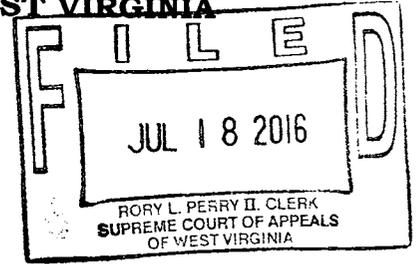


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 15-0714



**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

V. Appeal from a final order
of the Circuit Court of Braxton County
(15-F-5)

**GERALD DOOM,
Defendant Below, Petitioner.**

SUPPLEMENTAL BRIEF

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ISSUE PRESENTED

THE SUPREME COURT LACKS JURISDICTION TO CONSIDER THIS
CASE ON THE MERITS UNTIL THE CIRCUIT COURT ENTERS AN
ORDER ON PETITIONER’S MOTION FOR REDUCTION OF SENTENCE.

**KIND OF PROCEEDING AND THE NATURE OF
THE RULING IN THE CIRCUIT COURT**

This is an appeal from a sentencing order that was entered by the Circuit Court of Braxton County, West Virginia. After the sentencing order was entered, Petitioner (Defendant below) filed a notice of appeal with the West Virginia Supreme Court and then filed a “Motion to Reconsider Sentence,” per Rule 35, with the circuit court. Pursuant to Petitioner filing his Appellate Brief, this Honorable Court issued an order instructing parties to file supplemental briefs to determine whether the West Virginia Supreme Court has Jurisdiction to rule on a circuit court’s sentencing order, while there is still a pending Rule 35 Motion in the circuit court.

STATEMENT OF THE CASE

The original criminal case being appealed stems from events alleged to have occurred on or about the 14th day of June, 2014, wherein the Petitioner is alleged to have committed the act of Shoplifting—Third Offense. Appx. 16-17. The Petitioner pled guilty to this offense and a written plea agreement was entered on April 27, 2015. Appx. 25-26

At sentencing, Petitioner (then Defendant) argued for alternative sentencing and that any sentence imposed on Petitioner run concurrent to the sentence he was serving for similar charges in Monongalia County. Appx. at 29. The State joined the Petitioner in recommending that Petitioner's sentence run concurrent with the sentence he was serving in Monongalia County. *Id.*

The circuit court did not accept these recommendations and sentenced Petitioner to not less than (1) one year nor more than (10) ten years incarceration in the state penitentiary, said sentence to run consecutively to the sentence the Petitioner received in Monongalia County. Appx. at 30. Further, Petitioner was ordered to file a Motion for Reconsideration of his sentence within one hundred twenty (120) days if he so desired, per West Virginia Rules of Criminal Procedure, Rule 35. Appx. at 31.

The circuit court entered its Sentencing Order on July 6, 2015. Appx. at 32. The Petitioner filed a Notice of Appeal with the West Virginia Supreme Court on July 23, 2015. The Petitioner filed a Rule 35 "Motion to Reconsider Sentence" with the circuit court on October 12, 2015. Appx. at 35-37.

Counsel for the Petitioner, exercising an abundance of due caution, chose to file a Notice of Appeal within thirty days of the circuit court entering Petitioner's Sentencing Order, even though he knew there was a good chance he would be filing a Rule 35 Motion with the circuit court sometime in the two to three months after filing Notice with the Supreme Court. This is counsel's normal modus operandi when engaging in post-sentencing advocacy for criminal clients. This is to insure for situations where, sometime in the two to

four months after entry of a sentencing order, a client decides that he or she does not want to move for a reconsideration of sentence by the circuit court, but would rather file directly for an appeal. Under these circumstances, had counsel not filed his client's notice of intent to appeal within a month after entry of the sentencing order, it would be past the filing deadline because the sentencing order would have been the circuit court's final order. As described below, there also appears to be some vagueness as to whether a notice of appeal filed only after a ruling on a motion to reconsider or reduce sentence, and not after an original sentencing order, is proper.

Petitioner's Appellate Brief was filed on October 23, 2015. Petitioner's brief notes the filing of the Motion to Reconsider Sentence, stating:

Counsel for the Petitioner filed said Motion on October 12, 2015 and it is currently pending before the Circuit Court of Braxton County. Because this Appellate action addresses only sentencing, should the Petitioner's Motion be granted, this Appellate action would likely become moot.

