

No. 35140

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Plaintiff Below,

Appellee,

VS.

CASE NO. 06-F-240
06-M-56

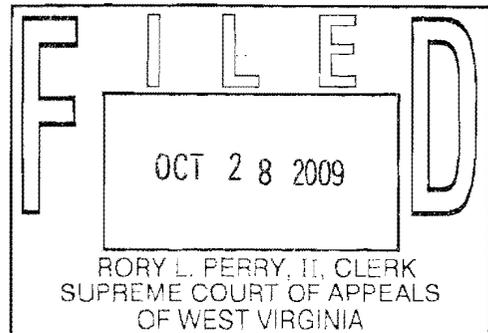
DAVID HAROLD EILOLA,
Defendant Below,

Appellant.

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

**TO THE HONORABLE JUSTICE OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA:**

**THE KIND OF PROCEEDING AND NATURE OF
THE RULING IN THE LOWER TRIBUNAL**

A Kanawha County jury convicted the Appellant on April 26, 2007 of attempted first degree murder, malicious assault, fourth degree arson, violation of a domestic battery order and domestic battery. The court sentenced the Appellant on August 6, 2007 to consecutive terms of 3-15 years, 2-10 years, 2 years, 12 months and 12 months. The trial court ordered all sentences to be served consecutively.

STATEMENT OF THE FACTS OF THE CASE

The Appellant, David Eilola, has remained incarcerated since April 15, 2006, unable to post bond in the amount of \$50,000, cash only. Originally, Mr. Eilola's effective sentencing date, the date given on commitment in order to give credit for time served, was given as March 29, 2006. The State moved to amend the court's Order of Commitment to be consistent with this Court's decision in St. v. Middleton, 220 W. Va. 89, 640 SE 2d 152 (2006).

Following a hearing held November 13, 2007 the trial court granted the State's motion and changed the effective sentencing date to August 6, 2007. While giving Mr. Eilola credit for 495 days confinement on the end of his sentence, thus keeping his discharge date the same, he received no credit for time served for purposes of parole eligibility. Given the new effective

sentencing date of August 6, 2007, his actual sentencing date, the running of time served for parole eligibility starts at zero on August 6, 2007 instead of from the time of incarceration on the charges, March 29, 2006.

**ASSIGNMENTS OF ERROR RELIED UPON ON
APPEAL AND THE MANNER IN WHICH
THEY WERE DECIDED IN THE LOWER TRIBUNAL**

1. Whether refusing to give the Appellant credit for time served prior to sentencing on the front of his sentence thus moving back his parole eligibility violates the constitutional guarantees of equal protection under the law.

**POINTS AND AUTHORITIES RELIED UPON,
DISCUSSION OF THE LAW,
AND THE RELIEF PRAYED FOR**

Refusing to give the Appellant credit for time served prior to sentencing on his parole eligibility violates the constitutional guarantees of equal protection under the law.

The Appellant respectfully submits that this Court's holding in St. v. Middleton, 220 W. Va. 89, 640 SE 2d 152 (2006) regarding credit for time served be reconsidered and reversed. The Court's ruling results in loss of credit on a sentence for periods of incarceration based solely upon economic status or resources.

Two identical twins, separated at birth, are raised in similar environments. Both have the same or similar educational, vocational, medical, psychological and criminal backgrounds. Both

commit the same crime of breaking and entering of a non-dwelling with a potential sentence of 1-10 years in the penitentiary.

Because of the fairness of the bail system, each has a bond set in the amount of \$50, 000 with the option of posing 10% cash. Both have trials dates that for whatever reason results in sentencing one year from the date of arrest.

The first individual cannot make bond and spends one year in confinement before trial and sentencing. The second brother has a girlfriend who the week before his arrest buys the winning lottery ticket winning the \$5,000 necessary to post her boyfriend's bond.

Both are sentenced on the same day to 1-10 years. Both are model inmates and make parole the first time they are eligible. The first brother has spent two years confinement based upon the same facts as his sibling who happened to be dating a lucky lottery winner.

