year term of incarceration.
STANDARD OF REVIEW	Sentencing orders are reviewed under a deferential abuse-of-discretion standard unless the order violates statutory or constitutional commands. A sentence within statutory limits and not based on an impermissible factor is not subject to appellate review.
PRECEDENTIAL VALUE	Published memorandum decision; limited precedential value under West Virginia appellate practice
PARTIES	Edward C. Frazier v. State of West Virginia

TOPICS

sentencing

bail

appellate procedure

standard of review

criminal procedure

PRACTICE AREAS

criminal law

criminal procedure

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appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court abused its discretion by denying credit for 538 days spent on home incarceration as a condition of bail.
2. Whether the one-to-five-year sentence and \$10,000 fine were subject to appellate review when they fell within the statutory limits.
3. Whether denying Frazier home-incarceration credit while granting such credit to his codefendant rendered the sentence unconstitutional or otherwise constituted an abuse of discretion.

HOLDINGS

1. West Virginia Code § 62-11B-11(b) gives the circuit court discretion to grant credit for time spent on home incarceration as a condition of bail when the defendant complied with bail terms; the credit is not mandatory.
2. A sentence within the statutory limits and not based on an impermissible factor is not subject to appellate review.
3. Disparate sentences for codefendants are not per se unconstitutional, and the circuit court did not abuse its discretion by denying Frazier credit after identifying relevant differences between him and his codefendant.

KEY QUOTATIONS

“Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” (2)

“Disparate sentences for codefendants are not per se unconstitutional.” (2)

“Obviously, this statute provides circuit courts discretion in granting credit for time served and does not make such an award mandatory.” (2)

FACTUAL BACKGROUND

Frazier was arrested with more than 900 opiate tablets, estimated by law enforcement to be worth more than \$21,000. He was on home incarceration as a condition of bail for 538 days without violations. After pleading guilty under a plea agreement to possession with intent to deliver a Schedule III controlled substance, he received a one-to-five-year sentence and a \$10,000 fine. The circuit court denied home-incarceration credit based on the seriousness of the offense and other circumstances, including its disbelief of Frazier's explanation and his failure to accept responsibility.

PROCEDURAL HISTORY

A Jackson County grand jury indicted Frazier on multiple drug-distribution and conspiracy charges. Pursuant to a plea agreement, he pleaded guilty to one count of possession with intent to deliver a Schedule III controlled substance. The circuit court sentenced him to one to five years of incarceration and a \$10,000 fine, denied credit for 538 days of home incarceration, and denied his request to serve the sentence on home incarceration. The Supreme Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Lucas, 201 W. Va. 271, 496 S.E.2d 221 (1997)
- State v. James, 227 W. Va. 407, 710 S.E.2d 98 (2011)
- State v. Goodnight, 169 W. Va. 366, 287 S.E.2d 504 (1982)
- State v. Georgius, 225 W. Va. 716, 696 S.E.2d 18 (2010)
- State v. Buck, 173 W. Va. 243, 314 S.E.2d 406 (1984)
- State v. Jones, 216 W. Va. 666, 610 S.E.2d 1 (2004)

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS State of West Virginia, Plaintiff Below, Respondent FILED May 24, 2013 RORY L. PERRY II, CLERK vs) No. 12-0849 (Jackson County 11-F-104) SUPREME COURT OF APPEALS OF WEST VIRGINIA Edward C. Frazier, Defendant Below, Petitioner MEMORANDUM DECISION Petitioner's appeal, by counsel Kevin B. Postalwait, arises from the Circuit Court of Jackson County, wherein he was sentenced to a term of incarceration of one to five years following his guilty plea to one count of possession with intent to deliver a Schedule III controlled substance by order entered June 22, 2012.

The State, by counsel Scott E. Johnson, has filed its response. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error.