Pet. Brief, FN 1, at 8.

As of this writing, the circuit court has not issued an order on the Motion to Reconsider Sentence, nor has it scheduled a hearing on said Motion.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Order of this Court from June 2, 2016, commands that the parties write supplemental briefs on the issue of:

Whether this Court has jurisdiction to consider a direct appeal of a sentencing order when a subsequent Rule 35 Motion is pending before the circuit court?

Ct. Order, June 2, 2016.

Because this issue has not been authoritatively decided in the Court's jurisprudence, oral argument under Rev. R.A.P. 18(a) may be necessary unless the Court determines the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court determines that oral argument is not necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

SUMMARY OF ARGUMENT

The Petitioner believes that this Honorable Court does not have jurisdiction to consider the direct appeal of a sentencing order when a subsequent Rule 35 motion is pending before the circuit court.

STANDARD OF REVIEW

The West Virginia Supreme Court has the inherent authority to examine the basis of its own jurisdiction, *sua sponte*, even where neither party to an appeal raises, briefs, or argues a jurisdictional question presented. See Syllabus Points 1 and 2, *James M.B. v Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16, (1995).

This Court has stated, "Where the issue on appeal is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of

review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995); *State v. Collins*, 221 W. Va. 229, 232, 654 S.E.2d 115, 118 (2007). Because this Court’s jurisdictional authority to review a sentencing order is a question of law, it is subject to this Court’s *de novo* review.

ARGUMENT

THE SUPREME COURT LACKS JURISDICTION TO CONSIDER THIS
CASE ON THE MERITS UNTIL THE CIRCUIT COURT ENTERS AN
ORDER ON PETITIONER’S MOTION FOR RECONSIDERATION OF
SENTENCE.

Rule

Rule 35(b) “Reduction of Sentence” of the West Virginia Rules of Criminal Procedure states:

A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

W. Va. R. Crim. P. 35(b).

West Virginia Rule of Criminal Procedure 37(b) “Time for Taking Appeal” states that:

(1) Time for Notice of Intent to Appeal. The notice of intent to appeal by a defendant shall be filed within 30 days after the entry of the judgment, decree or other order appealed from. A notice of intent to appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. A judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket.

W. Va. R. Crim. P. 37.

By a plain reading of these two statutes in conjunction, if one is filing a direct appeal of the sentencing order of a circuit court, they would be inclined to believe that there is a thirty day window from the time the sentencing order was entered to when the notice of appeal of that order must be filed. Further, Rule of Appellate Procedure 10 states that, "Typically, the petitioner's brief must be filed four months from entry of the final order being appealed..."

W. Va. R. App. P. 10. This is roughly the same time limit that a defendant has to file his Rule 35 motion to reduce sentence. W. Va. R. Crim. P. 35(b).

However, a few issues arising in civil cases notwithstanding, the West Virginia Supreme Court does not accept interlocutory appeals. The Code states:

A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties. *The defendant in a criminal action may appeal to the supreme court of appeals from a final judgment of any circuit court in which there has been a conviction or which affirms a conviction obtained in an inferior court.*

W. Va. Code Ann. § 58-5-1 (West) (emphasis added).

This is commonly called “the finality rule,” and this Court has stated that:

With rare exception, the “finality rule” is mandatory and jurisdictional. Thus, to be appealable, an order must be final as discussed above, must fall within a specific class of interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure.

James M.B. v. Carolyn M., 193 W. Va. 289, 292, 456 S.E.2d 16, 19 (1995)

(Cleckley, J.). On a theory of judicial economy, this policy prohibits, “piecemeal appellate review of trial court decisions which do not terminate the litigation[.]”

Id. citing *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 265, 102 S.Ct. 3081, 3082, 73 L.Ed.2d 754, 756 (1982).

This Court previously, in one instance, was unconvinced that a lower court’s modification of a sentencing order for DUI constituted a final judgement on the matter, but rather found the final order was the earlier affirmation of the municipal court’s judgement by the circuit court. *City of Philippi v. Weaver*, 208 W. Va. 346, 349, 540 S.E.2d 563, 566 (2000). The Court noted that the appellant was, “not disputing the elements of the modification of sentence contained in the [modification] order, but [was] rather appealing the alleged errors of the lower court encompassed within the [earlier] order [which affirmed the judgement in the municipal court].” *Id.* This Court found appellant’s reliance on the later date for filing her notice of appeal and brief were improper, and the appeal was deemed untimely. *Id.*

However, this Court has never decisively ruled on the jurisdictional concerns that arise between a circuit court and the West Virginia Supreme Court on a sentencing order in a criminal case, which creates a conundrum of legal principles whenever a criminal defendant wishes to have the circuit court reconsider his or her sentencing order in the 120 days after sentencing, but would also like to appeal that sentencing order to the West Virginia Supreme Court. This Court's most recent indication of an opinion on a similar matter was in *Rhodes v. Ballard*, wherein the petitioner, while his post-sentence Rule 35 Motion to Reduce Sentence was still pending, filed a direct appeal with the Supreme Court, based on an involuntary guilty plea. *Rhodes v. Ballard*, No. 15-0430, 2016 WL 1550430, at *1 (W. Va. Apr. 15, 2016) (unpublished). The State filed a motion to dismiss the appeal as interlocutory, and this Court granted the motion and dismissed petitioner's appeal without prejudice. *Id.*

Similar issues have been addressed by this Court in civil actions. In a civil context, West Virginia Rule of Civil Procedure 73 mirrors Rule 37 of the Rules of Criminal Procedure. Civil Procedure Rule 73 states that “[w]ithin thirty days of entry of the judgment being appealed, the party appealing shall file a Notice of Appeal in accordance with Rule 5 of the Rules of Appellate Procedure.” W. Va. R. Civ. P. 73, W. Va. R. Crim. P. 37.

This Court has held that when a party files a motion to “reconsider’, ‘vacate’, ‘set aside’, or ‘reargue’” after entry of a judgment in a civil case, if that motion for new trial or amendment of judgment has been filed with the circuit court within ten days of entry of a final judgment, it is automatically assumed

to be filed under West Virginia Rule of Civil Procedure 59(e) “New Trials; Amendment of Judgments,” Syllabus Point 1, *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992) (abrogated on other grounds by *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001)); Syl. Pt. 6, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 291, 456 S.E.2d 16, 18 (1995).¹ When this happens, the judgment is no longer considered final, and the time for filing an appeal is tolled until the circuit court rules on the motion. Syl. Pt. 4, *James M.B.*; Syl Pt. 8, *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 408, 541 S.E.2d 1 (2000). This ostensibly leaves jurisdiction squarely in the circuit court for this time.

However, if a motion to “reconsider’, ‘vacate’, ‘set aside’, or ‘reargue’” is filed with the circuit more than ten days after entry of judgment, that motion will be treated as a motion to vacate judgment under Rule 60(b) “Relief from Judgment or Order.” Syl. Pt. 3, *Lieving v. Hadley*; W. Va. R. Civ. P. 60(b). Rule 60(b) Motions must be filed within one year of entry of the final judgment and *do not* toll the time for filing an appeal of the final judgment. *Id.*

The parallel to this rule is also true, and a Rule 60(b) Motion, if filed within ten days of entry of the final judgment, will be treated as a Rule 59(e) Motion, and the clock to file appeal on the judgment is tolled until the circuit court enters an order on the motion. Syl. Pt. 1, 2, *Lieving*; Syl. Pt. 6, *James M.B.*

¹ While a motion to “reconsider” would prima facie seem congruent to the kind of motion at issue in this case, in the above cited cases, Justice Cleckley, writing for the Court, uses “motions to ‘reconsider’, ‘vacate’, ‘set aside’, or ‘reargue’” as a kind of pejorative catch-all for all manner of unspecified motions that disappointed parties file with the trial court after adverse civil rulings. It is really not the same thing.

This begs the question of whether a Rule of Criminal Procedure 35 Motion to Reduce Sentence should function as a Rule 59(e) motion in civil procedure which tolls the time for appeal and renders the judgement of the circuit court interlocutory until that court rules on it, or whether it should function as a parallel to a Rule 60(b) motion, which keeps the appeal clock running and does not render the judgement of the circuit court interlocutory.

