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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

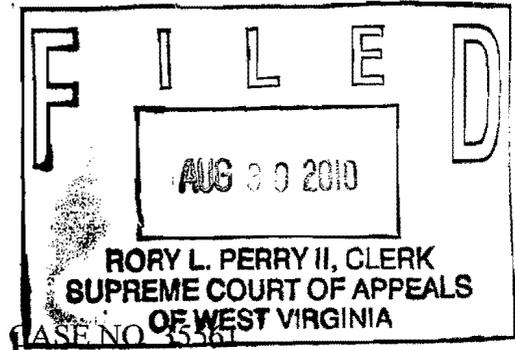
APPELLEE,

VS.

JERRY LEE HEDRICK,

APPELLANT.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
APPELLEE,

VS.

CASE NO. 35561

JERRY LEE HEDRICK
APPELLANT.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

KIND OF PROCEEDING AND NATURE
OF THE RULING BELOW

The Appellant, Jerry Lee Hedrick, (hereinafter referred to as Appellant) was convicted following a trial by jury in the Circuit Court of Mineral County, West Virginia, on two Counts of the felony offense of sexual abuse in the first degree in violation of the provisions of *West Virginia Code*, §61-8B-7(a)(1). The Appellant was initially indicted for said charges in the Circuit Court of Grant County. However, after an attempt to empanel a jury in Grant County proved unsuccessful, said Court granted a change of venue Motion made by the Appellant. Venue was then transferred to Mineral County where the trial was held. The Appellant was subsequently sentenced by the Circuit Court of Mineral County to not less than one year nor more than five years and fined \$10,000.00 on each Count in accordance with the above statute and was directed to serve twenty-five years on extended supervised release under the provisions of *West Virginia Code*, §62-12-26. The Appellant filed a Petition for Appeal to this Court

alleging several grounds for relief. By Order dated May 5, 2010, this Court granted the appeal on only one of the issues raised by the Appellant. Said issue pertained to the Appellant's claim that §62-12-26 was unconstitutional under both the Federal and State Constitutions.

STATEMENT OF FACTS

The Appellee sees no need to fully set forth all of the facts leading up to the acceptance of this issue for appeal by this Court. The facts provided by the Appellant in his Brief adequately apprise the Court of the history of this matter. The Appellee would clarify two items as reflected in the Appellant's brief. First, the Appellant reports that the two crimes occurred sequentially on the same date, time and place. This is correct but with the understanding that there was a sufficient break between the two acts to justify two crimes instead on just one. Second, the Appellant never raised the issue as to the constitutionality of §61-12-26 until the filing of his Petition with this Court. In fact, the Notice of Intent to Appeal as filed with the Circuit Clerk does not include this issue. See Court Record (Ct.R.) Pages 344-345.

POINTS AND AUTHORITIES RELIED UPON

CONSTITUTIONAL AUTHORITIES

United States Constitution, Fifth Amendment	5
United States Constitution, Sixth Amendment	5
United States Constitution, Eighth Amendment	9
United States Constitution, Fourteenth Amendment	5, 9
West Virginia Constitution, Article 3, Section 5	9

West Virginia Constitution, Article 3, Section 10	5
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WEST VIRGINIA STATUTORY AUTHORITY

<i>West Virginia Code</i> , §61-2-14a	7
<i>West Virginia Code</i> , §61-8B-7	10
<i>West Virginia Code</i> , §61-8B-7(a)(1)	1
<i>West Virginia Code</i> , §62-12-2(e)	11
<i>West Virginia Code</i> , §62-12-26	Passim

FEDERAL STATUTORY AUTHORITY

Title 18 <i>United States Code</i> §3583	7, 8
Title 18 <i>United States Code</i> §3583(k)	7

WEST VIRGINIA CASE AUTHORITY

<i>State v. Booth</i> , 224 W.Va. 307, 685 S.E.2d 701 (2009)	11
<i>State v. Cooper</i> , 172 W.Va. 266, 304 S.E.2d 851 (1983)	10; 11
<i>State v. Epperly</i> , 135 W.Va. 877, 65 S.E.2d 488 (1951)	6
<i>State v. Goodnight</i> , 169 W.Va. 366, 287 S.E.2d 504 (1982)	9
<i>State v. Haught</i> , 218 W.Va. 462, 624 S.E.2d 899 (2005)	7
<i>State v. Head</i> , 198 W.Va. 298, 480 S.E.2d 507 (1996)	9
<i>State v. Jarvis</i> , 199 W.Va. 635, 487 S.E.2d 293 (1997)	6
<i>State v. Lucas</i> , 201 W.Va. 271, 496 S.E.2d 221 (1997)	4, 9
<i>State v. Redman</i> , 213 W.Va. 175, 578 S.E.2d 369 (2003)	9
<i>State v. Richardson</i> , 214 W.Va. 410, 589 S.E.2d 552 (2003)	4

