

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia
Plaintiff below, Respondent**

vs) **No. 101502** (Cabell County 06-F-3)

**Thomas S. Talbert
Defendant below, Petitioner**

FILED

April 18, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Thomas S. Talbert appeals the circuit court’s denial of his motion to correct an illegal sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure. Petitioner is serving a recidivist life sentence for his third offense driving under the influence (“DUI”) conviction.

This Court has considered the parties’ briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, 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 Revised Rules.

Petitioner was arrested for his third DUI in 2005, after having been convicted of DUI in both 2001 and 2003. Petitioner moved to bifurcate the trial regarding the 2005 DUI, and in March 2006 he was found guilty of misdemeanor DUI. The second portion of the trial was conducted to determine if petitioner was guilty of third offense DUI. The jury in the second portion of the trial found that petitioner had been found guilty of two prior DUIs within the previous ten years, and that he had just been found guilty of the third DUI. Petitioner was then sentenced under the recidivist statute, West Virginia Code §61-11-18, to life with mercy. Petitioner argues that the jury in this matter never found him guilty of felony third offense DUI, and therefore he should not have been sentenced as a recidivist. The circuit court denied the Rule 35(a) motion after a hearing in a brief order.

This Court holds that “[i]n reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.” Syl. Pt. 1, *State v. Palmer*, 210 W.Va. 372, 557 S.E.2d 779 (2001).

This Court has held in *State v. Williams*, 196 W.Va. 639, 474 S.E.2d 569 (1996), that “the lack of an exemption suggests that the Legislature intended that once a felony conviction is entered, it can be used for sentence enhancement under West Virginia Code §61-11-18 regardless of whether that conviction resulted from a pure felony or from an enhanced misdemeanor.” Further, in *Williams* the Court stated “[w]e therefore conclude that despite the fact that a third offense DUI felony conviction pursuant to West Virginia Code §17C-5-2(j) results from an enhanced misdemeanor, the Legislature intended that this type of felony conviction be used for sentence enhancement in connection with the terms of the recidivist statute West Virginia Code §61-11-18.” Based upon its careful review of petitioner’s arguments, this Court finds no error in the circuit court’s ruling.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 18, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh