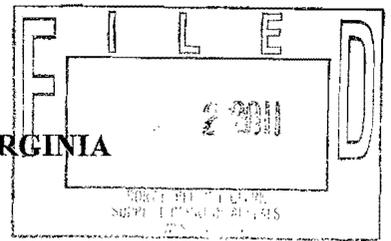


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0533



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

DAVID D. GRIFFY

*Defendant Below,
Petitioner.*

RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA

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RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On April 23, 2010, the Circuit Court of Raleigh County held a hearing in which the Petitioner, David D. Griffy, pled guilty to two counts of Grand Larceny. (App. Item No. 9 at 40-43.)

On April 27, 2010, the Circuit Court of Raleigh County entered an order memorializing the court's acceptance of the pleas. (App. Item No. 2.) On July 16, 2010, the circuit court held a sentencing hearing and sentenced the Petitioner. (App. Item No. 4.) The sentence was memorialized in an order dated July 20, 2010. (App. Item No. 2.) On November 8, 2010, the Petitioner filed a Rule 35 Motion to Reconsider Sentence. (App. Item No. 5.) On February 14, 2011, the circuit court held a hearing on the Rule 35 motion in which Petitioner's counsel asked that the circuit court allow the Petitioner to withdraw his pleas. (February 14, 2011, Hearing Transcript, Supp. App. 1.)

By Order dated February 23, 2011 and accompanying Memorandum of the same date, the circuit court denied the Petitioner's Rule 35 motion. (App. Items Nos. 6 and 7.) On March 24, 2011, the Petitioner appealed to the West Virginia Supreme Court of Appeals from the circuit court's judgments of conviction and/or sentence.

II.

SUMMARY OF ARGUMENT

The Petitioner complains that the Circuit Court of Raleigh County erroneously refused to allow him to withdraw his pleas of guilty to guilty to two Grand Larceny charges, after the court sentenced the Petitioner in a fashion that was contrary to the Petitioner's wishes. The record shows that the Petitioner's counsel apparently inaccurately advised the Petitioner about the consequences of pleading guilty with respect to whether the Petitioner could withdraw his pleas -- and the Petitioner's counsel allowed the Petitioner to enter his pleas without having a clear plea agreement in place. As an initial matter, it is beyond dispute that the Petitioner is not entitled to have a particular sentence imposed, as there was never any agreement with the prosecution that he should receive a particular sentence, and the circuit court never accepted a plea agreement based upon such an agreement.

In two post-plea hearing proceedings challenging the Petitioner's sentence, the Petitioner's counsel **did not mention** the circuit court's failure to explicitly "warn" the Petitioner at the plea hearing, pursuant to West Virginia Rule of Criminal Procedure Rule 11(e)(2), that he could not withdraw his pleas. Nevertheless, **this "failure to warn" is the sole conduct by the circuit court that the instant Petition for Appeal asserts as error.**

The Petitioner's failure to bring this claim to the circuit court's attention, despite ample opportunity to do so, means that the issue has not been properly preserved for appellate review and can only be subject to a "plain error" analysis. Additionally, any error in the trial court's "failure to warn" is subject to a "harmless error" and "manifest injustice" review.

Applying these standards of review, the record before this Court may be inadequate to determine with any certainty whether, due to Petitioner's counsel's errors, the Petitioner actually labored under a misapprehension about the consequences of pleading guilty when he entered his pleas -- although this seems to be possible.

Therefore, to avoid the *possibility* of unfairness to the Petitioner (that would have been solely caused by his counsel's apparent misunderstandings about the nature of a plea agreement, and counsel's failure to raise the "warning" issue before the circuit court), this Court may wish to remand the instant case to the Circuit Court of Raleigh County for further proceedings. Or, this Court may conclude that the record is sufficient for review under the foregoing standards -- in which case the circuit court's rulings should be affirmed.

III.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent State of West Virginia does not believe that oral argument is necessary in the instant case.

IV.

