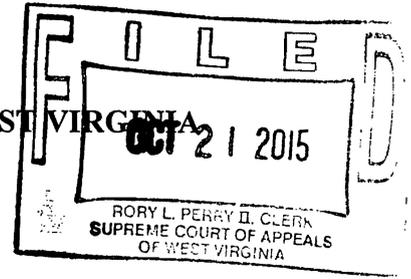


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0345



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

vs.

JERRY DEEL,

*Defendant Below, Petitioner.*

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SUMMARY RESPONSE

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SUMMARY RESPONSE

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The petitioner asserts that the circuit court erred by imposing a term of supervised release when it corrected the petitioner's probationary term. The basis for that argument is that because the original sentencing judge did not impose a term of supervised release, and further because the 2006 amendments to the statute regarding supervised release were not made explicitly retroactive, Judge Swope should not have imposed supervised release. Counsel for the respondent believes that the original sentence was illegal and that an illegal sentence may be corrected at any time. The respondent does not assert that the failure to imposed supervised release initially was illegal; but the ten year probationary term rendered the sentence illegal. Because the original term of probation was illegal, the circuit court had the duty to impose a legal sentence. Part of the corrected, legal sentence was a term of supervised release. As the sentence most recently imposed is now a legal sentence, and not based on any impermissible factor, counsel for the respondent asserts that it is not subject to appellate review.

## I.

### STATEMENT OF THE CASE

A multi count indictment returned in 2004 by the Mercer County Grand Jury; charged the petitioner with the felony offenses of sexual abuse in the first degree, attempt to commit first degree sexual assault, sexual assault in the first degree, and sexual abuse by a custodian. Each offense listed the same child, who was eleven years old or less, as the victim. (Appendix at 56-57.) Following a jury trial, the petitioner was convicted of each of the indicted offenses. (*Id.* at 58-61.)

At disposition, the court noted that as to “aggravating” factors, the overriding factor was the offense itself, along with the petitioner’s serious substance abuse problem and the conclusions contained in the sexual offender evaluation. (*Id.* at 32.) The assaults on the child victim happened at different times and different places on the same day. According to the child, she was cut with a knife and threatened. The petitioner later had intercourse with her. The petitioner’s own statements revealed that he kissed the child, and may have grabbed her breasts but he “had a buzz” and didn’t remember a whole lot. (*Id.* at 32-33.) The petitioner showed no remorse, sorrow or guilt according to the evaluations. The petitioner blamed the child for “coming onto him. . .” (*Id.* at 33.) The petitioner was at a high risk to reoffend. (*Id.* at 34.) The court believed that the offenses were extremely serious, as serious as any other offense, absent murder. (*Id.*)

Despite the aggravating factors, and the extremely serious nature of the offenses committed against this child, inexplicably (at least to counsel for the respondent), the original sentencing court was incredibly lenient with the petitioner, albeit the end result was an illegal sentence.

The court imposed the statutory sentence for each of the offenses: indeterminate terms of one to five for first degree sexual abuse, one to three years for attempt to commit a felony, fifteen to thirty five years for first degree sexual assault, and ten to twenty years for sexual abuse by a custodian. (*Id.* at 65.) Those sentences were ordered to be run concurrently with one another. Moreover, the petitioner was ordered to serve only one active term of incarceration—the ten to twenty year term for sexual abuse by a custodian. Imposition of each of the other three sentences was suspended. After discharge from the penitentiary, the petitioner was ordered to be on probation for a period of ten years. This was one term of probation, not separate terms of probation for separate offenses. (*Id.* at 66.)

The petitioner discharged his sentence on or about January 24, 2015. (*Id.* at 68.) At a hearing, which in the order following that hearing was described as “a hearing upon defendant’s motion to modify probation” (*Id.* at 70.), Judge Swope corrected the original, illegal sentence imposed upon the petitioner. As noted in petitioner’s brief, Judge Swope was not the judge at the original disposition.

At the hearing, upon determining how much time the petitioner had served and what was left that he potentially could serve, the court noted that the original judge “then wanted to probate him for the balance of the time that was remaining.” (*Id.* at 47.) The court noted the petitioner had to register as a sexual offender and stated that the petitioner also should be on supervised release. The court noted that imposition of supervised release would not involve ex post facto considerations. (*Id.* at 47.)

The judge corrected the imposition of probation to the maximum legally allowable, five years. (*Id.* at 48.) The court also imposed extended supervised release for a period of twenty

years. (*Id.* at 49.) Defense counsel noted that the original sentencing judge had the authority to sentence him to supervised probation, and didn't.

A written order memorializing the hearing directed that the probationary period be modified to five years, followed by twenty years of intensive supervision as a sex offender. (*Id.* at 70.)

The petitioner's brief posits that because the original judge had the discretion not to impose supervised release (because petitioner's original disposition occurred before 2006); Judge Swope erred in imposing such supervised release. (Petitioner's Brief at 1-2.) The petitioner acknowledges that supervised release is civil in nature (as is sex offender registration) and can be applied retroactively. It is further petitioner's argument that legislative intent as regards the 2006 amendments does not supply retroactivity. (*Id.* at 5.)