Analysis

In the instant case, Petitioner's notice of appeal was filed within thirty days of entry of the sentencing order, and his motion to reduce sentence was filed after the notice, but before perfection of his appellate brief. By a plain reading of the rule, the circuit court technically had jurisdiction to reduce Petitioner's sentence upon its own accord at any time within 120 days of entering its sentencing order or within a reasonable time after Petitioner filed his motion to reduce sentence. At issue, however, and unsettled before this Court, is whether the circuit court lost jurisdiction through the filing of the notice of appeal, or through perfection of the appeal, or whether the circuit court still has jurisdiction to this day.

Petitioner is taking the stance that while a Rule 35 motion to reduce sentence is still pending in circuit court, the circuit court has not yet issued its final order on the case, and, in particular, has not authoritatively decided the sentence that it will impose. Rule 35's 120 day rule works as an effective drafting stage, wherein the circuit court can freely lower the defendant's

sentence when it so chooses. The complication with this is, of course, the “reasonable time” requirement that kicks in for the court to rule on a Rule 35 motion, when a defendant files such a motion within 120 days of entry of the sentencing order. However, assuming the circuit court diligently responds with an order on the motion within a “reasonable time,” no serious issues affecting timely administration of justice should occur.²

If, as in the instant case, a Rule 35 motion is filed within the 120 day time limit, the circuit court is bound by the rule to give at least passing reflection on the prior sentence it imposed and issue an order which either confirms said sentence or reduces it. If an appeal is pending on the case, and one of the assignments of error in the appeal is that the circuit court’s sentencing order was either unconstitutionally harsh or suffered some other defect, that assignment of error is inherently unripe. This is because the circuit court must finalize its sentencing order within a reasonable time by issuing a ruling on the Rule 35 motion.³

Here, where Petitioner has argued that the circuit court imposed an unconstitutionally harsh sentence on him for his shoplifting offense, the truth of the matter is that the circuit court has not actually entered its final decision

² Petitioner would have no objection to this court setting a formal limit on what constitutes a “reasonable time” for a circuit court to rule on a Rule 35 motion.

³ Petitioner is aware that Rule 35 also allows for the circuit court to take up a motion for reduction of sentence, “within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation.” W. Va. R. Crim. P. 35. However, reliance on this part of the statute seems manifestly inapplicable, as it is a new opening of a 120 day window for the circuit court to reduce its sentence, which likely takes place well over a year from the original sentencing date, and seems distinct from the original window for reduction.

as to what Petitioner's sentence ought to be. The circuit court's ruling on the Rule 35 motion will actually be the circuit court's final determination of what Petitioner's sentence shall be.

Where this becomes more difficult, is deciding whether, at any point, the Petitioner has relieved the circuit court of the ability to reconsider his sentence, by availing himself to the jurisdiction of the West Virginia Supreme Court.

In the event that this Honorable Court finds that an original sentencing order constitutes a final order of the circuit court, Petitioner feels that it would be irrational to say that the filing of his notice of appeal automatically removes jurisdiction from the circuit court and places it exclusively with the West Virginia Supreme Court.⁴ This is because a notice of appeal must be filed within thirty (30) days of the entry of final judgement. Thus, the 120 day time period for the defendant to file a Rule 35 motion and the time for that motion to be ruled upon by the circuit court would be whittled down to a mere thirty (30) days, assuming the defendant wished to file an appeal on the sentence or any other perceived errors from the circuit court proceeding. While Petitioner defers to the judgement of the Court, he does feel it would be against the spirit and purpose of Rule 35 to come to such a conclusion.

Petitioner does believe, based on contemplation of the inherent issues of judicial economy and comity between courts, as described in *James M.B. v. Carolyn M.*, that there is an argument that might be made for this Court

⁴ Petitioner would have no objections if this Honorable Court were to find that, for appeal timeline purposes, an order on a Rule 35 Motion to reduce sentence would qualify as the final order of a circuit court, and its entry would serve as the measuring date from which appeal deadlines were derived.

retaining exclusive jurisdiction over review of a sentencing order where the Petitioner has perfected his actual appellate brief. At this point, Petitioner is aware that the Attorney General has likely begun to expend hours and resources to prepare argument and file a respondent's brief. These efforts would be for naught if the circuit court judge were to rule on the motion to reduce sentence, find that a more lenient sentence were more appropriate, and render the appeal moot.

