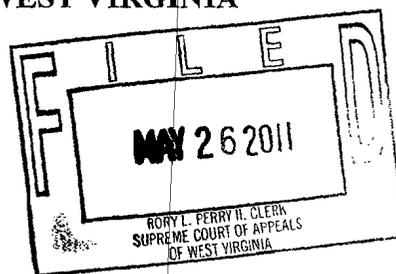


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0634



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

KAREN TANNER,

*Defendant Below,
Petitioner.*

BRIEF OF THE RESPONDENT STATE OF WEST VIRGINIA

Comes now the Respondent, State of West Virginia, by counsel, and files the within brief in response to the petition for appeal.

I.

STATEMENT OF THE CASE

The Petitioner, and Defendant below, Karen Tanner, ("Petitioner"), waived prosecution by Indictment and consented to the filing of an Information on June 9, 2009. (App. 5-6.) On the same day, the Petitioner entered a guilty plea to the Felony offense of Manufacturing a Controlled Substance in violation of West Virginia Code § 60A-4-401. As a result of a plea agreement, the State dismissed the pending felonies of Operating or Attempting to Operate a Clandestine Drug Laboratory in violation of West Virginia Code § 60A-4-411 and Conspiracy to Operate or Attempt

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to Operate a Clandestine Drug Laboratory in violation of West Virginia Code § 61-10-31. A Plea Hearing Order was entered on June 18, 2009, and the Petitioner was released on post-conviction bond. (App. 7-11.)

While awaiting her sentencing hearing, the Petitioner violated the terms and conditions of her post-conviction bond when she tested positive for amphetamine and methamphetamine. (App. 51.) Because of the Petitioner's inability to "conform her conduct to the conditions of bond," the circuit court found that the Petitioner was not a good candidate for alternative sentencing. The circuit court ordered the Petitioner be sentenced to not less than one nor more than five years in the Penitentiary, and that the Petitioner have the opportunity to participate in a drug treatment and rehabilitation program while in the custody of the West Virginia Division of Corrections. The Sentencing Order was entered on August 23, 2009. (App. 27-29.)

On December 29, 2009, the Petitioner filed an "Amended Motion for Modification of Sentence Per Rule 35 of the West Virginia Rules of Criminal Procedure." (App. 31-34.) In the Motion for Modification, the Petitioner asked that she be released from prison and placed on Home Confinement to care for her ailing father. On January 26, 2010, the circuit court granted Petitioner's motion and placed the Petitioner on Home Confinement. (App. 43-45.) On July 21, 2010, the Petitioner filed a "Motion to Reconsider Date for Court Ordered Parole and Release from Home Confinement Based on Calculation Error of Time Served," asking that the circuit court release her from Home Confinement. (App. 48-50.) By Order dated August 23, 2010, the circuit court admitted the Petitioner to "Court Supervised Parole" and set out specific conditions for Petitioner's release from Home Confinement. (App. 59-61.) The circuit court included a condition which stated: "The defendant shall not be in the presence or accompaniment of anyone convicted of a felony including

her husband.” Petitioner filed a “Notice of Intent to Appeal” on September 8, 2010, and “Amended Supplemental Notice of Intent to Appeal” on October 6, 2010, based on the aforementioned condition. The Petitioner appeals from the Order. (App. 22-26.)

The Petitioner and her husband were involved in the manufacturing of methamphetamine together. In January 2007, the Petitioner’s husband, Michael Tanner, became involved in the manufacture and personal use of methamphetamine. Only after her husband began his criminal conduct did Petitioner become involved in the same activities. Although this was the Petitioner’s first offense, her husband had an extensive criminal record. From 1986 to 1998, Mr. Tanner was “charged with fourteen (14) crimes and convicted of half as many.”¹ For the next nine years, Mr. Tanner was neither charged nor convicted of any crimes. The Petitioner claims the lull in criminal activity was due to her “good influence,” but the State declines to accept such as fact. On June 18, 2009, Mr. Tanner pled guilty to Manufacturing a Controlled Substance in violation of West Virginia Code § 61-10-31, and Conspiracy to Operate or Attempt to Operate a Clandestine Drug Laboratory in violation of West Virginia Code § 61-10-31. (App. 62-76.) Mr. Tanner presently remains incarcerated in the Central Regional Jail, and according to West Virginia Division of Corrections information, has a projected release date of July 25, 2014.²

II.

