

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee/Plaintiff Below,

v.

Docket No.: 34807
(Berkeley County Criminal Case No: 04-F-229)

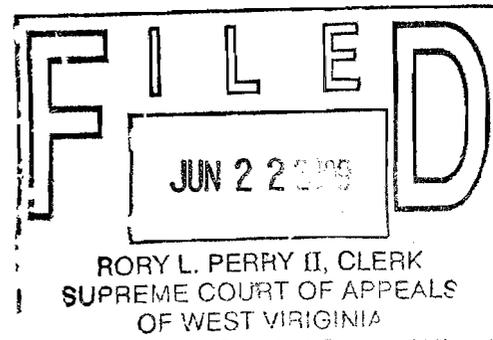
WILLIAM GEORGIUS III,

Appellant/Defendant Below.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

State of West Virginia,
by counsel,

Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971



I. STATEMENT OF THE CASE.

The Appellant was found guilty at a jury trial of the First Degree Sexual Assault, in violation of **W. Va. Code § 61-8B-3**, of his five year-old niece. The Appellant was sentenced to the statutory sentence of fifteen-to-thirty-five (15-35) years in the penitentiary.

The Appellant did not appeal from this conviction, but timely filed a **W.V.R.Cr.P. 35(b)** motion for reconsideration of sentence. Nearly three years later, the trial court heard testimony on the motion for reconsideration and properly denied it.

The State respectfully requests this Court to deny the Petition for Appeal and affirm the judgment of the circuit court.

II. STATEMENT OF THE FACTS AND PROCEEDING BELOW.

1. The Appellant was found guilty at a jury trial of one felony count of First Degree Sexual Assault, in violation of **W. Va. Code § 61-8B-3**, committed upon his then five year-old niece. A fifteen year old juvenile¹ at the time of the 2002 offense, the Appellant was earlier transferred to adult status. [Order of Detention and Remand, 3/18/05; Indictment, 10/26/04; Transfer Hearing Order, 12/13/04, In re: William Georgius III, Juvenile Case No.: 02-JD-151.]

2. The Appellant turned eighteen before sentencing. Upon his eighteenth birthday, he was remanded to jail. [Id.]

3. At sentencing, the Appellant showed no remorse and accepted no responsibility. The victim's mother (the Appellant's own sister) insisted on the maximum sentence allowed. The Appellant was sentenced to the statutory fifteen-to-thirty-five year sentence. [Post Trial Motions

¹ The Appellant was fifteen (15) years old at the time of the offense, based on the date of the incident and his date of birth, DOI: June-September 2002, DOB: 4/1/1987). This age is reflected in all of the pleadings and was never in dispute. However, in his Petition for Appeal, and again in his Brief before this Court, the Appellant contends that "it is undisputed that at the time of the offense the Appellant had just turned Fourteen (14) years old." [Petition for Appeal.]

Hearing and Sentencing Order, 8/3/05.]

4. The Appellant never appealed from the conviction or sentence, but timely filed a **W.V.R.Cr.P. 35(b)** motion for reconsideration of sentence. [R., *passim*; Motion for Reconsideration of Sentence, 10/11/05.]

5. Nearly three years later, the trial court heard testimony on the motion for reconsideration from the Appellant and his sister. The Appellant testified that he admitted his guilt to his father and sisters and regretted his previous denials. The Appellant testified to the various programs he has participated in while incarcerated. The Appellant's sister testified that she now wanted a lesser sentence for her brother than she had previously requested. The Appellant's sister also testified that she no longer has legal custody of her daughter, the victim. [Tr., 6/17/08.]

6. Upon consideration of this testimony, and noting the Appellant's lack of evidence regarding the wishes of the victim or her father (who has sole custody of her), or of any psychological evidence from the Appellant to assess his future risk or any proposed treatment, the trial court denied the motion. [Order Denying Motion to Reconsider Sentence, 7/2/08.]

7. The State respectfully requests this Court to deny the Petition for Appeal and affirm the judgment of the circuit court.

III. ISSUES PRESENTED.

A. WHETHER THE SENTENCE IMPOSED IS SUBJECT TO APPELLATE REVIEW WHEN IT IS WITHIN THE STATUTORY LIMIT AND IS NOT ALLEGED TO BE BASED ON SOME IMPERMISSIBLE FACTOR?

B. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT’S RULE 35(b) MOTION?

IV. TABLE OF AUTHORITIES.

State v. Redman, 213 W. Va. 175, 578 S.E.2d 369 (2003).....4, 5, 6, 7.

State v. Goodnight, 169 W. Va. 366, 287 S.E.2d 504 (1982).....4, 6.

State v. Head, 198 W. Va. 298, 480 S.E.2d 507 (1996).....5.

State v. Arbaugh, 215 W. Va 132, 595 S.E.2d 289 (2004).....6-7.

W. Va. Code § 61-8B-3.....4.

W.V.R.Cr.P. 35(b).....5, 6.

V. ARGUMENT.

A. THE SENTENCE IMPOSED IS NOT SUBJECT TO APPELLATE REVIEW SINCE IT IS WITHIN THE STATUTORY LIMIT AND IS NOT ALLEGED TO BE BASED ON SOME IMPERMISSIBLE FACTOR.

1. Standard of Review.

“Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 3, State v. Redman, 213 W. Va. 175, 578 S.E.2d 369 (2003); Syl. pt. 4, State v. Goodnight, 169 W. Va. 366, 287 S.E.2d 504 (1982).

