14-0919

In the Circuit Court of Preston County, West Virginia

State of West Virginia

vs. **Case Nos. ~~13-F-1~~ 12-F-85**
Hon. Lawrance S. Miller, Jr.

Denny Franklin Ervin

Sentencing Order

A hearing was held in the above-styled case on June 5, 2014, to consider the Defendant's Motion for New Trial, Judgment of Acquittal, and New Counsel and If the Court ruled adversely to the Defendant to sentence the Defendant. The State of West Virginia appeared by Mel Snyder, Prosecuting Attorney of Preston County, and James Shay, Assistant Prosecuting Attorney of Preston County. The Defendant appeared in person and was represented by counsel, Kevin Tipton. Also present was Probation Officer Todd Schell.

Previously, on April 17, 2014, the Jury found that the Defendant was guilty of the felony crime of "First Degree Murder" as charged in Count 1 of the Indictment; the Defendant had committed "First Degree Murder" by the "Use of a Firearm" as alleged in Count 2 of the Indictment; and the Defendant was guilty of the felony crime of "Wanton Endangerment" as charged in Count 4 of the Indictment.

The Court first took up the Defendant's Motions for a New Trial and Judgment of Acquittal. After considering the proffers and arguments of counsel the Court **FINDS** that the Motions are ~~not warranted~~ denied for the reasons the court has explained in detail on the record.[1] Accordingly, the Court **ORDERS** that the Defendant's Motions for a New Trial and Judgment of Acquittal are denied.

The Court notes that the Pre-Sentence Investigation (PSI) Report was filed and provided to the parties at least 10 days prior to this hearing and counsel and the Defendant have had a chance to review the Report. The Court inquired if counsel had any objections or amendments to the Report and the Court accordingly made any necessary changes and adopts the information in the Report for purposes of sentencing the Defendant. ~~Likewise, the Court notes that a Victim Impact Statement was filed and provided to the parties and the Court has reviewed the same.~~ The Court then inquired if any party wished to delay sentencing and no request for delay being made the Court proceeded to sentence the Defendant.

[1] The Court did grant the Defendant's motion for new appellate counsel. The Court's Rulings are reflected by written opinion after following June 5, 2014 Hearing on Defendant's Post-Trial Motions filed June 17, 2014 hereby incorporated by reference.

The Court next heard the proffers and arguments made by the State, made by Defendant's Counsel, and informed the Defendant of his right of allocution and heard the Defendant's allocution.

The Court after due consideration of the PSI Report and the statements and proffers noted above **ORDERS** that:

Upon the Defendant's jury conviction for the felony crime of "First Degree Murder" without a recommendation for mercy the Defendant is sentenced to imprisonment for life; and

Upon the Jury's determination that the "First Degree Murder" was committed by the "Use of a Firearm" the Defendant is not eligible for probation; and

Upon the Defendant's jury conviction for the felony crime of "Wanton Endangerment" the Defendant is sentenced to imprisonment for a determinate sentence of five (5) years, said sentence to be served consecutive to the Defendant's sentence for "First Degree Murder."

The Defendant is given credit for time served since May 9, 2012, at the Tygart Valley Regional Jail. The Defendant is also assessed the costs of this proceeding.

CONVICTION DATE:	**April 17, 2014**
SENTENCE DATE:	**June 5, 2014**
EFFECTIVE SENTENCE DATE:	**May 9, 2012**

The Court affirmatively recommends that the Defendant receive any alcohol and psychological treatment that may be available to him while imprisoned.

The Court notes that the Defendant may be liable for Restitution and requested the State to schedule and notice a restitution hearing, if necessary.

The Court informed the Defendant of his right to appeal, the necessity of filing a notice of appeal within thirty (30) days, his right to a free transcript, his right to have the Court appoint him an attorney if he cannot afford one, and his right to file a motion for Reduction of Sentence within 120 days as provided in Rule 35(b) of the West Virginia Rules of Criminal Procedure. The Defendant was also given a written copy of his Notice of Appellate Rights, which explains his appellate rights in more detail. The original of the Notice of Appellate Rights was filed in the Court file in this case.

The Court next considered the Defendant's Motion for New Counsel and the Motion to Withdraw by Defendant's counsel. Said Motions were not opposed by the State. Accordingly, for the reasons stated by Defendant and his Counsel on the record and in their written motions the Court will appoint new counsel for purposes of appeal and any further proceedings in this matter by separate Order.

The parties are saved their objections and exceptions to the rulings of the Court.

The Court directs the Clerk to provide a copy of this Order to:

the West Virginia Division of Corrections, ATTN: Diann Skiles, by facsimile 304-558-8430; the Tygart Valley Regional Jail, by facsimile 304-637-0349; Kevin Tipton, Counsel for the Defendant; and the Office of the Prosecuting Attorney. and to Attorney Richard Gutmann and Attorney Michael Starley

3 Copies
SID
2 Copies
FAXED
6/18/14

Enter: JUNE 18, 2014

Judge

Entered: JUNE 18, 2014

Clerk Betsy Castle

By: Sheila Turner
Deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT

By Sheila Turner Deputy