SUMMARY OF THE ARGUMENT

¹According to Petitioner’s brief, this quote is drawn from the pre-sentence report on Michael Tanner.

²Information gathered from the West Virginia Division of Corrections website. <http://www.wvdoc.com>.

The sentencing court did not err by imposing upon the Petitioner a condition that she not associate with any convicted felon, including her husband and co-defendant. Although a sentencing provision prohibiting contact between spouses would appear to be an issue of first impression in West Virginia, the matter has been considered by other courts, including California and Alaska, and such restriction has been upheld. Although the sentencing court might have explained its rationale more fully, a complete reading of the record, including but not limited to, the Petitioner's brief reveals that she became involved in the use of and manufacture of methamphetamine under her husband's influence, and the prohibition upon contact with convicted felons is a reasonable restriction on her liberty, in an effort to prevent future criminal conduct and relapse into drug use.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under West Virginia Revised Rules of Appellate Procedure 18(a) is not necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

IV.

ARGUMENT

The Petitioner pled guilty to manufacturing methamphetamine, along with her husband and co-defendant. She remained free on bond, following her plea, and could not refrain from the use of illicit substances. She, therefore, was sentenced to prison. As a matter of grace, the court granted her motion to be released upon home confinement. Later, and at her request, the court removed the provision of home confinement, and placed her on what it termed "Court Supervised Parole," which

appears to be analogous to probation. As a condition of her release, the Petitioner could not associate with any convicted felon, including her husband.

The right to privacy in marriage is a fundamental right. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, (1942). "A condition of probation restricting marital association plainly implicates the constitutional rights of privacy, liberty, and freedom of association." *Thomas v. State*, 710 P.2d 1017, 1019 (Alaska App. 1985.) Therefore, any restriction upon the ability to associate with one's spouse must be rationally related to a compelling state interest.

The Petitioner argues two assignments of error: First, that the circuit court erred in prohibiting association between spouses without providing specific reasons or information explaining how the prohibition would assist in the rehabilitation of the parolee. Second, the Petitioner argues that the circuit court erred in prohibiting association between the Petitioner and her husband where it failed to narrowly tailor its prohibition to a rationally related purpose.

The Petitioner first takes issue with the fact that the trial court "prohibited association between spouses without providing specific reasons for so doing and how said prohibition would assist in the rehabilitation of the parolee." (Pet'r's Brief at 3.) The circuit judge did not detail his specific reason regarding the condition. However, the record is clear. The Petitioner and her husband were manufacturing methamphetamine together. Although this was the Petitioner's first offense, her husband had a lengthy criminal record. Petitioner cites the "insidious effects of methamphetamine in and of itself" (*Id.* at 10.) as the cause for her involvement with methamphetamine. Such a statement clearly minimizes involvement of human forces, specifically those of Petitioner's husband. Prior to her association with her husband, who had a criminal history

before they met, the Petitioner neither used nor manufactured methamphetamine. In her brief, the Petitioner admits that insecurities about her weight and husband were involved in her own methamphetamine use:

Michael is younger than the Petitioner. Having born six children, Ms. Tanner was prone to weight gain. Karen's emotional insecurities about her weight and age compared to Michael, who even without the use of methamphetamine, tends to be of a trim build, made the use of methamphetamine more attractive.

(Pet'r's Brief at 10.)

Even after the Petitioner entered a guilty plea for her drug charges, she was unable to conform her conduct to the dictates of the law and refrain from the use of methamphetamine. Therefore, the Petitioner's previous behavior warrants closely monitoring her personal situation, including contact with others, to attempt to ensure that the Petitioner will not engage in additional criminal conduct. The Petitioner tested positive for methamphetamine and amphetamine on her first court-administered drug test while released on post-conviction bond. (App. 27-29; 51.)