State v. Rutherford, 223 W.Va. 1, 672 S.E.2d 137 (2008) 4, 7

State ex. rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965) 6

Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981) 10, 11

Willis V. O'Brien, 151 W.Va. 628, 153 S.E.2d 178 (1967) 7

FEDERAL CASE AUTHORITY

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 5, 7, 8

Johnson v. United States, 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000) 8

United States v. Huerta-Pimental, 445 F.3d 1220 (9th Cir. 2006) 8

United States v. Pettus, 303 F.3d 480 (2nd Cir. 2002) 8

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995) 8

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996) 8

DISCUSSION OF THE LAW

1. STANDARD OF REVIEW

“The Supreme Court of Appeals reviews sentencing orders, . . . , under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.”

State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997) (Syllabus Point 1). See also *State v. Richardson*, 214 W.Va. 410, 589 S.E.2d 552 (2003).

“The constitutionality of a statute is a question of law which this Court reviews *de novo*.”
State v. Rutherford, 223 W.Va. 1, 672 S.E.2d 137 (2008). (Syllabus Point 1).

2. *WEST VIRGINIA CODE*, §62-12-26 DOES NOT VIOLATE THE DUE PROCESS PROVISIONS OF THE FIFTH, SIXTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION NOR ARTICLE 3, SECTIONS 10 AND 14 OF THE WEST VIRGINIA CONSTITUTION.

The Appellant argues that §62-12-26 is facially unconstitutional as it imposes additional penalties upon the Appellant in violation of the due process requirements contained in the cited Constitutional provisions. Appellant bases this argument entirely on the ruling of the United States Supreme Court in the case of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Apprendi* the Court held that, "The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt."

The language of §62-12-26 specifically states as follows:

"Notwithstanding any other provision of this code to the contrary, **any defendant convicted** after the effective date of this section of a violation of section twelve, article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b, eight-c, or eight-d of said chapter **shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty** or condition imposed by the court, a period of supervised release of up to fifty years:" (Emphasis added).

Therefore, a circuit court does not need to make any findings beyond the actual conviction for one of the designated offenses in order to impose the extended period of supervision. In the Appellant's case, he was found guilty of one of those designated offenses by a jury following a trial where all of his due process rights were more than adequately protected. Based upon same, the Court was duty bound to impose the extended supervision period.

The statute is clear and unambiguous. This statute was passed in 2003 and went into effect on March 8, 2003. There have been a couple amendments of the statute in 2006 and 2009.

However, the primary purposes and language of the statute were in effect when the Appellant committed, was convicted, and sentenced on the crimes. At the sentencing hearing, Appellant's counsel and Appellant, himself, acknowledged that the Probation Officer reviewed the terms of extended supervision with him during the pre-sentence investigation and on the day of and prior to the actual sentencing. His counsel also acknowledged reviewing same with the Appellant prior to the day of sentencing. See Transcript (10/21/09 hearing) page 4.

As an aside, the Appellee would note that even though the Appellant clearly had knowledge of this statute and the requirement of extended supervision, he lodged no objections to same at the time of sentencing or in the Notice of Intent to Appeal.

The Legislature clearly views sex crimes as crimes of great concern. As a result, it enacted this extended supervision statute to provide for added supervision, treatment, and hopeful rehabilitation of those individuals convicted of such crimes. This Court has long established principles when dealing with legislative enactments. In Syllabus Point 2 of *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951), the Court stated, "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect". See also *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997). The Appellee recognizes that the constitutionality of a statute is reviewable by this Court.

However, as acknowledged by the Appellant, this Court has viewed that process narrowly as stated in Syllabus Point 1 of *State ex. rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965), in the following language:

"In considering the constitutionality of a legislative enactment,

courts must exercise due restraint, in recognition of the principle of separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.”

This standard has also been upheld by this Court in cases involving attacks on various sentencing statutes based upon *Apprendi*. *State v. Haught*, 218 W.Va. 462, 624 S.E.2d 899 (2005), dealt with an attack on the §61-2-14a, which is the kidnaping statute, and *State v. Rutherford*, supra., also cited by Appellant, dealing with enhancement of penalties in certain drug convictions. In *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967), the Court not only stated that every reasonable construction must be resorted to by a court to sustain constitutionality of an act but further added that there is a presumption that the legislature in the passage of an act considered the constitution and did not intend to violate it in enacting the legislation. As stated above §62-12-26 first went into effect in 2003, with amendments in 2006 and 2009. *Apprendi* was decided in 2000.

In addition to the above precedents, there is support for this type of statute and its compliance with constitutional precepts under Federal law. In 1984 Congress enacted the Sentencing Reform Act which included a statute codified as 18 U.S.C. §3583 which provides for a term of supervised release after the individual has been released from prison. The term of supervision could be for a set number of years as provided in §3583(a) or could be for a minimum of five years up to life as set forth in §3583(k). A significant portion of the language

in §62-12-26 is similar to the language contained in the Congressional enactment. However, 18 U.S.C. §3583 covers more than just sex crimes.

There have been various constitutional attacks on 18 U.S.C. §3583. In the following cases addressing various constitutional attacks, the Courts were consistent in their conclusion that denial of due process as found and struck down in *Apprendi* was not a viable attack on the supervised release and potential consequences in the event of violations of that supervision as provided in 18 U.S.C. §3583. This was based on the clear understanding that the supervised release was a part of the original sentence and not a new sentence or punishment for new acts or violations of the release provisions. *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995). *United States v. Wyatt*, 102 F.3d 241, 245 (7th Cir. 1996). *Johnson v. United States*, 529 U.S. 694, 700, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000). *United States v. Pettus*, 303 F.3d 480, 487 (2nd Cir. 2002). *United States v. Huerta-Pimental*, 445 F.3d 1220, 1221 (9th Cir. 2006).

Appellee would submit that a review of the above federal authorities would provide overwhelming support that §62-12-26, which mirrors 18 U.S.C. §3583 in many respects does not violate the due process requirements of the United States Constitution nor the holdings in *Apprendi*. Appellee understands that this Court may impose stricter constitutional protections than those imposed federally. However, these federal authorities coupled with the clear reading of §62-12-26, the legislative intentions in providing a more in-depth treatment and monitoring system for sex offenders, and this Court's established precedents on review of constitutional attacks on legislative enactments would provide overwhelming authority that §62-12-26 does not violate the due process provisions of the West Virginia Constitution.

3. *WEST VIRGINIA CODE*, §62-12-26, DOES NOT VIOLATE THE CRUEL AND INHUMAN PUNISHMENT PROVISION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION NOR ARTICLE 3, SECTION 5 OF THE WEST VIRGINIA CONSTITUTION ON ITS FACE NOR IN ITS APPLICATION IN APPELLANT'S CASE.

Appellant appears to contest the sentence of the Circuit Court as being disproportionate to the crimes committed. Appellee would interpret this as an attack on the application of the provisions of §62-12-26 to the Appellant specifically and not a facial challenge to the provisions of §62-12-26 as being cruel and inhuman punishment. However, for the various reasons stated earlier in this Brief, the Appellee would submit that §62-12-26 is constitutionally sound on its face as being a part of the overall punishment required in convictions for sex offenses as designated in said statute.

As to whether or not the sentences in the Appellant's case are disproportionate to the crimes committed, this Court has continually held that it will defer to the discretion of the sentencing court unless the sentence violates statutory or constitutional commands. *State v. Lucas*, supra. The Court has also recognized that sentences imposed by a trial court within statutory limits and if not based upon some impermissible factor are not subject to review. *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982) (Syllabus Point 4). In *State v. Redman*, 213 W.Va. 175, 181, 578 S.E.2d 369 (2003), this Court recognized the trial court's discretion in sentencing as a critical component of the process. In citing the following language from Justice Cleckley's concurring opinion in *State v. Head*, 198 W.Va. 298, 306, 480 S.E.2d 507 (1996), the Court affirmed the deference to the trial court's discretion in matters of sentencing: "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”.

The Appellee does not infer that this Court does not have the authority to review a sentence for statutory or constitutional violations. But it is clear that this Court has recognized a strong understanding that the trial court is in the best position to impose sentence and that position should not be disregarded lightly. Therefore, it is necessary to determine if the trial court violated any statutory or constitutional commands in sentencing the Appellant. As is clear from §62-12-26, the trial court was required to impose a term of extended supervised release. Since the Appellant was convicted of a violation of §61-8B-7, the court would have to impose a term of supervised release for a minimum of ten years up to a maximum of fifty years. See §62-12-26(a). The court imposed a period of twenty-five years. Therefore, the sentence did not violate any statutory commands.