STATEMENT OF FACTS

On February 21, 2007, David Douglas Griffy (herein, after "the Petitioner") allegedly broke into the West Virginia State Police's Whitesville, West Virginia detachment, in Raleigh County,

West Virginia, and stole equipment from a storage room. (App. Item No. 9 at 37.) On January 14, 2008, the Petitioner was indicted for this incident, and was charged with one count of Grand Larceny. (App. Item No.1.)

On August 6, 2007, the Petitioner allegedly broke into property owned by Interstate Machinery in Raleigh County, and stole mining equipment. (App. Item No. 9 at 37.) On September 8, 2008, the Petitioner was indicted for this incident, and was charged with one count each of Trespassing, Grand Larceny, Destruction of Property, Transferring Stolen Property, and Conspiracy. (App. Item No. 8 at 1.)

In January of 2010, plea discussions began between the Raleigh County Prosecutor's office and the Petitioner's counsel regarding the charges from both incidents. (App. Item No. 5 at 1.) The Petitioner had been incarcerated since April of 2009, on parole revocation resulting from other charges in Boone County. (App. Item No. 9 at 9.) On February 24, 2010, the prosecution sent a letter to the Petitioner's counsel outlining the terms of a proposed plea agreement, stating *inter alia*:

Your client [the Petitioner] will plead guilty to Grand Larceny, as a lesser included offense under the Breaking and Entering charge in Indictment 08-F-92-H, and your client will plead guilty to the Grand Larceny charge as listed in Count 2 of Indictment 08-F-370-B, with the State dismissing the remaining charges, and agreeing not to seek recidivist charges against your client, and standing mute as to sentencing, except to request restitution.

(Appendix, Item No. 5 at 5.)

On March 24, 2010, the Petitioner's counsel sent a letter responding to the prosecution's proposed plea agreement. The letter stated, *inter alia*:

[The] Defendant [the Petitioner] will enter a [West Virginia Rule of Criminal Procedure] Rule 11(e)(1)(B) plea of guilty to the lesser included offense of Grand Larceny as contained in Indictment 08-F-92-H and be sentenced to One (1) year, to run *concurrent* with the time being served on parole revocation;

[The] Defendant will enter a Rule 11(e)(1)(B) plea of guilty to Count 2, Grand Larceny, as contained in Indictment 08-F-370-B and be sentenced to One (1) year, to run concurrent with the time being served on parole revocation;

All remaining counts will be dismissed; Both one year sentences will run *consecutively*; [and], The State will remain silent as to sentencing. . .

(App. Item No. 5 at 6.)

It should be noted that this letter's quoted language is internally inconsistent, because it proposes that the Petitioner "will" receive specific sentences; and also proposes that the prosecution will "remain silent" as to sentencing. The inconsistency comes from the fact that the prosecution's "remaining silent" or not as to sentencing would not be a consideration in a plea agreement, if the agreement in fact is that the Petitioner "will" receive a particular sentence. As discussed further in the Argument section of this Response Brief, it appears that this inconsistency reflects the Petitioner's counsel's apparent misunderstanding of the different types of plea agreements authorized under W. Va. R. Crim. P. Rule 11.

On April 23, 2010, a plea hearing was held before the Honorable Robert A. Burnside, Jr., Raleigh County Circuit Judge. (App. Item No. 9 at 1-46.) In that hearing, the Petitioner's counsel and the prosecution described to the circuit court, in what can best be described as a confusing exchange, conflicting understandings of what sort of "plea agreement" had (or had not) been reached:

Petitioner's counsel: And what we offered, your Honor, was two counts of grand larceny that, as Mr. Truman has said, carry a one to ten or a flat one. We wanted to argue to the Court for the flat ones to run consecutively, which would be a two-year flat sentence, and that sentence to run concurrent with his parole revocation which he told you about earlier.

(*Id.* at 35.)

The prosecution expressed a different understanding of the putative plea agreement:

Mr. Truman: Well, that is not the State's understanding. The state's understanding is that the Defendant could argue for alternative sentencing but that he was entering his plea with the risk that the Court could impose one to ten concurrent, could impose one to ten consecutive, could impose one year on each concurrently, run all that concurrent to his current charges or consecutive to his current charges.

