

SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM GEORGIUS, III

APPELLANT

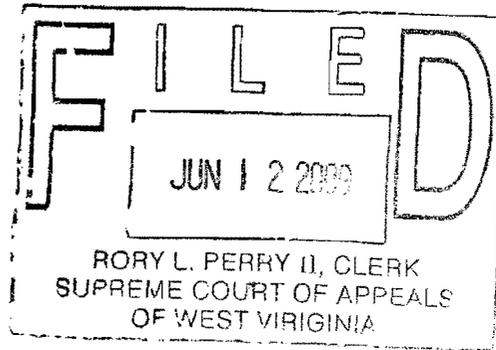
CASE NO.: 34807
(DIVISION III-JUDGE SILVER)

V.

STATE OF WEST VIRGINIA

APPELLEE

APPELLANT'S BRIEF



WILLIAM GEORGIUS, III
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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellant, William Georgius, III, by and through counsel, R. Steven Redding, appeals the July 1, 2008 Order of the Circuit Court of Berkeley County, Judge Gray Silver, III. On or about October 11, 2005 the Appellant filed his Motion to Reconsider Sentence. This motion was filed subsequent to Appellant's conviction for sexual assault in the first degree, and upon the sentence of the Court to the statutory sentence of fifteen (15) to Thirty-Five (35) years in the State Penitentiary. Subsequent to a full hearing, held on June 17, 2008, the Court entered its Order Denying Motion to Reconsider Sentence. It is from this Order, entered on July 1, 2008, that Appellant appeals.

II. STATEMENT OF THE FACTS OF THE CASE

Appellant was indicted by a grand jury on the charge of sexual assault in the first degree. Subsequent to a trial by jury, Appellant was found guilty. At sentencing, the trial judge sentenced Appellant to Fifteen (15) to Thirty-Five (35) years in the state penal system. It is undisputed that at the time of the offense the Appellant had just turned Fourteen (14) years old.

Sadly, the facts of the underlying offense involved a sexual act against Appellant's four year old niece.. At sentencing, the Court placed great weight upon the request of the victim's mother, Amanda Georgius (sister of Appellant), that her brother be given the maximum allowable sentence.

After his sentencing, Appellant filed his Motion to Reconsider Sentence. Thirty-two months later, on June 17, 2008, a hearing was held on Appellant's motion. At the hearing the following facts were established:

- 1) The Appellant testified that he was fourteen years old at the time of the crime, and that the victim was four years old (Hearing Transcript, Page 22), (Hereinafter "HR").
- 2) The Appellant was seventeen years old at the time of his sentencing and just barely eighteen years old when he was sentenced (See Sentencing Order 22).
- 3) The Appellant was Twenty-One years old at the time of the hearing on his Motion to Modify Sentence (HR, Page 22) The Appellant had already served approximately four years in the penitentiary before he was provided a hearing of his Motion to Modify Sentence.
- 4) The Appellant had a troubled upbringing, including a father who made repeated vulgar sexual comments directed at Appellant and a drug addicted Mother who abandoned the family when Appellant was very young (HR, Page 22);
- 5) The Appellant admitted committing the crimes for which he was convicted (HR, Page 26);
- 6) Appellant denied the crime during the trial because he was ashamed of himself and his actions, and believed his family would shun him (HR, Page 26);
- 7) The Appellant's mother died prior to Defendant admitting his guilt to her, and Appellant realized she died believing her son's lie, that he did not assault his niece (HR, Page 27);
- 8) The Appellant testified that he will never rid himself of the scar he created by allowing his mother to die not knowing the truth, and did not want the same thing to happen with his father or sisters (HR, Page 27);

- 9) The Appellant took the sentencing judge's instruction to heart at the sentencing hearing, when the judge exhorted Appellant to take advantage of any and all educational opportunities available in prison (HR, Page 23);
- 10) Among the classes that Appellant has taken in the four plus years he has been incarcerated include obtaining his GED, taking instruction in anger management, parenting classes, stress management education, and a sex offender course.
- 11) Appellant scored high enough on his GED exam to qualify for a \$1,000.00 scholarship (HR, Page 25);
- 12) Appellant testified that through his course work he has learned you do not bottle your anger inside you because it leads to an inability to control feelings (HR, Page 24);
- 13) Also through his course work, Appellant came to realize the extent of the trauma he put his niece through, and does not believe he would ever hurt another person (HR, Page 23);
- 14) The Appellant tearfully apologized to his sister in open court for the harm he caused his niece (HR, Page 28-29);
- 15) The Appellant stated he would like to participate in the Anthony Center, or an inpatient sexual offender rehabilitation program (HR, Page 28);
- 16) The Appellant testified that he believes the community would be safe if he were granted probation (HR, Page 28);
- 17) The Appellant stated that he has also admitted his crime to his father and second sister (HR, Page 31);