The only problem with taking this position is that it relies on a fallacious economic theory of sunk costs. It is not unusual that a particular controversy or conflict might be resolved during the appeal process, leaving the issue being appealed moot, so that the matter be dismissed. It is actually in the interest of judicial economy that if one of the assignments of error on appeal is an unconstitutionally harsh sentence, and that sentence is pending reconsideration by a circuit court's on a Rule 35 motion, that that assignment of error then be dismissed from the appeal.

Where the Rules of Appellate Procedure call for an appeal to be filed within four months of a final order, and the 120 day window of Rule 35 is just under four months, the time for perfecting with the Supreme Court and filing a Rule 35 motion with the circuit court are roughly the same, with the time for filing the Rule 35 motion being slightly shorter.

Practically, if this Court were to follow its prior ruling from *Rhodes v. Ballard*, this issue of judicial economy would, for the most part, solve itself. Even if the rule were that a defendant had thirty (30) days from the time of his

or her sentencing order being entered to file a notice of appeal, the case could still be dismissed without prejudice as interlocutory from the Supreme Court if the defendant decided to move for a reduction of his or her sentence with the circuit court. When the circuit court issued a ruling on that motion, the timeline could begin to run on the appeal once more, with the order on the Rule 35 motion serving as the final order of the circuit court.

While the Court might expend some resources on preparing scheduling orders, etc., the appeal process would never reach the deadline for the appellant actually perfecting his or her appeal.

Of course, this Honorable Court's ruling on this issue in the instant case is likely to affect how Petitioners choose to present challenges to sentencing orders on appeal. Practically, appellants should not plan to perfect an appeal and then take the totally irrational step of filing a Rule 35 motion with the circuit court, which would have the procedural effect of causing their already filed appeal to be dismissed as interlocutory.

Conclusion

Therefore, it is Petitioner's position that this Honorable Court follow in the steps of its opinion in *Rhodes v. Ballard* and find that it does not have jurisdiction to consider a direct appeal of a sentencing order when a subsequent Rule 35 Motion is pending before the circuit court. This is also based on this Honorable Court's concern for finality before appeal and concerns of judicial economy discussed in *James M.B. v. Carolyn M.* and

Petitioner's opinion that the circuit court has not yet made its final judgement in the case.

CONCLUSION

While the law is unsettled on the matter, and Petitioner defers to the interpretation of the Court, Petitioner feels this Honorable Court does not have jurisdiction to hear a direct appeal of Petitioner's sentencing order, while said sentencing order is still pending review, based on a Rule 35 motion in the Circuit Court of Braxton County.

WHEREFORE, the Petitioner prays that this Honorable Court will remand his case to the Circuit Court of Braxton County and grant unto the Petitioner such other, further and general relief as may seem proper to this Honorable Court.

Respectfully Submitted,
Petitioner,
GERALD DOOM
By counsel.



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CASE NO. 15-0714

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

**V. Appeal from a final order
of the Circuit Court of Braxton County
(15-F-5)**

**GERALD DOOM,
Defendant Below, Petitioner.**

CERTIFICATE OF SERVICE

I, Kevin W. Hughart, Counsel for Petitioner, hereby certify that on this 18th day of July 2016, true and accurate copies of the foregoing "Petitioner's Supplemental Brief" were deposited in the U.S. Mail, contained in postage-paid envelope, addressed to counsel for all other parties to this appeal and such other parties as follows:

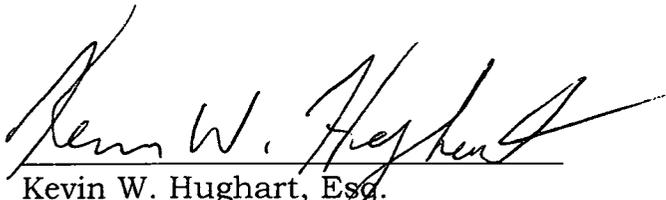
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