(*Id.* at 36-37.)

The circuit court responded to the conflicting views expressed by the Petitioner's counsel and the prosecution about the plea agreement as follows:

The Court: Let me let that gel awhile while you -- and ask you now to recite the factual basis for these charges.

(*Id.* at 37.)

After a further colloquy, in which the court did not revisit the issue of the nature of the plea agreement, the court accepted the Petitioner's pleas of guilty to two counts of Grand Larceny. (*Id.* at 41-43.) The Petitioner's counsel later stated to the court, in the subsequent Rule 35 proceeding, that the Petitioner's counsel expected the court to decide at a later point, after the Petitioner entered his pleas, whether the Petitioner would be able to withdraw his plea if the sentence was not in accord with the Petitioner's request. *See* discussion *infra* at p. 10.

On April 27, 2010, the circuit court entered an order memorializing its acceptance of the Petitioner's guilty pleas; the order states that the Petitioner's pleas were made pursuant to an agreement in accord with W. Va. R. Crim. P. 11(e)(1)(B), which (as discussed *infra* at p. 10), does not provide for the withdrawal of a plea if the sentence is not in accord with the defendant's expectation. (App. Item No. 3 at 1.)

On July 16, 2010, a sentencing hearing was held for the Petitioner, in which the Petitioner's counsel asked the court to have the Petitioner be given two flat one-year sentences, as opposed to two one-to-ten year sentences, because of the effect on the Petitioner's parole eligibility. (App. Item No. 4 at 8.) The Petitioner's counsel told the court that it was counsel's understanding that if the court did not give the Petitioner two flat one-year sentences, then Petitioner would be able to withdraw his guilty pleas: "[if] you choose not to accept that, then we're just back to pretty much under -- back to starting all over." (App. Item No. 4 at 6.) The court asked the Petitioner's counsel whether the agreement between the prosecution and the Petitioner under which the Petitioner pled guilty was a so-called "binding" or "C" type of plea agreement, as described in W. Va. R. Crim. P. Rule 11(e)(1)(C), in which the prosecution and a defendant agree that a certain sentence is appropriate, and a defendant is entitled to withdraw his plea if the court does not impose that particular sentence that has been agreed to by the prosecution and the defendant, *see further discussion infra* at pp. 11-12; and the Petitioner's counsel agreed that there was no such agreement:

The Court: I gather there was no agreement with -- no specific agreement as to a sentencing structure. . . . You had no agreement as to that?

Petitioner's Counsel: I would agree with that, yes.

(App. Item No. 4 at 11-12.)

The Court also asked the Petitioner personally about his understanding of the "plea agreement."

The Court: All right. So you think the agreement is the two flat one-year sentences?

Petitioner: I thought that was how it was wrote up.

.....

The Court: So are you telling me you think you have an agreement that . . . the sentence would be two one-year sentences as distinguished from two one- to-ten sentences?

Petitioner: Yeah, my understanding.

The Court: Who told you that?

Petitioner: My understanding, if I didn't get that, I could withdraw my plea.

....

The Court: What is it about yourself or about your situation you believe I should think about before deciding what to do?

Petitioner: Well, I mean, I signed a (B) plea and I didn't realize I was signing a (B) plea. I mean I thought I had the option to withdraw from my plea or I probably wouldn't have never signed that plea.

(*Id.* at 12-17.)

The Court also addressed the Petitioner's counsel concerning the putative plea agreement.

The Court: Well, I'm looking at the plea order and it says this is a type (B) plea, page 4. Doesn't that answer all the questions?

....

The Court: Well, there's nothing to stop you from making a motion to withdraw if you think somehow . . . a plea understanding or agreement was violated, but I don't see it as a (C) plea.

(*Id.* at 16.)

The court concluded the hearing by sentencing the Petitioner to two one-to-ten year sentences for two counts of Grand Larceny, with the sentences to run consecutively with each other, and concurrently with the sentence that had been imposed by the Circuit Court of Boone County that the Petitioner was then serving due to a parole violation. (App. Item No. 2 at 2.)