- 18) Appellant has also taken alcohol and drug abuse education, and has received a building construction certificate (HR, Page 32);
- 19) The Appellant's sister, Amanda Georgius (mother of the victim), testified that at the sentencing hearing she was extremely angry, and thus asked the judge to sentence Appellant to the maximum time permitted by law (HR, Page 12);
- 20) Ms. Georgius testified that she and her brother and sister had an extremely difficult upbringing, that their mother was a drug addict (HR, Page 15); that she abandoned the family when Appellant was nine years old (HR, Page 16); that when their Mother was home she slept constantly and did not care for her children (HR, Page 14);
- 21) Ms. Georgius also testified that their father was mentally and emotionally abusive to his children (HR, Page 14); and frequently made sexually inappropriate comments to his children (HR, Page 14-15);
- 22) Ms. Georgius provided an example of the type of vulgar behavior exhibited by her father, stating that if Appellant procrastinated on a chore by saying he would do it later, Appellant's father would comment that "...if you were living with your mother and you told Mike (Appellant's mother's boyfriend) "later", then he'd stick his dick in your ass" (HR, Page 15);
- 23) Ms. Georgius informed the court that her father was a very negative person, and criticized the children frequently while they were growing up. (HR, Page 15);
- 24) Ms. Georgius further instructed the court that she witnessed first hand her father's mental and emotional abuse severely affecting Appellant as he was being raised (HR, Page 16);

- 25) She further testified that after their mother abandoned the family, Appellant became very withdrawn, and that his seclusion progressively worsened (HR, Page 16);
- 26) Ms. Georgius testified that Appellant confessed his guilt to her during a prison visit, stated how sorry he was for what he had done, and expressed his hope that she could forgive him (HR, Page 17);
- 27) She further testified that Appellant was very tearful during this visit, and that after he expressed remorse and sought forgiveness, she began to believe that his sentence was too harsh (HR, Page 17-18);
- 28) Ms. Georgius further testified that she has come to realize that Appellant was only fourteen years old at the time the crime was committed, and that a 15-35 year sentence is very strict, thus she requested that the trial judge modify the sentence (HR, Page 17-18);
- 29) She stated she would not object to an Anthony Center disposition, and that he would not pose a threat to the community (HR, Page 18);
- 30) Ms. Georgius testified that Appellant has a good heart, that other than the subject offense, she has never seen him act mean or spiteful (HR, Page 18), and that he is always looking out for the well being of others (HR, Page 18-19);
- 31) Moreover, Ms. Georgius stated a belief that if released from the penitentiary Appellant would become a productive member of society and that she sees no public benefit related to Appellant serving a 15-35 year sentence (HR, Page 19);
- 32) The testimony of Appellant's father and second sister was proffered to the court, i.e., that Appellant made admissions to them in the penitentiary, shared with them

how ashamed he was of what he did, accepted full responsibility for his actions, stated that he was heartbroken that he had committed this horrendous crime against his niece, and asked them to find forgiveness for him (HR, Page 34-35).

33) On May 12, 2005, prior to sentencing, Appellant was evaluated by Joseph R. Novello, M.D., a forensic psychiatrist. A thorough evaluation and examination was conducted, leading to a well reasoned report and recommendations to the trial court. Dr. Novello found, based

III. ASSIGNMENTS OF ERROR

It is Appellant's contention that the trial court was given clear instruction by the Supreme Court of Appeals, in a case directly on point, and utterly failed to follow the high court's precedent. More specifically, in State v. Arbaugh, 215 W.Va.132, 595 S.E.2d 289(2004), this Court provided the framework under which the lower courts are to determine appropriate sentences for youthful sex offenders. Despite the clear direction of the Arbaugh Court, the trial judge failed to follow its lead.