Confinement is confinement whether in it is spent in the custody of the Department of Corrections or the custody of the Regional Jail system. Given the current overcrowding of Department of Corrections facilities and the waiting list to be transferred to a Department of Corrections Facility, pre-conviction and post-conviction confinement may be spent in the same facility only with a different classification.

Two individuals similarly situated are subjected to different punishments based solely upon economic status. One does not need much imagination or experience representing persons within the criminal justice system to think of situations where persons similarly situated face greater punishment, that is, confinement, than another, based solely upon economic status. That difference in treatment by the criminal justice system can be the result of being in a family with greater economic resources or having one's own economic resources resulting in less time behind

bars based solely on that status than a less advantaged defendant.

The argument that giving credit for time served on the front or parole eligibility portion of a sentence creates the absurd result that a defendant could be paroled without ever being in a Department of Corrections facility ignores other instances where persons do not see the inside of a prison such as the various alternate sentences now available. The reasoning also ignores the current situation where the Department of Corrections does not have the space to house all inmates committed to its custody resulting in prisoners serving substantial parts of their sentences in Regional Jails. It is difficult to explain to an individual who has been confined under the arguably more Spartan conditions of a Regional Jail where educational and recreational opportunities are more limited as well more limited living space than at a DOC facility that he has not been serving his sentence at least as far as parole eligibility is concerned.

Middleton treats indigents less favorably than others similarly situated based solely upon their economic status. This Court has recognized that parole involves a substantial interest subject to legal protection. St. ex rel. Carper v. West Virginia Parole Board, 203 W. Va. 583, 509 S.E.2d 864 (1998). While parole eligibility is not a right to be paroled, there is a due process and equal protection right to have to have the opportunity to be considered for parole.

The southern district of Ohio has recognized the credit for pre-sentence detention has a dual effect. In addition to the earlier expiration of a sentence, the credit for time served also results in earlier parole eligibility. Otherwise, indigent defendants are confined for longer period of time before they become eligible for parole than other inmates who remain free until after their trials. White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972).

The Supreme Court of Wisconsin requires credit be given both for time served on

expiration of sentence and for parole eligibility. If a defendant does not receive credit for time for pre-trial incarceration for parole eligibility, "a person financially unable to make bail would be required to serve a longer period of incarceration to be eligible for parole than a non-indigent prisoner who is bailed pending conviction." St of Wisconsin v. Wilson, 82 Wis.2d 657, 264 N.W.2d 234 (1978).

The Middleton Court framed the issued as providing credit to both of the defendant's sentences for pre-sentence incarceration. With all due respect, the Appellant is not requesting an allocation of time served between sentences or "volume discounts." The Appellant is only seeking the same credit for time served behind bars prior to sentencing as a defendant who does not go behind bars until after sentencing.

If Mr. Eilola had only been convicted of one charge, say the 3-15 year term for attempted murder, he would receive credit on the end of the sentence of 495 days plus good time. He would receive credit on the front of the sentence of 495 days leaving 600 more days for him to serve before becoming eligible for parole. (3 years X 365 days =1095 days-495 days=600 days). He gets credit for the same 495 on the end of the consecutive sentence and the front of the consecutive sentence.

The effect of the ruling upon Mr. Eilola is to require an additional period of confinement of almost 1 ½ years before being eligible for parole. The Petitioner requests that Middleton be reversed and that he be given credit for time served prior to conviction and that his effective sentencing date be adjusted to give him credit for 495 days toward parole eligibility.

RELIEF PRAYED FOR

The Petitioner requests that this Court remand his case with instructions that he be given full credit for pre-trial incarceration on the beginning of his sentence of 495 days and that this Court's holding regarding credit for time served prior to sentencing on the parole eligibility portion of his sentence be reversed and any other just and appropriate relief.

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Appellant, By Counsel


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CERTIFICATE OF SERVICE

I, Edward L. Bullman, counsel for the defendant herein, DAVID HAROLD EILOLA, do hereby certify that on this 27th day of October, 2009, I have placed a true and exact copy of the foregoing **APPELLANT'S BRIEF** in the United States Mail, postage properly paid, in envelopes addressed as follows:

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WV Attorney General's Office
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Edward L. Bullman