2. Discussion.

The statutory sentence for felony First Degree Sexual Assault, in violation of **W. Va. Code** § 61-8B-3, is fifteen-to-thirty-five (15-35) years in the penitentiary.

The trial court sentenced the Appellant to this statutory sentence. At sentencing, the Appellant showed no remorse and accepted no responsibility for his offense. The victim had experienced much emotional trauma. Additionally, many family members spoke and requested that the court impose the statutory sentence.

The sentence imposed is within the statutory limits. The Appellant alleges no impermissible factor used by the trial court in sentencing the Appellant. This sentence is not subject to review by this Court. State v. Redman, *supra*; State v. Goodnight, *supra*. For this reason, this Court is requested to deny the Petition for Appeal and affirm the judgment of the circuit court.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT’S RULE 35(b) MOTION.

1. Standard of Review.

The standard of review of a circuit court's ruling on a Rule 35 motion is:

In 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. Redman, *supra*; Syl. pt. 1, State v. Head, 198 W. Va. 298, 480 S.E.2d 507 (1996).

2. Discussion.

At sentencing, the Appellant showed no remorse and accepted no responsibility. In the Pre-sentence report he stated that he had a good relationship with his parents.

In support of his **W.V.R.Cr.P.** 35(b) motion, filed shortly after sentencing, the Appellant alleges that he has participated in programs and is willing to accept responsibility for his actions and that he believes that “no further public good is to be served by his continued incarceration.”

At hearing on that motion nearly three years later, he testified that he has participated in programs and that he regrets that he did not accept responsibility before. He put on no evidence that he has expressed remorse or apology to the victim. He put on no evidence that he is not a continuing threat to that victim or the community. His sister, once demanding a long sentence and now supporting an early release, testified that their parents were abusive and neglectful and admitted that she has since lost legal custody of her daughter, the victim.

In denying the Rule 35(b) motion, the trial court noted the discrepancies of the

Appellant's statement at sentencing about the good relationship he had with his parents and the testimony at the reconsideration hearing about how horrible the parents were. The trial court also noted the lack of supporting evidence justifying a modification. The court then ruled that:

The Court holds that this statutory penalty is not disproportionate to the serious felony of which the Defendant was convicted. Incarceration in a State penal facility is the best means by which the public will remain safe from this Defendant. The Defendant's need for correctional treatment is best provided by his continued commitment to a correctional institution. A reduction in sentence will depreciate the seriousness of the Defendant's crime.

[Order Denying Motion to Reconsider Sentence, 7/2/08.]

In Redman, *supra*, this Court held that the trial court did not abuse its discretion in denying a Rule 35(b) motion to reconsider where no new arguments or reasons for granting the motion were presented:

Because nothing new had transpired in the period following the trial court's ruling on the probation revocation petition, it stands to reason that there would be no additional findings of fact or legal rulings required, other than the granting or denial of the Rule 35 motion itself. [...] Consequently, the trial court referenced the reasons previously given in its [earlier] ruling in denying probation in the first instance.

Redman, 578 S.E.2d 369, 373-374.

As this Court denied the appellant relief in Redman, this Court is requested to deny the Petition for Appeal in this case since the trial court did not abuse its discretion in denying the Rule 35 motion where no new arguments or reasons were offered.

The Appellant alleges no impermissible factor used by the trial court in sentencing. This sentence is not subject to review. State v. Redman, *supra*; State v. Goodnight, *supra*.

The Appellant, however, argues that this Court's decision in State v. Arbaugh, 215 W. Va 132, 595 S.E.2d 289 (2004), controls. In Arbaugh, this Court, in a hotly debated 3-2 decision,

reversed a trial court's denial of a Rule 35(b) motion for probation. Four factors not present in the case *sub judice* primarily motivated the Arbaugh majority: 1) a youth who was found suitable for probation at the time of his initial sentencing; 2) evidence of the youth being a victim of prolonged sexual abuse at the time he committed the offense; 3) current psychological evidence that the youth was not a future sexual threat; and 4) a rehabilitation plan of national acclaim. Arbaugh.

These four factors do not exist in this case. The Appellant was not found suitable for probation at the initial sentencing. There was no evidence that the Appellant was the victim of prolonged sexual abuse. The Appellant offered no current psychological evaluation regarding his risk for reoffending.² The Appellant offered no rehabilitation plan for himself. To the extent that Arbaugh continues to be of some precedential value, it is distinguished from the case *sub judice*.

The trial court did not abuse its discretion in refusing the Appellant's request for a modified sentence. State v. Redman, supra.

² A pre-sentence psychiatric evaluation report was filed on behalf of the Appellant and is part of the record. However, that report is not current and was not utilized by the Appellant in support of his Rule 35 motion. The Appellant presented no current psychiatric or psychological evaluation in support of his Rule 35 motion.

VI. CONCLUSION.

For the foregoing reasons, this Court is respectfully requested to deny the Petition for Appeal and affirm the judgment of the circuit court.

Respectfully submitted,
State of West Virginia,
by counsel,



Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **BRIEF OF APPELLEE STATE OF WEST VIRGINIA** on this the 16th day of June, 2009, by ___ hand-delivery, x first-class mail, postage prepaid, ___ facsimile to:

R. Steven Redding, Esq.
P.O. Box 2169
Hedgesville, West Virginia 25427

A handwritten signature in cursive script, appearing to read "Chris Quasebarth", written in black ink over a horizontal line.

Christopher C. Quasebarth