
NO. 35647

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

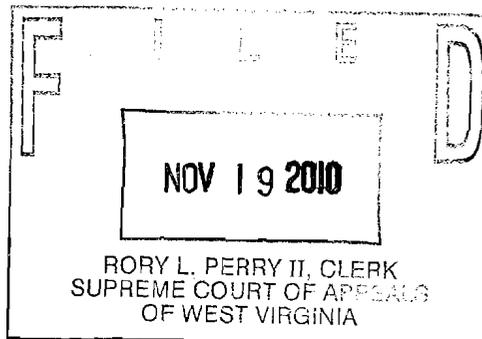
STATE OF WEST VIRGINIA,

Appellee,

v.

CHRISTOPHER PROCTOR,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

Christopher Proctor (hereinafter “the Appellant” or “Appellant”), while on probation for felony breaking and entering,¹ sexually abused his fiancée’s three-year-old daughter, J.J.,² by rubbing her vagina and buttocks. The evening he abused J.J., his fiancée was six months pregnant with the Appellant’s child. The Appellant claimed that he was motivated by a two-day bender during which he ingested a large amount of meth. The police caught him driving on a suspended license.

¹Carrying an underlying indeterminate sentence of 1-10 years.

²As is this Court’s practice involving sensitive matters, counsel for the Appellee will use the parties initials rather than their full names. *Marilyn H. v. Roger Lee H.*, 193 W. Va. 201, 202 n.1, 455 S.E.2d 570, 571 n.1 (1995).

When he was first caught he blurted out that he had entered J.J.'s bedroom and pulled her pants down. He has admitted to rubbing three-year old J.J.'s vagina and buttocks, but now asks this Court to find that the lower court abused its wide-ranging discretion when it denied his Motion for Reduction of Sentence under West Virginia Rule of Criminal Procedure 35(b), and is asking this Court to remand this matter back to the trial court for imposition of a "proper sentence."

He also asks this Court to overrule *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992), a case that has been on the books for almost twenty years and was most recently quoted four months ago. See *State ex. rel. Games-Neely v. Silver*, 226 W. Va. 11, 697 S.E.2d 47 (2010). Why: Because it is the Appellant's position that this Court misapplied United States Supreme Court precedent when deciding *Gill*. The Appellant is wrong. This is his only legal argument. It is the Appellee's position that *Gill* conforms with federal precedent; thus, leaving no reason to revisit it.

The September 2008 Term of the Kanawha County, West Virginia, Grand Jury indicted the Appellant with two counts of First Degree Sexual Abuse (Counts 1 & 3) pursuant to West Virginia Code § 61-8B-7(a)(3)³ and § 61-8B-1(6),⁴ and two counts (Counts 2 & 4) of Sexual Abuse by a Parent, Guardian or Custodian pursuant to West Virginia Code § 61-8D-5(a).⁵ (R. at 1.)

³"(a) A Person is guilty of sexual abuse in the first degree when. . . (3) [s]uch person, being fourteen years old or more, subjects another person to sexual contact who is younger than twelve years old."

⁴"In this article, unless a different meaning plainly is required . . . (6) "[s]exual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person"

⁵"In addition to any other offenses set forth in this Code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may

On March 9, 2009, pursuant to a plea agreement with the State, the Appellant pled guilty to Counts 1 and 2 as contained in the Indictment. The State, with the consent of the trial court, dropped Counts 3 and 4. By order entered June 24, 2009, the trial court, (Kaufman, J.), sentenced the Appellant to the statutorily provided terms of 5 to 25 years on Count 1 (First Degree Sexual Abuse) and 10 to 20 years on Count 2 (Sexual Abuse by a Parent, Guardian or Custodian). The trial court ran these sentences consecutively for a total of 15 to 45 years.

On October 22, 2009, the Appellant filed a Motion for Reduction of Sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure. (R. at 75.) By order entered November 23, 2009, the trial court summarily denied Appellant's motion. (R. at 85.) The Appellant appeals the trial court's ruling.

II.

STATEMENT OF FACTS

At the time of the incident the Appellant, his fiancée C.J.⁶, C.J.'s three-year-old daughter J.J., and their eight-month-old daughter C.P. lived together in a home in Rand, Kanawha County, West Virginia. (Appellant's Statement at 3-4.) J.J.'s bedroom was across the hall from C.J.'s and the Appellant's. (*Id.* at 5.) On the evening of February 7, 2008, the Appellant entered J.J.'s bedroom, pulled her pants down and rubbed her vagina and buttocks with his hand.⁷ (*Id.* at 5, 7, 13.) When he was caught by his fiancée, the Appellant denied having done anything wrong. C.J. called her aunt

have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian or custodian or person in a position of trust shall be guilty of a felony"

⁶At the time of the incident C.J. was six months pregnant with the Appellant's child. (Presentence Report, Victim Impact Statement at 2.)

⁷After denying it numerous times. (Appellant's Statement at 5, 7, 11.)

who called the police. (Deputy O'Neal Narrative at G.) By the time the police arrived, the Appellant was gone.