IV. POINTS AND AUTHORITIES, DISCUSSION OF LAW, AND RELIEF PRAYED FOR BY APPELLANT

Fortunately, this Court recently visited the issue at the heart of Appellant's appeal, and provided clear instruction to the circuit courts when sentencing youthful sex offenders. Unfortunately, the lower court failed to follow this recent precedent. In State v. Arbaugh, 215 W.Va. 132, 595 S.E.2d 289(2004), the Court

reviewed the lower court's failure to place the defendant on probation during sentencing for a fifteen year old who plead guilty to first degree sexual assault against his half brother. As in the case *sub judice*, the defendant lead a painful life, including abuse from family members and a teacher. Id. At 133. Unlike the case at bar, the defendant in Arbaugh was initially granted probation, but had his probation revoked after violating the terms of probation on two separate occasions. In essence, after the sexual assault, the defendant in Arbaugh continued to get in trouble, thus leading to a penitentiary term of 15-35 years.

The Court was abundantly clear that youthful offenders should be treated differently than their adult counter parts, and in light of its analysis, the Court remanded the case back to the circuit court with instructions to grant the defendant probation and allow him to attend a renowned sexual offender treatment program. Id. at 143.

In reaching its conclusion, the Court held that the law treats juveniles differently than others, and that from the earliest time infants were regarded as entitled to special protection from the State. Id. at 136. See also State ex rel. Garden State Newspapers, Inc. v. Hoke, 205 W.Va. 611, 520 S.E. 2d 186(1999).

The Court went on to emphatically state that “considering Mr. Arbaugh’s tender age and extreme victimization, we cannot, we will not, surrender any opportunity to salvage his life and to turn him into a productive member of society”. Moreover, the Court opined that “we can conceive of no greater miscarriage of justice than subjecting Mr. Arbaugh under the facts of this case to

a term of imprisonment without affording him every opportunity to rehabilitate himself”. Arbaugh at 143.

Of note was the Arbaugh Court’s recognition of credible studies demonstrating that once a juvenile’s sex offending has been officially recognized, subsequent detected sexual recidivism is relatively infrequent, and that some studies to date reflect that very few who commit sex offenses as juveniles go on to commit such offenses as young adults. Id. at 136. (Citing Rightland & Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature* 30-31(U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention 2001).

Nonetheless, despite the clear and unambiguous language of the Arbaugh Court, the trial judge did not make any effort at all to follow this very recent precedent. Judge Silver essentially denied Appellant’s Motion to Reconsider Sentence based upon the fact that the input of the victim and the victim’s father was not offered at the hearing. Nowhere in the Arbaugh decision did the Court indicate that the input of the victim, or any member of the victim’s family was necessary for the Court to reconsider a sentence. The issue, quite simply, was not addressed at all.

Moreover, Judge Silver relied heavily upon his belief that the Appellant failed to offer evidence that he did not pose a risk to the community if released. There are two inherent problems with this element of the trial court’s ruling. First, it completely ignores the Ashbaugh Court’s recognition that once a juvenile sex offender’s behavior comes to light, there is very little chance of recidivist

behavior. Second, there was an evaluation done at the time of sentencing by Dr. Novello, indicating that the Appellant poses a low level threat to repeat offend. That report has been made part of the record in this appeal.

A review of the trial judge's analysis just prior to rendering his decision denying Appellant's Motion to Reconsider Sentence, clearly evidences the fact that the trial judge failed to perform an analysis pursuant to the guidelines required by this Court under Ashbaugh. This failure to remotely attempt to follow precedent clearly, in Appellant's mind, constitutes an abuse of discretion by the trial judge. As in Ashbaugh, this Court is urged to remand this case to the Circuit Court of Berkeley County with instructions to either order the Appellant to the Anthony Center, or in the alternative, to grant the Appellant probation and order him to immediately report to an inpatient sexual offender program

WHEREFORE, it is respectfully requested that the Supreme Court of Appeals of West Virginia reverse the July 1, 2008 Order of the Circuit Court of Berkeley County, which denied Appellant's Motion to Reconsider Sentence, with directions to either place the Appellant on probation and order him to report to an inpatient sex offender program, or in the alternative, to order him to report to the Anthony Center for completion of their rehabilitative program.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2009, a copy of Appellant's Brief was mailed, U.S. Mail, postage pre-paid, to Christopher C. Quasbarth, Esq., Chief Deputy Prosecuting Attorney, Berkeley County Office of Prosecuting Attorney, Berkeley County Judicial Center, 380 W. South Street, Martinsburg, WV 25401.



R. Steven Redding