In determining the constitutional implications, the Appellant has correctly cited the established tests.. There is a subjective and an objective test that this Court must consider in determining whether the sentence imposed violates the proportionality principles. The subjective test, as stated in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983) (Syllabus Point 5), involves a determination as to whether the punishment is so disproportionate to the crime that it “shocks the conscience and offends fundamental notions of human dignity”. The objective test was first set forth in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981) (Syllabus Point 5). Further, in Syllabus Point 4 of *Wanstreet*, the Court also held as follows: “While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum

set by statute or where there is a life recidivist sentence”. Neither of these basic applicability scenarios, which were applicable in *Cooper* and *Wanstreet*, are applicable in Appellant’s case. See also *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009), affirming the tests set forth above and upholding an eighty year sentence for first degree robbery.

Taking into consideration all of these principles, this Court must look at the evidence and information that was available to the Circuit Court in making its determination. The Appellant did undergo an evaluation by Dr. Thomas R. Adamski, a forensic psychiatrist, for the purpose of establishing his eligibility for probation under *West Virginia Code*, §62-12-2(e). A copy of said evaluation is attached and marked as Appellant’s Attachment No. One. Dr. Adamski found that the Appellant was not motivated for treatment, would not do well in a program, was oblivious to the fact that women would complain about his behavior, adroit at manipulating his circumstances, and would require intense supervision if released to probation. See Page 9.

In addition, the Court had a rather extensive Pre-sentence Investigation Report prepared by the Probation Department of the Court. Ct. R. 329-342 sets forth the portion of said Report that was made available to counsel. Of course, there are portions that are for the Court’s eyes only. During the sentencing hearing, the Court acknowledged the receipt and review of extensive information as a part of the Probation Officer’s Report and submissions by the Appellant. In fact, the Court referred to said Report as “. . . the longest Pre-sentence Report that I’ve seen for quite awhile, . . .” See Transcript (10/21/09 hearing) pages 25-31. The Appellee did not receive said additional items referred to by the Court in the sentencing hearing. However, by the remarks made, the Court found them to be extremely pertinent to the sentence imposed.

The Appellant was in his late fifties at the time of the crimes and the victim was twenty-

five. The Appellant was her employer and in a position of authority/control over her at the time. The victim had just started her employment and needed the job. Luckily she had the good sense and fortitude to leave this employment even though it did result in financial implications for her until she could re-establish herself. The Appellant appears to downplay the circumstances as being minor and only involved touching of her buttocks and breast. However, sex crimes are not minor or insignificant. These crimes are a product of the perpetrator's abhorrent thought processes and their desire to control and demean others for their own lustful purposes. The victims of these types of crimes, no matter the nature of the actions, are significantly affected by the humiliation, fear, lack of control and other consequences of their victimization.

Obviously, the Legislature has recognized the impact of these types of crimes on society. It has also recognized that sex offenders require more extensive supervision and treatment than that accorded by simple incarceration. *West Virginia Code*, §62-12-26, is an appropriate and constitutionally sound method of trying to address the seriousness of these crimes and the need to insure that offenders are properly treated and transitioned back into society with the goal of preventing the re-offending which has too often happened.

Under all of the circumstances of this Case and the extensive amount of information available to the Trial Court, the Appellee would submit that the sentence imposed on the Appellant does not shock the conscience and does not violate constitutional commands. There is no abuse of discretion by the Circuit Court and its actions should be upheld.

CONCLUSION

The Appellee would submit that based upon the above authorities, *West Virginia Code*,

§62-12-26 does meet all constitutional requirements and that same is an authorized and legal enactment by the Legislature. Therefore, the sentence of the Circuit Court of Mineral County imposing a twenty-five year period of extended supervised release upon the Appellant after he has completed his term of imprisonment and/or parole is a proper exercise of the authority of said Court and should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
APPELLEE,

BY COUNSEL:



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CERTIFICATE OF SERVICE

I, Dennis V. DiBenedetto, Prosecuting Attorney for Grant County, do hereby certify that I have served a true copy of the above BRIEF OF APPELLEE STATE OF WEST VIRGINIA upon the Appellant by mailing same to Stephen G. Jory, his counsel, at his address of P. O. Box 1909, Elkins, West Virginia, 26241, by United States Mail, postage prepaid, on this the 27th day of August, 2010.



Dennis V. DiBenedetto