Appellant's wife told one of the investigating officers that she saw the Appellant, dressed only in his boxer shorts, kneeling beside J.J.'s bed. She also noticed that he had an erection. (Report of Investigation at 6.) J.J. was wearing blue jeans which were unbuttoned and partially pulled down. (*Id.*) She was lying on her left side with her knees at the edge of her bed.

One of the responding officers found the Appellant driving his car near his home and pulled him over. (Report of Investigation at 6.) After running a license check, the officer discovered that the Appellant's license was suspended for unpaid traffic tickets. During the stop the Appellant blurted out that he hadn't done anything by pulling the victim's pants down. (*Id.*; Narrative at 8.)

The Appellant was taken to the Kanawha County Sheriff's Department where he was interviewed by Detective Snuffer. Before asking him any questions, Detective Snuffer *mirandized*⁸ the Appellant, who waived his rights. Initially, the Appellant denied touching J.J. although he admitted pulling her pants and panties down. (Appellant's Statement at 4, 5, 7, 8, 16.) He repeatedly told Detective Snuffer that he did not know why he was in J.J.'s bedroom. (*Id.* at 5-7.) The Appellant denied being a pedophile, but claimed to suffer from a sickness. (*Id.* at 9, 10, 11.) As the interview progressed, the Appellant admitted rubbing J.J. around her vaginal area and buttocks. (*Id.* at 12-13.) He denied penetration. (*Id.* at 13, 20.) Appellant also admitted touching J.J. one time before, but not in a sexual manner. (*Id.* at 15.)

That same evening Deputy C.E. O'Neal spoke to C.J. C.J. told the Deputy that she suspected prior abuse. On one occasion, she had seen her daughter rub her vagina with a rubber duck. On

⁸*Miranda v. Arizona*, 384 U.S. 436 (1966).

another, she had noticed redness around J.J.'s vagina. (Report of Investigation at 7.) When Deputy O'Neal asked J.J. if her father had touched her, she answered "yes."⁹ He qualified her statement, saying he was not sure what J.J. meant when she answered his question. (*Id.*)

On February 11, 2008, C.J. and J.J., accompanied by Detective Snuffer, spoke with Maureen Runyon at Women and Children's Hospital. (*Id.* at 9.) Ms. Runyon interviewed J.J. alone. The investigating officer sat on the other side of a one-way mirror and observed the interview. J.J. denied that the Appellant had ever touched her vagina or buttocks. Detective Snuffer's Report of Investigation stated, "[J.J.] did not disclose anything during the interview." (*Id.* at 10.) There was no corroborative physical evidence.

The same day Ms. Runyon interviewed J.J., Probation Officer Donald King went to the South Central Regional Jail to collect a urine sample from the Appellant. While at the jail, the Appellant made inculpatory statements.¹⁰

On January 20, 2009, the State offered Appellant a plea agreement allowing him to plead guilty to one count of First Degree Sexual Abuse (Count 1), and one count of Sexual Abuse by a Parent, Guardian or Custodian (Count 2). (R. at 32.) In exchange for guilty pleas on Counts 1 and 2, the State agreed to drop Counts 3 & 4. Counsel for the State reserved the right to speak at sentencing. (*Id.*) A letter memorializing the terms of the agreement signed by the Appellant and his counsel is in the record. (R. at 34.) This was not a conditional guilty plea as contemplated under

⁹Thus the statement, "When authorities spoke with the minor victim, [J.J.] and asked her if her father touched her, she answered, "Yes", though no specific information was obtained." (Presentence Report at 2.)

¹⁰The investigating officer's report does not specify what those statements were.

Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure. There were no additional terms or conditions apart from those set forth in the State's letter.

On March 9, 2009, the Appellant executed a Plea of Guilty fully listing the constitutional rights he was waiving by entering into this plea. The document stated, in part,

That I have the right to challenge in the trial Court and on appeal all pre-trial proceedings, but by pleading guilty I would waive all pre-trial defects with regard to, among others, my arrest, the gathering of evidence and prior confessions as well as, all non-jurisdictional defects in this criminal proceeding.

(R. at 36.)

The Appellant's guilty plea hearing before the trial court took place on March 9, 2009. The Appellant, by counsel, executed the plea agreement in open court. (R. at 38.) Prior to signing this document the trial court spread the terms of the agreement on the record. (Plea Hr'g at 4-5.) The court also advised the Appellant of his duty to register as a sex offender. (*Id.* at 5.) The Appellant stated that he was represented by able counsel who fully discussed the terms of the plea with him. (*Id.* at 7, 8.)