A condition of probation prohibiting association between spouses is an issue of first impression in this Court. However, the subject has been addressed by other jurisdictions previously. In *People v. Jungers*, 127 Cal. App. 4th 698, 25 Cal. Rptr. 3d 873 (Cal. App. 2005), the court held that, as to prohibiting contact between spouses as a condition of probation:

A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality...' Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." *People v. Jungers*, 127 Cal. App. 4th 698, 25 Cal. Rptr. 3d 873 (Cal. App. 2005) quoting *Brown v. Superior Court* (2002) 101 Cal. App. 4th 313, 319, 124 Cal. Rptr. 2d 43; *People v. Lent* (1975) 15 Cal.3d 481, 486, 124 Cal. Rptr. 905, 541 P.2d 545.

Therefore, California, at least, has noted that prohibition of association between spouses can be a valid condition of probation if such condition relates to the crime and is reasonably related to bar future criminality. Although the circuit court did not elaborate on the condition, a review of the record notes that the Petitioner's criminal conduct was directly related to her marital relationship. The condition that "[Petitioner] shall not be in the presence or accompaniment of anyone convicted of a felony including her husband," (App. 59-61), has a clear relationship to the crime for which the offender was convicted. The Petitioner and her husband, Mr. Tanner, were involved in the manufacturing of methamphetamine *together* and were indicted for the same crimes. Although, the interaction of the Petitioner and her husband alone is not in itself criminal, it is "reasonably related to the crime of which the [Petitioner] was convicted and to future criminality." *Jungers*, 127 Cal. App. 4th at 701, 25 Cal. Rptr. 3d at 876. At the Petitioner's own admission, the mix of methamphetamine and her insecurities regarding her husband and her body image were not at all conducive to her sobriety. The Petitioner was unable to remain sober even in the short period between the time she entered a guilty plea and the time that she was sentenced for her crimes. Because of this inability to "conform her conduct to the conditions of bond," the Petitioner was denied the privilege of alternative sentencing in the first instance. (App. 27-29; 51.) Clearly, the Petitioner has struggled with her addiction to methamphetamine and the Petitioner herself admits that her husband is part of the struggle. Even though the circuit judge did not engage in dialogue with the Petitioner regarding this particular condition of release, and did not provide any additional details about why he believed contact to be inadvisable, a glance at the procedural history in this matter and a reading of Petitioner's brief in which she blames her use of and manufacture of methamphetamine at least in part upon her desire to remain attractive to her younger, trimmer

husband reveals cogently that the condition is “reasonably related to the crime of which the defendant was convicted and to future criminality,” and should be upheld.

As a second point of contention, the Petitioner argues that the trial court erred in prohibiting association between the Petitioner and her husband where it failed to narrowly tailor its prohibition to a rationally related purpose. As stated in *American Jurisprudence*, Second Edition, summary regarding the “Nature of Marital Relationship”:

The right to marry is a fundamental right, a basic right fundamental to humanity’s very existence and survival, and part of the fundamental right of privacy. Furthermore, it has been said that the freedom to marry is recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free persons, that the right to marry is guaranteed to those subject to American law by the Fourteenth Amendment to the United States Constitution, and that choices about marriage are among the associational rights ranked as of basic importance in our society.³

52 Am. Jur. 2d *Marriage* § 3 (2000 & March 2011).

Marriage is unquestionably of great importance. The State in no way intends to devalue the marital relationship shared between the Petitioner and her husband. However, the State undoubtedly has an interest in providing for the rehabilitation of the Petitioner and preventing future criminal action. As the Petitioner concedes, several courts have upheld a prohibition regarding spousal association to protect one spouse from repeated domestic violence, where the condition was rationally related to preventing further batteries of the victim.⁴ A two-year restriction of contact

³Quoting *Theck v. Warden*, I.N.S. 22 F. Supp. 2d 1117 (C.D. Cal. 1998); *Lockert v. Faulkner*, 574 F. Supp. 606 (N.D. Ind. 1983); *Loving v. Virginia*, 388 U.S. 1 (1967); *In re Guardianship of Mikulanec*, 356 N.W.2d 683 (Minn. 1984); *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 108 Ohio App. 3d 96, 670 N.E.2d 268 (9th Dist. Lorain County 1995); *Cooper v. State of Utah*, 684 F. Supp. 1060 (D. Utah 1987), *related reference*, 894 F.2d 1169 (10th Cir. 1990); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

⁴See *Moody v. State*, 551 S.E.2d 772 (Ga. App. 2001); *People v. Jungers*, *supra*.

between husband and wife was also upheld where the condition held a reasonable relationship to goal of rehabilitation and preventing future crimes where a wife had attempted to assist her husband in escaping from prison.⁵ In *Dawson v. State*, 894 P.2d 672 (Alaska 1995), the Court of Appeals of Alaska held that:

While discouraging a probationer from associating with former partners in crime is obviously related to the goal of rehabilitation, precluding association between marital partners is just as obviously an extreme restriction of liberty, even when the marital partners were once partners in crime. In certain types of cases, such as cases involving domestic violence, limiting marital association would plainly be defensible. *In any type of case, it is conceivable that such a limitation might be justified by case-specific circumstances demonstrating actual necessity and the lack of less restrictive alternatives. In such a case, however, to avoid unnecessary intrusion on marital privacy, it would seem appropriate to tailor a close fit between the scope of the order restricting marital association and the specific needs of the case at hand.*

(894 P.2d at 680-81; footnote omitted; emphasis added.)

“W. Va. Code 62-12-9, as amended, permits a trial judge to impose any condition of probation which he may deem advisable, but this discretionary authority must be exercised in a reasonable manner.” Syl. Pt. 6, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976).

Concededly, the condition that “the defendant shall not be in the presence or accompaniment of anyone convicted of a felony including her husband” could be considered somewhat broad. In *Dawson v. State*, 894 P.2d at 680-81, the Court of Appeals of Alaska stated that:

In any type of case, it is conceivable that such a limitation might be justified by case-specific circumstances demonstrating actual necessity and *the lack of less restrictive alternatives*. In such a case, however, to avoid unnecessary intrusion on marital privacy, it would seem appropriate to tailor a close fit between the scope of the order restricting marital association and the specific needs of the case at hand.

⁵See *Mitchell v. State*, 516 So. 2d 1120 (Fla. Dist. Ct. App. 1st Dist. 1987).

In the present case, the Petitioner was granted release from prison and placed on Home Confinement in order to care for her terminally ill father, at her own request. The Petitioner was subsequently released from Home Confinement, again at her request, and admitted to "Court Supervised Parole," with an order remarkably similar to a probation order. Said order contained the disputed condition. (App. 59-61.)

There are in fact, more restrictive sentencing alternatives available in this case. The Petitioner could continue to serve her original prison sentence. However, there are no lesser restrictive alternatives than the sentence the Petitioner is serving, which permits her to be free to be with her children, with reasonable restrictions on her liberty. Petitioner asserts a lengthy argument regarding the difference between parole, which is exclusively a function of the executive branch and something in which a prisoner holds a property right, and probation. Petitioner argues strongly that the Sentencing Order is akin to a Probation Order. However, "probation is not a right guaranteed by the constitution but is an act of grace granted to one convicted of a crime." *Escoe v. Zerbst*, 295 U.S. 490, (1935), as adopted by *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 519, 165 S.E.2d 90, 101 (1968). The Petitioner has no constitutional right to probation. Petitioner requested to be released from prison in a Motion for Modification of Sentence to care for her ailing father. In accordance with West Virginia Code § 62-12-9 and *Louk v. Haynes, supra*, the circuit judge exercised his authority in a reasonable manner by imposing a condition that allowed the Petitioner to be released from prison care for her terminally ill father while still upholding the State's goal of rehabilitating the Petitioner and preventing future crimes.

However, it is important to note that although the Petitioner has been released from prison, the Petitioner's husband currently remains incarcerated. Because the Petitioner's husband is

currently in prison and will remain in prison for an estimated three years, at this time, Mr. Tanner's incarceration status and not the Order in question, prevents the couple from living together as husband and wife. Even if the special condition of the Sentencing Order was removed, the couple still could not cohabitate as husband and wife.

V.

CONCLUSION

For the foregoing reasons, this Court should affirm the Sentencing Order and refuse any and all relief prayed for by the Petitioner.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

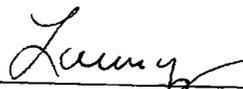


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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of "Brief of the Respondent State of West Virginia" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 26th day of May, 2011, addressed as follows:

To: Barbara Harmon-Schamberger
P.O. Box 456
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LAURA YOUNG