For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure. During the June 2011 term of court, petitioner was indicted by a Jackson County Grand Jury on seven counts of possession with intent to deliver a Schedule II controlled substance, one count of conspiracy to commit the offense of possession with intent to deliver a Schedule II controlled substance, and one count of possession with intent to deliver a Schedule III controlled substance.

These charges stemmed from an incident in which petitioner was arrested with over 900 opiate tablets in his possession, which law enforcement estimated to be worth over \$21,000. In March of 2012, petitioner entered into a plea agreement whereby he would plead guilty to possession with intent to deliver a Schedule III controlled substance.

On June 18, 2012, the circuit court held a sentencing hearing, during which petitioner was sentenced to a term of incarceration of one to five years, and also ordered to pay a fine of \$10,000. At the time of sentencing, petitioner had been on home incarceration as a condition of bail for a total of 538 days with no violations.

The circuit court denied petitioner's request to serve his sentence on home incarceration and also denied him time-served credit for the 538 days on home incarceration. The circuit court specifically stated that it was denying the credit "[b]ased on the seriousness of the offense and all other circumstances of the case...." 1 On appeal, petitioner alleges that the circuit court erred in denying him time-served credit for the 538 days he spent on home incarceration and in sentencing him to a period of incarceration of one to five years.

In support, petitioner argues that his co-defendant, who was indicted on identical charges, was given credit for the time he served on home incarceration and that it was an abuse of discretion to deny him the same. Petitioner also alleges that he has an extremely limited criminal history, having only one prior arrest for petit theft. He also asserts his status as a disabled Navy veteran who served in the Vietnam War and his lengthy employment history as factors in favor of granting credit for his time served on home incarceration.

Petitioner asks the Court to apply proportionality principles to this issue by comparing the sentence he actually received to the sentence that he would have been granted with time credit. According to petitioner, had the circuit court granted him credit for his time served, he would have been eligible for parole immediately upon his sentencing. "The Supreme Court of Appeals reviews sentencing orders... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syl.

Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Upon our review, the Court finds no error in regard to petitioner's assignments of error. "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syllabus Point 4, *State v. Goodnight*, 169 W.Va.

366, 287 S.E.2d 504 (1982)." Syl. Pt. 3, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). Petitioner was convicted of possession with intent to distribute a Schedule III controlled substance under West Virginia Code § 60A-4-401(a)(ii), which provides for both a term of incarceration of

one to five years and a fine of up to \$15,000. It is uncontroverted that petitioner was sentenced within these statutory limits, and his sentence is therefore not subject to review.

As to petitioner's argument that it was error to deny him credit for the time he served on home incarceration as a condition of bail, the Court finds no error. West Virginia Code § 62-11B 11(b) 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." Obviously, this statute provides circuit courts discretion in granting credit for time served and does not make such an award mandatory.

Further, we have held that "[d]isparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse." Syllabus Point 2, in part, *State v. Buck*, 173 W.Va.

243, 314 S.E.2d 406 (1984). Syl. Pt. 5, *State v. Jones*, 216 W.Va. 666, 610 S.E.2d 1 (2004). In the instant matter, the circuit court considered multiple factors differentiating petitioner from his co-defendant. Most importantly, the circuit court expressed disbelief as to petitioner's account of how the crime in question occurred, noting that he "takes absolutely no responsibility for his conduct." According 2 to the circuit court, petitioner stated that he came to be in possession of the large quantity of controlled substances when he picked up the wrong bag in Florida.

Conversely, petitioner's co defendant gave a statement to law enforcement in which he admitted that he and petitioner conspired to sell prescription pills and stated that he would take "whatever punishment" was given. Based upon these facts, the Court finds no error in the circuit court denying petitioner credit for time served while on home incarceration as a condition of bail.

For the foregoing reasons, the circuit court's order is hereby affirmed. Affirmed. ISSUED: May 24, 2013 CONCURRED IN BY: Chief Justice Brent D. Benjamin Justice Robin Jean Davis Justice Margaret L. Workman Justice Menis E. Ketchum Justice Allen H. Loughry II 3