The trial court then thoroughly reviewed the constitutional rights the Appellant was waiving by entering into this plea. These included the right to counsel, the requirement that the State prove every element of every offense beyond a reasonable doubt, the right to a public trial before twelve impartial jurors, the right to remain silent, the right of confrontation, the right to testify, the right to appeal any and all pre-trial proceedings, the right to suppress any illegally obtained evidence or illegally obtained confession. (Plea Hr'g at 6-9.) The Appellant, in the presence of counsel, acknowledged that he knew he was waiving these rights by pleading guilty. (*Id.* at 9, 13.) During his guilty plea he admitted touching J.J.'s vagina. (*Id.* at 11.) By order entered March 9, the trial court found that the Appellant had voluntarily, knowingly and intelligently waived his constitutional

rights, that he was represented by competent defense counsel, and that he understood the potential consequences of his plea. (Plea Hr'g at 14.) The trial court accepted Appellant's guilty plea to Count 1. (*Id.*)

The trial court reread Appellant his constitutional rights before accepting his plea to Count 2. (*Id.* at 15-16.) The state made it clear that Count 2 was based upon the Appellant's status as the victim's custodian. (*Id.* at 17.) Pursuant to West Virginia Code § 62-12-2(e) the trial court approved Appellant's motion for a forensic psychiatric report,¹¹ and scheduled sentencing for May 19. (*Id.* at 19.)

Forensic Psychiatrist Doctor Steven Dreyer performed the evaluation on May 12, 1999. Appellant admitted touching J.J.'s vagina to Dr. Dryer stating, "Thank God my old lady walked in on me before anything more serious happened. I ran up to her saying I hadn't done nothing but, as you can imagine, she was pretty upset." (PsyCare Eval. at 4.) He also admitted to long-term drug abuse, minimal psychiatric treatment, and a history of sexual abuse. (*Id.* at 4-5.) The Appellant stated that he was willing to participate in sex offender and drug and alcohol treatment. (*Id.* at 5-6.)

¹¹ "In the case of any person who has been found guilty of, or pleaded guilty to, a violation of the provisions of section twelve, article eight, chapter sixty-one of this code, the provisions of article eight-c or eight-b of said chapter, or under the provisions of section five, article eight-d of said chapter, such person shall only be eligible for probation after undergoing a physical, mental, and psychiatric study and diagnosis which shall include an on-going treatment plan requiring active participation in sexual abuse counseling at a mental health facility or through some other approved program"

But see W. Va. Code § 61-8B-9a(a) (Defendant who commits offense under W. Va. Code § 61-8B-7 not eligible for probation if he is eighteen years or older and the victim is younger than twelve.).

Appellant's verbal intellectual capacities were in the high end of the low average range, but he scored in the 98th percentile on the performance section of his IQ test. (*Id.* at 7.) Several other tests indicated malingering, and exaggerating of clinical symptoms. (PsyCare Evaluation at 6-7.) He was found to present a moderate risk of reoffending. (*Id.* at 10.)

Dr. Dreyer opined that the Appellant "minimizes the degree to which deviant sexual thoughts and behaviors are being manifested." (*Id.*) He appeared to accept that there was something wrong with him, and acknowledged a need for treatment. He also expressed concern over his victim.

After being continued once, Appellant's sentencing hearing took place on September 24, 2009. Counsel for the State noted that the Appellant was on probation for breaking and entering when he committed the present offenses. She recommended that the court run his sentences consecutively. (Sentencing Hr'g at 3-5.) J.J.'s mother submitted a victim impact statement which characterized J.J. as an innocent, defenseless, and a completely helpless minor child. Defense counsel stated that he had read through both the presentence report and the psychological evaluation before the hearing. She appended a copy of a short letter from Doctor John Hutton of Process Strategies stating that the victim was receiving outpatient treatment for PTSD and mood stability issues. (Sentencing Hr'g at 7; Presentence Report Victim Impact Statement.) Neither the Appellant nor his counsel objected to the contents of either document. By sentencing order entered the same day, the trial court sentenced Appellant to 5-25 years on Count 1, and 10-20 years on Count 2, said sentences to be served consecutively. (R. at 42-43.)

On October 22, 2009, the Appellant, by counsel, filed a motion for a reduction of sentence, and a memorandum of law pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure

raising the same issues raised on appeal. (R. at 79-84.) The trial court summarily denied Appellant's motion on November 23. (R. at 85.) Appellant appeals the trial court's ruling.

III.

ARGUMENT

A. THE APPELLANT WAIVED THIS ASSIGNMENT OF ERROR.

1. The Standard Of Review.

As a general rule, “[s]entences imposed by the trial court, if within statutory limits and if not based upon some [im]permissible factor, are not subject to appellate review.” Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982); accord Syl pt. 2, *State v. Shaw*, 208 W. Va. 426, 541 S.E.2d 21 (2000); Syl pt. 2, *State v. Farmer*, 193 W. Va. 84, 454 S.E.2d 378 (1994). “When a defendant has been convicted of two separate crimes, before sentence is pronounced for either the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively.” Syl. pt. 3, *Keith v. Leverette*, 163 W. Va. 98, 254 S.E.2d 700 (1979). Subject to certain narrowly drawn exceptions, this Court has consistently held that sentencing decisions rest within the sound discretion of the trial court. “The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). The balance struck by the sentencing judge after weighing competing sentencing factors, reviewing all of the documentation, and observing the demeanor of the witnesses will not be disturbed by this Court unless it is manifestly unsupported by reason. *State v. Redman*, 213 W. Va. 175, 578 S.E.2d 369, 375 (2003) (*per curiam*) (“Our system of criminal jurisprudence views a trial court’s discretion during the sentencing phase of a criminal

proceeding as critical component of the process. Circuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.”) (quoting *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring)); *State v. Cooper*, 172 W. Va. 266, 273, 304 S.E.2d 851, 857 (1983); *State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003) (*per curiam*). Additionally, when a defendant has pled guilty to an offense which does not fully encompass the seriousness of his conduct, or has received a significant reduction in potential exposure to confinement through a plea bargain, “the trial court has great discretion in imposing even the maximum sentence possible for the pled offense.” *Redman*, 213 W. Va. at 181, 578 S.E.2d at 375; *State v. Lowery*, 765 So. 2d 460, 463 (La. App. 2d Cir. 2000).

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

“A motion made under Rule 35 of the West Virginia Rules of Criminal Procedure is directed to the sound discretion of the circuit court and generally, is not reviewable absent an abuse of discretion.” *Head* at 301, 480 S.E.2d at 510. “Thus we will disturb a decision granting or withholding relief under [Federal Rules of Criminal Procedure] Rule 35(b) only upon a showing ‘that the trial court *grossly abused its discretion.*’ *United States v. Ames*, 743 F.2d at 48.” *United States v. Dicologero*, 821 F.2d 39, 42 (1st Cir. 1987) (emphasis added).

[A] motion to reduce does not compel the trial judge to delve so deeply into his original sentencing decision since, as a practical matter, the issue is only whether he feels sufficiently motivated by the information contained in the moving papers and adduced at hearing to undertake reconsideration of the existing sentence and ultimately perhaps to alter it.

Id. at 41 (quoting *McGee v. United States*, 462 F.2d 243, 247 n.8 (2d Cir. 1972)).

2. By Not Objecting To The Allegedly Misleading Information In The Presentence Report At The Sentencing Hearing The Appellant Waived This Assignment of Error.

Because the Appellant knew, or should have known, about the alleged misstatements in the presentence report, and had in his possession the taped interview with the victim before he was sentenced, but did not object to either at sentencing, any objections to either are waived.¹² *Cf. Fox v. State*, 176 W. Va. 677, 347 S.E.2d 197 (1986) (In matter in which the sentencing court orders restitution as a condition of probation, “The offender then *has the burden of advising the court of*

¹²Appellant’s counsel claims, in part, that the reason he did not object to these alleged misrepresentations is because of a “last-minute substitution of counsel prior to sentencing.” (Appellant’s Brief at 9.) The Appellant entered his guilty plea on March 9, 2009. At the time he was represented by Barbara Brown. The trial court set a sentencing date of May 19, 2009.

At the first sentencing date the defense asked for a continuance, which was granted by the court. Appellant was not sentenced until almost a month later. By that time he was represented by Justin Collin and George Castelle, the same two lawyers who drafted the Rule 35(b) motion and the brief before this Court. At sentencing Mr. Collin informed the court that he had received a copy of the presentence report and had reviewed it. (Sent. Hr’g at 7, 8.) This substitution was not “last minute.” Appellant’s counsel had more than enough time to review the presentence report for any alleged errors.

Appellant’s counsel also claims that new counsel was unaware of the untranscribed DVD of the forensic interview of the victim. (Appellant’s Brief at 9.) The State provided discovery to the defense on October 7, 2008, eight months before the Appellant was sentenced. (R. at 27.) Among the exhibits listed in the investigating officer’s report is a VHS videotape containing the audio and visual interview of J.J. by Maureen Runyon. (Report of Investigation at 6.) If Appellant’s counsel did not know that the victim’s interview with Ms. Runyon was preserved, it is because of a lack of diligence on their part.

any inaccuracies in the presentence report or any such reason that he would be unable to make restitution, presenting such evidence as the court, in its discretion, may deem relevant.”) (emphasis added). See also W. Va. R. Crim. P. 32(b)(6)(B) (“Within a period *prior to the sentencing hearing*, to be prescribed by the court, the parties shall file with the court any objections to any material information contained in or omitted from the presentence report.”) (emphasis added); W. Va. R. Crim. P. 32(b)(6)(C) “Except for any unresolved objection under subdivision (b)(6)(B), the court may, *at the sentencing hearing*, accept the presentence report as its findings of fact.”) (emphasis added); *People v. Sharp*, 481 N.W.2d 773 (Mich. App. 1992) (defendant’s failure to raise the alleged inaccuracies of the presentence report *at sentencing*¹³ waives his right to challenge information on appeal.); *United States v. Bustos*, 98 F.3d 1350 (10th Cir. 1996) (failure to object at sentencing to two-point enhancement recommendation in presentence report waived issue on appeal); *United States v. Cotton*, 535 U.S. 625 (2002) (Defense counsel’s failure to raise an *Apprendi* objection to a presentence report waives error); *In re Connick*, 28 P.3d 729 (Wash. 2001) (offenders failure to challenge information on his offender score and sentence range waives right to challenge court’s reliance on such information); *Carter v. State*, 711 N.E.2d 835 (Ind. 1999) (“The defendant generally has to an onus of pointing out any factual inaccuracies in the presentence report.”).

The Appellant cites to *State v. Craft*, 200 W. Va. 496, 490 S.E.2d 315 (1997). In *Craft* counsel for the defense objected to inaccurate information in his presentence report during the sentencing hearing. *Craft*, 200 W. Va. at 498, 490 S.E.2d at 317. The trial court failed to address the alleged inaccuracies in the report as mandated by Rule 32(c)(3)(1) of the West Virginia Rules of Criminal Procedure. Appellant filed a Rule 35(b) motion which was denied by the trial court. On

¹³Not in a subsequent Rule 35(b) Motion.

appeal the Appellant argued that he was entitled to a resentencing because the trial court failed to address an alleged factual inaccuracy in the manner mandated by W. Va. R. Crim. P. 32(c)(3)(D).¹⁴ Appellant's appeal was not based on the misstatements, but how the trial court addressed, or failed, to address them at the sentencing hearing. This Court denied Appellant's appeal because his Rule 35(b) motion did not mention the trial court's failure to follow the procedures set forth in W. Va. R. Crim. P. 32(c)(3)(1) and there was no plain error.

In the case-at-bar, the Appellant did not object to the presentence report until after his sentencing hearing. The trial court had no reason to resolve alleged inaccuracies relevant to sentencing pursuant to W. Va. R. Crim. P. 32(c)(1) because they were not raised at sentencing. Moreover, because the Appellant did not request an evidentiary hearing on the alleged misstatements until after sentencing, he waived his claim. *Cf. United States v. Atehortua*, 875 F.2d 149, 150-51 (7th Cir. 1989) (objections to the accuracy of information in a presentence report may not be raised in a Rule 35(a) motion when a defendant does not object to the report, or to an inadequacy of time

¹⁴Now W. Va. R. Crim. P. 32(c)(1) states:

(1) *Sentencing Hearing*. At the sentencing hearing, the court must afford counsel for the defendant and for the state an opportunity to comment on the probation officer's determinations and other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not effect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Board of Parole.

to consider it, at the sentencing hearing). Clearly, this violates the proscriptions set forth in W. Va. R. Crim. P. 32. Thus, Appellant has waived this assignment of error.¹⁵

3. **Given the Nature Of Appellant's Crimes The Trial Court's Sentencing Decision Was Well Within The Bounds Of Its Discretion.**

Even if this Court were to find that the Appellant properly preserved this assignment of error, the outcome should be no different. Appellant, while in a position of trust, while his fiancée was six months pregnant with his child, sexually assaulted three-year-old J.J. C.J. appended a brief letter from Doctor John Hutton of Process Strategies opining that J.J. suffers from PTSD and problems with mood stability. (Presentence Report, Victim Impact Statement.)

Mr. Proctor's record includes arrests for entering without breaking, breaking and entering, driving while license suspended or revoked, public intoxication, auto tampering, fleeing, and grand larceny. If we are to believe the Appellant, the evening of the offense he was driving on a suspended license while under the influence of methamphetamine-- which he had been taking the last four days.

He committed this act while on probation for another crime. There is no questioning his guilt. He claims that he only rubbed J.J.'s vagina a little bit.¹⁶ In fact, he claims that his contact

¹⁵In fact, because the Appellant failed to raise these issues prior to sentencing, or at the sentencing hearing, he cannot even prove that the trial court relied upon these alleged misstatements when pronouncing sentence. *See United States v. Miller*, 871 F.2d 488 (4th Cir. 1989) (trial court permitted to impose sentence without taking alleged misstatements in presentence report into account.) *See also* W. Va. R. Crim. P. 32(c)(1); *United States v. Matthews*, 773 F.2d 48, 51 (3d Cir. 1985) ("In this circuit, the test to evaluate whether a sentence has been based on criteria violative of a defendant's due process right is two-fold: (1) has misinformation of a constitutional magnitude been given to the district court; and (2) has that misinformation been given specific consideration by the sentencing judge?").

¹⁶The Appellant admitted that the only reason he stopped was because J.J.'s mother came into the room. (PsyCare Evaluation at 4.)

with this three-year-old was so minimal that the victim was not aware it happened. Notwithstanding this alleged dearth of evidence the Appellant chose to plead guilty, and has not raised a sufficiency of the evidence argument before this Court. Even if this were true, it hardly mitigates his repugnant conduct.¹⁷ Appellant speculates that J.J. denied this assault when Ms. Runyon asked her because she could not remember it. The dynamics of this situation offer several other potential reasons for her denial. Since this case was resolved by a guilty plea, there was little opportunity for factual development. Appellant seeks to exploit this, passing off speculation as certainty.

The trial court's sentences were within the statutory limits. As a general rule, "[s]entences imposed by the trial court, if within statutory limits and if not based upon some [im]permissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Dr. Dryer opined that the Appellant minimized his deviant behavioral tendencies and categorized him as a moderate risk of reoffending by Dr. Dreyer. (PsyCare Evaluation at 10.)

Both the Legislature and this Court have recognized the prevention of sexual offenses by adults against small children as a compelling interest. *See* W. Va. Code § 61-8B-3(c) (increasing penalty for First Degree Sexual Assault from 15-35 years to 25-100 years if the perpetrator is more than 18 and the victim is 12 or younger)¹⁸; W. Va. Code § 61-8B-7(c) (raising the penalty from 5

¹⁷A victim's degree of awareness of the defendant's conduct is not an element of sexual abuse. A defendant may be convicted of Sexual Abuse in the First Degree if his victim is physically helpless. *See* W. Va. Code § 61-8B-7(a)(2). *See People v. Sene*, 66 A.D.3d 427, 887 N.Y.S.2d 8 (N.Y.A.D. 2009) (sleeping victim is considered physically helpless and incapable of consenting to sexual contact); *Platt v. People*, 201 P.3d 545, 548 (Co. 2009) (phrase "physically helpless under Colorado law is defined as "unconscious, asleep, or otherwise unable to indicate a willingness to act.")

¹⁸Had the Appellant penetrated the victim's vagina, however slightly, he would have been facing a far stiffer sentence. *See* W. Va. Code § 61-8B-3(2) and W. Va. Code § 61-8B-1(7).

years to 5-25 years if the perpetrator is more than 18 and the victim younger is 12 or younger); W. Va. Code § 61-8B-9a (restricted probation eligibility for defendants who have committed certain sexual offenses against children); Syl. pt. 2 *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990) (404(b) evidence admissible to prove that the defendant has a lustful disposition toward young children). Particularly when those offenses are committed by a person in a position of trust.

The Appellant claims that the sentencing court was “misled” by Detective Snuffer’s Report of Investigation and the presentence report. The Report of Investigation states that the victim, “[D]id not disclose anything during the interview [with Ms. Runyon].” (Report of Investigation at 10.) The presentence report states, “When authorities spoke with the minor victim, [J.J.], and asked if her father touched her, she answered “Yes”, though no specific information was obtained.” (Presentence Report at 2.) This part of the Appellant’s statement, like the rest, was vague and contradictory. (Appellant’s Statement at 14-15.) Detective Snuffer asked the Appellant if he had touched J.J. before. (*Id.* at 14.) The Appellant admitted he had touched her one time before. He then denied touching J.J. sexually. Detective Snuffer followed up:

Q: This time and one other time are the only two times that you’ve ever done anything to [J.J.].

A: Yes sir.

(Appellant’s Statement at 15.) The Appellant then denied again that the prior touch was sexual, insisting that he had only touched J.J. once before on the arm. (*Id.* at 15.)

It is the Appellant’s position his psychiatric evaluation is based, in part, on Appellant’s unwillingness to admit he was a repeat offender. There is no such allegation in Detective Snuffer’s investigation report. The doctor did not have a copy of Appellant’s presentence report when he evaluated him. Dr. Dreyer’s information did not come from the investigation report, but from the

Appellant's own mouth. Appellant's statement to Detective Snuffer was dishonest and slippery. Initially, he denied ever touching J.J., just entering her bedroom and pulling her pants down. (Appellant's Statement at 4, 5, 7, 8.) When asked if he intended to touch J.J.'s vagina, the Appellant stated, "No sir. I mean I don't think I was. That's what I say I don't know what I was doing in there sir. I don't really know." (*Id.* at 8.) The Appellant then admitted to dreaming of rubbing J.J.'s butt and arm.¹⁹ (*Id.* at 10.) Appellants finally admitted rubbing the area around J.J.'s vagina, although he is not sure whether he rubbed the crack of her vagina. (*Id.* at 13, 19.)

B. THE APPELLANT WAIVED ANY DOUBLE JEOPARDY ARGUMENT BY PLEADING GUILTY. ADDITIONALLY, *STATE v. GILL* CONFORMS WITH STATE AND FEDERAL CONSTITUTIONAL LAW AND THE DOCTRINE OF *STARE DECISIS*; THUS, THIS COURT HAS NO REASON TO REVISIT ITS HOLDING.

1. Standard Of Review.

"We have previously held that claims involving double jeopardy are reviewed *de novo*." Syl. pt. 1, *State v. Sears*, 196 W. Va. 71, 73, 468 S.E.2d 324, 326 (1996).

2. The Appellant Waived This Assignment of Error By Pleading Guilty.

It is indeed axiomatic that a guilty plea alone does not deprive a defendant of all constitutional protections. Rather, a guilty plea acts only to bar relief on all non-jurisdictional issues. *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) ("A guilty plea . . . renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.").

¹⁹Once again, J.J. is three years old.

The waiver of non-jurisdictional claims includes “many of the most fundamental protections afforded by the Constitution.” *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995); *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (“[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”); *United States v. Broce*, 488 U.S. 563 (1989) (plea of guilty waives any right to raise a double jeopardy claim).

The United States Supreme Court has recognized that defendants may waive several fundamental constitutional rights by entering a guilty plea:

In fact, double jeopardy rights may be waived by failing to preserve the issue for appeal. *Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) (citing with approval *United States v. Bascaro*, 742 F.2d 1335, 1364-65 (11th Cir.1984) (holding that failure to raise the issue of double jeopardy at trial results in a waiver of that claim)). Here, when Gomez entered his plea, he did not preserve the double jeopardy issue for appeal. Rather, he entered an unconditional plea of no contest. His double jeopardy claim was waived.

Gomez v. Berge, 434 F.3d 940, 943 (7th Cir. 2006).²⁰

What constitutional rights are not waived by the general notions of the consequences of admitting in open court to committing the crime charged, can be expressly waived--including double jeopardy so long as the waiver is knowing and intelligent. “[T]here can be no effective waiver of

²⁰*Menna* did, however, hold that a plea of guilty or no contest does not forgive the unconstitutionality of an indictment that violates double jeopardy. *Menna*, 423 U.S. at 63. The indictment in this case is not at issue. *Menna* prohibits a state from “hailing a defendant into court on a charge” when double jeopardy applies. *Menna*, 423 U.S. at 62. Appellant, however, was not haled “into court on a charge”; rather, he willingly cooperated with prosecutors to effect the terms of the plea, which included pleading guilty to the additional charges. *Menna* also did not include waiver of double jeopardy rights in the facts of the case before the court.

a fundamental constitutional right unless there is an ‘intentional relinquishment or abandonment of a known right or privilege.’” *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The most basic rights of criminal defendants are . . . subject to waiver. *Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). Accord *United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). *Waivable constitutional rights include protection against double-jeopardy, Ricketts v. Adamson*, 483 U.S. 1, 10, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); the privilege against compulsory self-incrimination, *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); the right to jury trial, *id.*; the right to confront one's accusers, *id.*; and the Sixth Amendment right to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

United States v. Teague, 443 F.3d 1310, 1316 (10th Cir. 2006) (emphasis added).

The court in *Teague* further observed: “Nonwaivable rights are rare.” *Id.* “When waiver has not been allowed, it has been because of the need to protect a public interest beyond that of the defendant or because of concern that undue, and unprovable, pressure may have been brought to bear on the defendant.” *Id.* In this instance, petitioner cannot demonstrate that the terms of his plea, and his life sentences for the murder of a child, are a violation of the public’s best interest or that the terms of the plea undermined the integrity of the system in violation of public interest.

Likewise, double jeopardy is not considered a jurisdictional issue when placed in the context of challenging the legality of a sentence. A jurisdictional claim implicates the trial court’s “statutory or constitutional power to hear a case.” *United States v. Cotton*, 535 U.S. at 630. Appellant does not claim that the trial court did not have jurisdiction to impose the sentence.

Therefore, because double jeopardy rights are waivable by both a plea and a knowing and intelligent waiver, and because the trial court had jurisdiction to impose the sentence, Appellant’s

sentence cannot be held to be illegal under any analysis as applied to the set of facts in the instant case. Appellant cannot manipulate constitutional principles to overcome his plea and waiver.

“The Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choices.” *Ricketts v. Adamson*, 483 U.S. 1, 11 (1987). “Where, as here, the defendant fully ‘understands the nature of the right [being waived] and how it would apply in general in the circumstances,’ he may knowingly and intelligently waive that right ‘even though [he] may not know the specific detailed consequences of invoking it.’” *Taylor v. Horn*, 504 F.3d 416, 447 (3d Cir. 2007), quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

3. **This Court’s Holding In *State v. Gill* Conforms With State And Federal Constitutional Law.**

Ultimately, when the same act violates two distinct statutory provisions, whether one act is punishable as separate offenses raises a question of legislative intent.” *See Garrett v. United States*, 471 U.S. 773, 778 (1985). “Established double jeopardy jurisprudence confirms that the Legislature may impose multiple punishments for the same conduct without violating the Double Jeopardy Clause. *See id.* at 778-79.

In ascertaining legislative intent, a court should look initially to the language of the involved statutes, and, if necessary, the legislative history to determine if the legislature has made a clear expression [of] its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932) to determine whether each offense requires an element of proof that the other does not.

Syl. pt. 8, in part, *State v. Gill*, 187 W. Va. at 138, 416 S.E.2d at 255. For example, in *Gore v. United States*, 357 U.S. 386 (1958), the Supreme Court upheld three consecutive sentences based on a single illicit drug sale that violated three statutes prohibiting different ways of selling illegal drugs. *See id.* at 386. *See State v. Dillon*, 632 N.W.2d 37 (S.D. 2001) (single act may form the basis

for convictions of Rape (SDCL 22-22-1(1)) and Criminal Pedophilia (22-22-30.1)). *See also Roberts v. State*, 712 N.E.2d 23, 29-30 (Ind. 1999) (Rape and Child Molestation prosecutions based upon the same act prohibited under state constitution but not prohibited under federal constitution²¹).