## II.

### ARGUMENT

The sentence imposed by Judge Frazier was illegal in that it mandated a ten year term of probation following the petitioner's discharge from prison. By law, a probationary term shall not exceed five years. An illegal sentence may be corrected at any time. Therefore, the final sentencing court had the authority to correct the illegal sentence and place the petitioner on extended supervised release. The final sentence, as imposed, is within legal limits, and not based on any impermissible factor and should not be reviewed. It is clear that the original sentencing court intended that the petitioner be supervised for a longer period of time than was legally permissible *the way the original order was framed*. Imposing a term of supervised release when the court corrected the illegally imposed sentence carries out the intent of the original order, but in a legal manner.

The period of probation together with any extension thereof shall not exceed five years. W. Va. Code Ann. § 62-12-11. “ Moreover, under our probation statute a maximum term of five years is set as the outer limit for probation time.” *Jett v. Leverette*, 162 W. Va. 140, 144, 247 S.E.2d 469, 471 (1978)

Because an individual may not be placed on probation for any longer than five years, the sentence imposed at original disposition—placing the petition on probation for *ten* years after his discharge from prison—was an illegal sentence.

Imposing a probationary term in excess of the statutorily imposed limit of five years as stated in W. Va. Code §62-12-11 is a clearly illegal sentence. According to the Second Edition of American Jurisprudence, Criminal Law § 764, “[a]n illegal sentence is one that does not conform to or exceeds statutory limits.” 21 Am. Jur. 2d Crim. Law § 764 (2011) (footnote omitted). The petitioner's sentence did not conform to the mandatory language of West Virginia Code § 62-12-11 and was therefore an illegal sentence. Additionally, that probationary period exceeded the statutory limits permitted for a probationary sentence.

Rule 35 of the West Virginia Rules of Criminal Procedure provides that, “[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period herein for the reduction of sentence.” Because the Petitioner's sentence was illegal, under Rule 35(a) of the West Virginia Rules of Criminal Procedure, the court could correct it at any time. When the Court reduced the probationary term to the statutory limit it corrected an illegal sentence. The imposition of supervised release as part of a corrected sentence was not an abuse of discretion.

The original sentencing judge, for whatever reason, effectively imposed a term of extended supervised release by placing the petitioner on probation for ten years. That was not legal under the probation statute. The sentence was corrected, and the intent of the original sentencing judge—to keep the petitioner under supervision as a sexual offender—was borne out by a corrected order reducing the probationary term to its statutory maximum, and imposing a term of supervised release. Although the respondent will acknowledge that the twenty years of supervised release is longer than the supervisory term imposed by the first sentencing judge, a court does have the ability both to extend or reduce a period of supervised release.

(g) *Modification of conditions or revocation.* -- The court may:

(1) Terminate a term of supervised release and discharge the defendant released at any time after the expiration of two years of supervised release, pursuant to the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice;

(2) Extend a period of supervised release if less than the maximum authorized period was previously imposed or modify, reduce or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, consistent with the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

W. Va. Code Ann. § 62-12-26

The petitioner argues that no supervised release was imposed. The respondent notes that the spirit of the original order was to have the petitioner on, essentially, supervised release for ten years. The mechanism chosen by the original sentencing judge was illegal. That illegal sentence was corrected to conform to the requirements of the probation statute.

Importantly, the petitioner has the ability to petition the court for release from supervision in two years, or perhaps even in ten years, which would conform to the original, illegal sentence.

The sentence as now imposed, is, however a legal sentence not based on any impermissible factor, and should not be reviewed.

In general, a sentence which is within statutory limits and not based upon some impermissible factor is not subject to appellate review. *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Further, this Honorable Court has noted:

Typically a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions. Although this Court may not necessarily have obtained the same result had we been presiding over a case determined by a lower court, our mere disagreement with such a ruling does not automatically lead to the conclusion that the lower court abused its discretion.

*State v. Allen*, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999).

In the case at bar, the circuit court lacked the discretion to do anything other than correct the illegal term of probation imposed at original disposition, and did not err in imposing a term of supervised release when the sentence was corrected. Although the petitioner posits that the statute was not made retroactive by the Legislature, it is uncontroverted that the imposition of supervised release by the latest sentencing court does not violate constitutional concerns. The petitioner could have been placed on supervised release when his original, illegal sentence was imposed. It was not an abuse of discretion for him to be placed on supervised release when his sentence was corrected. The present sentence is within legal limits and not based on any impermissible factor. The original sentence required some degree of supervision for ten years. The petitioner, in fact, if he proves trustworthy could be released from post-prison supervision in seven years, or fewer. He could petition to have his probation be terminated early; and could ask for extended supervised release to terminate in as short a period as two years. The period of supervised release should be affirmed.

III.

CONCLUSION

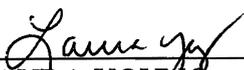
Counsel for the respondent respectfully requests this Honorable Court to affirm the order of the Circuit Court of Mercer County correcting the illegal sentence originally imposed upon the petitioner by modifying the probationary term to five years and including a term of supervised release, entered on March 2, 2015, be affirmed.

Respectfully Submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent*

By counsel

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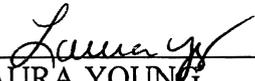
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*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Deputy Attorney General and counsel for the Respondent, hereby verify that I have served a true copy of "SUMMARY RESPONSE" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 21st day of October, 2015, addressed as follows:

Steven K. Mancini, Esq.  
P.O. Box 5514  
Beckley, WV 25801

  
\_\_\_\_\_  
LAURA YOUNG