

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

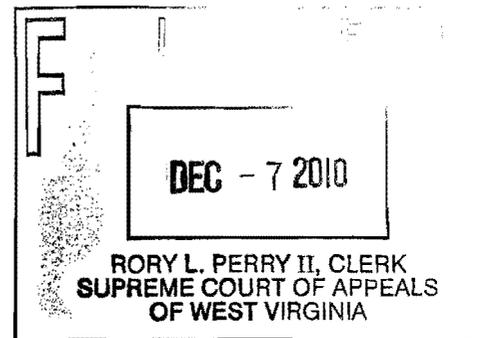
STATE OF WEST VIRGINIA,
Appellee

v.

CHRISTOPHER PROCTOR,
Appellant

Supreme Court No. 35647

Circuit No. 08-F-520
(Kanawha County)



REPLY OF APPELLANT

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REPLY OF APPELLANT

INTRODUCTION

In the Brief of Appellee, the State does not contest the assertion that, based on a review of the sexual offense statutes in all fifty states, West Virginia appears to be the only state in the union that authorizes a prosecution and punishment for sexual abuse, while simultaneously allowing a second prosecution and punishment, for the same act, punishable as sexual abuse by a guardian. Because West Virginia appears to stand alone in this regard, the State's argument for adhering to the doctrine of *stare decisis* is substantially weakened and should not prevail.

Additionally, contrary to the assertions in the Brief of Appellee, the Appellant did not waive the issues regarding material misstatements of fact at sentencing; the Appellant did not waive the issue of double jeopardy; and the multiple punishments in this case constitute a

violation of the constitutional protection against being punished twice for what both parties agree is a single act.

DISCUSSION OF LAW

I. The Appellant Did Not Waive the Issue Regarding Material Misstatements of Fact at Sentencing. The Appellant Brought the Misstatements to the Circuit Court's Attention in a Timely Motion for Reduction of Sentence Pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. One of the Explicit Purposes of Rule 35 is to Provide This Opportunity to Correct Errors or Oversight at Sentencing, to Avoid Penalizing a Defendant for the Errors of Others, and to Serve the Ends of Justice.

On pages 11-14 of the Brief of Appellee, the State asserts that the Appellant waived the issue regarding material misstatements of fact at sentencing by failing raise the issue at the sentencing hearing itself. Contrary to the State's assertion, for at least five reasons the Appellant did not waive this issue.

First, the State cites the federal court ruling in *United States v. Atehortua*, 875 F.2d 149 (7th Cir. 1989), for the proposition that objections to the accuracy of information in a presentence report may not be raised in a Rule 35 motion for correction or reduction of sentence when a defendant does not object to the report at the sentencing hearing itself. What the state overlooks, however, is that *Atehortua* is based on the *federal* Rule 35, a rule that is far more stringent and far more limited than Rule 35 as set forth in the West Virginia rules. (Initially, the federal rule and the West Virginia rule were similar, but the federal rules were amended in 1987 to conform to the Sentencing Reform Act of 1984, U.S.Code § 3742, the act which established a Sentencing Commission and sentencing guidelines.)

By contrast to current Rule 35 of the Federal Rules, Rule 35 of the West Virginia Rules is not limited to the narrow set of circumstances currently contained in the Federal Rules. Instead, as this Court acknowledged in *State v. Head*, 198 W.Va. 298, 306, 480 S.E.2d 507, 515 (1996), in motions for reduction of sentences under West Virginia Rule 35 the defendant should not be penalized for the oversight of others (in that instance, the oversight of the trial court itself), 198 W.Va. at 304, 480 S.E.2d at 513. Under the West Virginia Rule, the Court may consider additional matters "when such consideration serves the ends of justice," 198 W.Va. at 305, 480 S.E.2d at 514 (discussing matters occurring outside the 120-day time period.)

Second, based on the explicit language in Rule 35 of the West Virginia Rules (*Correction or reduction of sentence*), one of the key purposes of Rule 35 is to provide an opportunity to correct errors or omissions at sentencing. If there were a requirement that all errors must first be raised at the sentencing hearing itself, there would be no need to provide an opportunity to return to the trial court, under the West Virginia Rule, for an opportunity to correct those that weren't raised. As Justice Cleckley pointed out in his concurrence in *State v. Head*, 198 W.Va. 298, 306, 480 S.E.2d 507, 515 (1996), the purpose of a Rule 35 motion for reduction of sentence is not to provide a second opportunity, or "instant replay," of the sentencing hearing. Instead, the purpose of the hearing is to consider matters that, for whatever reason, were not considered at the sentencing hearing, but should have been.

Third, the reason for the requirement of a timely objection in the trial court is to preserve an issue for *appeal*. It is not to preserve an issue for the purpose of raising the same issue before the same judge again. *See, e.g., Marples v. W.Va. Department of Commerce*, 197 W.Va. 318, 323, 475 S.E.2d 410, 415 (1996) (Where objections were not made to the trial court, and not jurisdictional, objections will not be considered on *appeal*, absent plain error).

Fourth, "in order to avoid penalizing a defendant" for matters beyond the defendant's control, *State v. Head*, 198 W.Va. at 304, 480 S.E.2d at 513, the Appellant in the present case should not be punished for the oversight of his trial lawyers. As pointed out in the Brief of Appellant, the oversight occurred because of the change in lawyers due to (1) the emergency leave of original counsel, (2) the unfortunate practice of the prosecution in producing evidence favorable to the defendant, as required by *Brady v. Maryland*, 373 U.S. 83 (1963), but providing it in untranscribed DVD's, increasing the chances of it being overlooked; and (3) most significantly, the State's misleading characterization of the contents of the untranscribed DVD.¹

Fifth, Rule 2 of the Rules of Criminal Procedure (*Purpose and construction*) states that the rules "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." By contrast, the State would construe the rules to require the trial court to deny the Rule 35 motion for failure to raise the issue at sentencing, then require the defendant to pursue the circuitous route of a futile appeal, followed by a return to the trial court in a habeas proceeding to raise, once again, the points that were previously before the trial court in the Rule 35 proceeding. This circuitous and unnecessary route violates the principles of judicial economy, as well as violating the requirement of Rule 2 to construe the Rules of Criminal Procedure to provide for "simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

¹ The police report stated, misleadingly, that the child "did not disclose anything during the interview," suggesting that the child provided no information. Report of Investigation, at 10. Instead, when asked during the forensic interview if the Appellant ever touched her in her sexual areas, the child specifically answered "No." DVD, Feb. 11, 2008, at 13:48:30. The presentence report, relying on the misleading police report, then erroneously stated that the child answered "Yes" (when in fact the child answered "No"), an error that was compounded by the additional error in mistakingly stating that the Appellant admitted to committing the offense on another occasion as well. Presentence Report at 2, 6.

For all of these reasons, the oversight of counsel should be treated as excusable oversight, correctible if raised in a timely manner in a Rule 35 proceeding for correction or reduction of sentence. And in any event, as this Court at least indirectly acknowledged in *State v. Head*, the Appellant himself should not be punished for the oversight of others that was beyond his control.

II. The Entry of a Guilty Plea Does Not Constitute a Waiver of the Issue of Double Jeopardy at Sentencing. The United States Supreme Court has explicitly held that the entry of a guilty plea does not necessarily waive the issue of double jeopardy, *Menna v. New York*, 423 U.S. 61 (1975). Additionally, Under the Doctrine of Merger, a Defendant May Be Convicted or Plead Guilty to Violating Two or More Statutes, But the Convictions May Nevertheless Merge for Purposes of Sentencing.

The State argues that by entering guilty pleas the Appellant waived the right to raise the issue of double jeopardy at sentencing. The State's argument is erroneous for two reasons.

First, the United States Supreme Court in *Menna v. New York*, 423 U.S. 61 (1975)(per curiam), specifically held that a guilty plea does not necessarily waive the right to raise the issue of double jeopardy. As the Court explained, "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that -- judged on its face -- the charge is one that the State may not constitutionally prosecute." 423 U.S. at 198 n.2.

Second, the entry of a guilty plea to two charges does not waive the right to object to consecutive punishment for the two charges at sentencing. Numerous jurisdictions, particularly those applying the common law doctrine of merger of offenses at sentencing, recognize that a defendant may be convicted or plead guilty to two or more offenses, yet still have valid common law, statutory or constitutional grounds for opposing consecutive punishment. *See, e.g., State v.*

Dillihay, 601 A.2d 1149 (N.J. 1992); *Commonwealth v. Williams*, 496 A.2d 31 (Pa. Super. Ct. 1985); *State v. McCloud*, 177 Ore.App. 511, 34 P.3d 699 (2001).

III. The State's Analysis of the *Blockburger* Test for Double Jeopardy Contains So Many Misstatements Regarding the Elements of the Offenses in This Case That Its Analysis Should Be Disregarded.

On pages 22 - 23 of the Brief of Appellee, the State asserts that even if this Court were to apply the *Blockburger* double jeopardy test, *Blockburger v. United States*, 284 U.S. 299 (1932), the results would be no different and the Appellant's sentence would be sustained. The State makes so many erroneous assertions about the elements of the two offenses, however, that its assertions about the *Blockburger* test should be disregarded.

First, in its *Blockburger* analysis the State correctly states that the Appellant pled guilty to one count of "*First Degree Sexual Abuse . . .*" Brief of Appellee, 22. In the next sentence, however, the State then asserts what it purports to be the elements of "*Second Degree Sexual Abuse.*" Second degree sexual abuse relates to sexual contact with a person who is mentally defective. W.Va. Code § 61-8B-8. Despite the State's assertions, there are no charges of second degree sexual abuse, or mental defects, in this case. *See* Criminal Complaint, Feb. 7, 2008 (charging *first degree* sexual abuse and sexual abuse by a guardian), R. 8; Indictment, Sept. 19, 2008 (also charging *first degree* sexual abuse and sexual abuse by a guardian), R. 1-4; and Plea of Guilty, March 9, 2008 (pleading to *first degree* sexual abuse and sexual abuse by a guardian), R. 28. Consequently, an analysis of the elements of second degree abuse is inapplicable to the present case.

Second, in its *Blockburger* analysis the State then asserts that "sexual intercourse or sexual intrusion" is an element of second degree sexual abuse. Regardless of whether the State

means to refer to *second* degree sexual abuse (which was not charged in this case) or *first* degree sexual abuse (which was charged), the State's assertion that sexual intercourse or sexual intrusion is an element in this case is wholly erroneous. Neither sexual abuse in the first degree, W.Va. Code § 61-8B-7, nor sexual abuse in the second degree, W.Va. Code § 61-8B-8, contain sexual intercourse or sexual intrusion as an element. More significantly, as is clear from the indictment, the Sheriff's Report of Investigation, and the plea hearing itself, there is absolutely no evidence of sexual intercourse or sexual intrusion in this case, and none was ever alleged or charged.

Third, in its *Blockburger* analysis the State then asserts that "forcible compulsion" is an element of second degree sexual abuse. Once again, regardless of whether the State means to refer to *second* degree sexual abuse (which was not charged in this case) or *first* degree sexual abuse (which was charged), the State's assertion that forcible compulsion is an element in this case is also erroneous. Forcible compulsion is an element of *one alternative* of first degree sexual abuse, but not the alternative that was charged in this case. The statute setting forth the offense of first degree sexual abuse has three sub-sections, each setting forth an alternative means of committing the offense. W.Va. Code § 61-8B-7(a)(1) through (3). As is clear from the Indictment, the Sheriff's Department Report of Investigation, and the plea hearing itself, of the three alternative means of committing first degree sexual abuse the alternative that was charged in this case was not alternative one (forcible compulsion), but was instead alternative three (based on the age of the victim).

Fourth, in its analysis of the elements of sexual abuse by a parent, guardian or custodian, the State asserts that an element of the offense is "when the child is less than sixteen years of age." Much as in the case of sexual abuse, discussed above, the statute setting forth the offense of sexual abuse by a parent, guardian or custodian provides for alternative means of committing

the offense. W.Va. Code § 61-8D-5(a) and (b). The age of the child is an element of one alternative (procuring another person to engage in exploitation), but the age of the child is not an element in the alternative that was charged in this case. As is clear from the indictment, the Sheriff's Report, and the plea hearing, the alternative that was charged in this case was not alternative "(b)" (procuring, where age is an element), but was alternative "(a)" (sexual contact, where age is not an element). There is absolutely no evidence of procuring in this case, and none was ever charged or alleged. Consequently, despite the assertions of the State, age is not an element in the charge of sexual abuse by a guardian that was brought in this case.

As a result, the *Blockburger* analysis as set forth in the Brief of Appellee has so many erroneous statements regarding the elements of the offenses in this case that its analysis should be rejected.

IV. The State's Brief Contains Additional Misstatements About the Facts of This Case, Including Errors Regarding the Appellant's Charges in This Case As Well Misleading Characterizations of the Appellant's Prior Record.

Although portions of the Brief of Appellee contain carefully drafted and accurate statements of fact, other portions contain overstatements and errors that are prejudicial to the Appellant. In addition to the erroneous references to sexual intercourse and forcible compulsion in the State's discussion of the *Blockburger* test, as explained in part III, above, in its discussion of sentencing discretion the State again raises the claim of sexual intercourse by stating that the Appellant "sexually assaulted" the victim. Brief of Appellee, 14. Unlike the sexual contact that admittedly occurred in this case, sexual *assault* involves sexual intercourse or sexual intrusion. W.Va. Code § 61-8B-3 through 5. Contrary to the State's repeated assertions, there was absolutely no evidence of sexual assault in this case, and none was ever alleged or charged.

Additionally, the Appellant's prior record is overstated in the Brief of Appellee. In its brief, the State asserts that the Appellant's record contains numerous arrests, including arrests for, among other charges, "public intoxication, auto tampering, fleeing, and grand larceny. " Brief of Appellee, 14. As documented in the records of the NCIC (FBI National Crime Information Center) set forth in the Presentence Report, these four charges were from a single arrest rather than four arrests. More significantly, the last charge was not *grand* larceny (a felony), but was *petit* larceny, a misdemeanor. (And in any event, as set forth in the NCIC records, the charge was dismissed.)

CONCLUSION

For the above reasons, the assertions set forth in the Brief of Appellee are erroneous. West Virginia remains the only state in the union that appears to allow punishment for both sexual abuse and sexual abuse by a guardian, based on a single act. The State's argument for adhering to the doctrine of *stare decisis* is heavily outweighed by the constitutional protections against double jeopardy and by the isolation of the State of West Virginia as the only jurisdiction imposing multiple punishments in instances such as these.

Consequently, the Order of the Circuit Court of Kanawha County, denying the Appellant's Motion for Reconsideration of Sentence, should be reversed, and the case remanded for the imposition of an appropriate sentence.

Respectfully submitted,

CHRISTOPHER PROCTOR

By counsel



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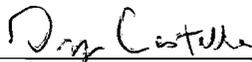
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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 7th day of December, 2010, I served,
by hand, a copy of the foregoing Reply of Appellant upon:

Robert D. Goldberg
Assistant Attorney General
Office of the Attorney General
State Capitol
Charleston, WV 25305



George Castelle