Indeed, the double jeopardy clause does not prohibit multiple punishments for offenses when one is included in the other under the *Blockburger*²² test if both are tried at the same time and if the Legislature specifically authorizes cumulative punishment for both offenses. *See Missouri v. Hunter*, 459 U.S. 359, 366-69 (1983). Thus, even if the elements of two crimes are the same, a defendant may in a single trial be convicted of and punished for both crimes if the Legislature intended for multiple punishments to apply.

The first sentence of West Virginia Code § 61-8D-5(a) unambiguously sets forth the Legislature's intent: There is no need to subject the statutory language to the *Blockburger* test. "In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]" *See* Syl. pt. 8, *State v. Gill, supra* ("In ascertaining legislative intent, a court should look initially at the language of the involved statutes, and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes."); *see also State v. Cecil*, 221 W. Va. 495, 498, 655 S.E.2d 517, 520 (2007) quoting Syl. pt. 9, *State v. Gill* ("Thus, the Legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians, 61-8D-5, is a separate and distinct crime from general sexual offenses, W. Va. Code, 61-8B-1, *et*

²¹*See State ex. rel. Franklin v. McBride*, No. 34595, 2009 WL 3255136 (W. Va. 2009) ("We begin by noting that the decisions of this Court have held that double jeopardy clauses of the state and federal constitutions impose the same protections[.]").

²²*Blockburger v. United States*, 284 U.S. 299 (1932).

seq., for purposes of punishment.”). Although the Appellant cites to no less than fifty rape statutes, his citations lack the clearly expressed legislative intent set forth in the first sentence of West Virginia Code 61-8D-5(a).

Even if this Court were to apply the *Blockburger* test, the result would be no different. The Appellant pled guilty to one count of First Degree Sexual Abuse, and one count of Sexual Abuse by a Parent, Guardian or Custodian. The elements of Second Degree Sexual Abuse are: 1) That a person; 2) engages in sexual intercourse or sexual intrusion; 3) without the victim’s consent; and 4) the lack of consent results from forcible compulsion.

Under West Virginia Code § 61-8D-5(a) Sexual Abuse by a Parent, Guardian, or Custodian requires: 1) Any parent, guardian, or custodian of or other person in a position of trust in relation to the child; 2) under his or her care, custody or control; 3) shall engage in or attempt to engage in; 4) sexual exploitation of or in sexual intercourse, sexual intrusion, or sexual contact; 5) when the child is less than sixteen years of age; 6) notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have suffered no apparent physical injury as a result of such conduct; 5) then such parent, guardian, or custodian shall be guilty of a felony.

As stated above the *Blockburger* test holds:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not.

Id., 284 U.S. at 301.

Second Degree Sexual Abuse requires proof of forcible compulsion. Forcible compulsion is defined, in part, as “fear by a person under sixteen years of age caused by intimidation, express or implied, by another person who is at least four years older than the victim.” W. Va. Code

§ 61-8B-1(1)(c). Sexual abuse by a parent, guardian or custodian requires proof that the perpetrator was a parent, guardian, custodian, or person in a position of trust.

4. **The Appellant Has Not Introduced Sufficient Reason For This Court To Ignore The Doctrine of *Stare Decisis*.**

“An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of *stare decisis*, which is to promote certainty, stability, and uniformity in the law.” Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974). The Appellant has failed to offer this Court any cogent reason to overrule *Gill*. Indeed, since this Court decided *Gill* it has woven itself into the fabric of this State’s jurisprudence. One needs only shepardize the case to see that *Gill* is mentioned by this Court in no less than thirty-two other cases. The legal principles set forth in *Gill* have long been accepted and applied by this Court.

The United States Supreme Court has repeatedly held that, ‘the doctrine of *stare decisis* is of fundamental importance to the rule of law.’ *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). Although we have cautioned that ‘*stare decisis* is a principal of police and not a mechanical formula of adherence to the latest decision.’ *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 241 (1970), it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’ The Federalist, No. 78, p. 490 (H. Lodge ed. 1988) (A. Hamilton). See also *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986)(*stare decises* ensures that ‘the law will not merely change erratically’ and ‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.’

Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

Clearly, if the court has erroneously applied precedent to reach the decision in question, the argument favoring the application of *stare decisis* is weaker. The Appellant claims that *Gill* misapplied *Missouri v. Hunter*, 459 U.S. 359 (1983); *Ohio v. Johnson*, 467 U.S. 493 (1984);

Albernaz v. United States, 450 U.S. 333 (1981); and *Garrett v. United States*, *supra*. This Court cited the above cases for the proposition that the *Blockburger* test is not controlling when the legislative intent is clear from the face of the statute. See *Gill*, 187 W. Va at 142, 416 S.E.2d at 259. The case law is dispositive and was correctly applied. *Hunter*, 459 U.S. at 367; *Albernaz*, 450 U.S. at 340.

IV.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

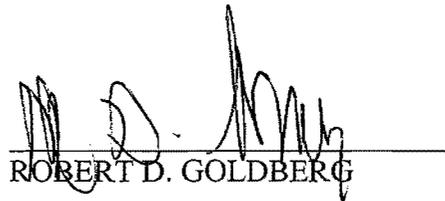


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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of November, 2010, addressed as follows:

To: George Castelle, Esq.
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