On November 8, 2010 , the Petitioner filed a Rule 35 motion for Reconsideration of Sentence. (App. Item No. 5.) On February 14, 2011, the circuit court held a hearing on the Motion -- a hearing that the apparently then-incarcerated Petitioner did not attend. (A defendant's personal presence at such a hearing is not required, *see State v. Conley*, 168 W. Va. 694, 285 S.E.2d 454 (1981) (*per curiam*)). The transcript of this hearing was not requested by the Petitioner's counsel for inclusion in the Appendix record of the instant case, even though the hearing resulted in an order and memorandum that the Petitioner's counsel has included in the Appendix. The Respondent State of West Virginia requested the transcript, which is attached to the Motion to Supplement the Appendix that accompanies this Response Brief.

During the Rule 35 motion hearing, the Petitioner's counsel stated that he had advised his client that if the court did not sentence the Petitioner to two one-year sentences, the Petitioner would be allowed to withdraw his pleas:

Petitioner's Counsel: . . . I had explained to Mr. Griffy that, you know, unless you have a guaranteed lock plea, a judge can reject any plea, and plea can be rejected, you can't force a judge to take a plea and, if the judge doesn't take the plea that we're going to offer, the worse you will be is you will be standing ready to go to trial . . .

The Court: You mean if you don't get it, you get to withdraw your plea and go to trial?

Petitioner's Counsel: That's correct

.....

The Court: Under a (B) plea?

Petitioner's Counsel: *Under all pleas*, yes, sir.

(Supp. App. 9, emphasis added.)

At the Rule 35 hearing, the Petitioner's counsel also stated that it was his understanding at the April 23, 2010 plea hearing that the Court would accept the Petitioner's pleas, and then would decide whether the prosecution and Petitioner had reached a binding, or non-binding, plea agreement. At the conclusion of the hearing, the Petitioner's counsel also asked the court to allow the Petitioner to withdraw his pleas and go to trial:

Petitioner's Counsel: Your Honor, I thought . . . that when there was [a] question [by] the Court as to exactly what we had that we made a comment that we should go ahead and go through with the sentencing and that the Court would rule on that issue.

....

The Court: Okay. What do you want me to do?

Petitioner's Counsel: I would like for you to allow him to withdraw his plea and go to trial.

(Supp. App. at 19 at 24.)

On February 23, 2011, the court issued an Order denying the Rule 35 Motion, and an accompanying Memorandum discussing the court's reasoning. (App. Items Nos. 6 and 7.) The memorandum concluded:

[i]f the motion is intended to withdraw the plea on the grounds that the court rejected a plea agreement governed by Rule 11(e)(1)(C), the court finds that the parties did not reach a plea agreement governed by that Rule and that the defendant may not withdraw his plea on a claim that a sentencing agreement was rejected by the court. . . . [I]f the motion is viewed as a motion to withdraw plea on the grounds that the state violated a plea agreement, the court finds that there is nothing on the record of the plea hearing or sentencing hearing that supports that conclusion.

(App. Item No. 7 at 4.)

In the instant appeal, the Petitioner asks this Court to vacate his conviction and to either require the circuit court to sentence him according to his wishes, or allow him to withdraw his guilty pleas.

V.

ARGUMENT

The sole Assignment of Error in the Petitioner's Brief is based on a claim that was never presented to the circuit court.

This Assignment of Error claims that because the circuit court, prior to accepting the Petitioner's pleas, did not specifically warn the Petitioner pursuant to W. Va. R. Crim. P. Rule 11(e)(2) that the court would not be bound by any sentence recommendation, and that the Petitioner would not be permitted to withdraw his pleas of guilty if the court's sentence was not in accord with the Petitioner's expectations -- that for this reason, the circuit court erred in not later allowing the Petitioner to withdraw those pleas. This claim is the sole basis for the instant appeal.

It appears to be the case that the circuit court in fact did not specifically advise or warn the Petitioner, prior to accepting his guilty pleas, that the court was not bound to impose a particular sentence, or that the Petitioner would not be able to withdraw his pleas if the court did not sentence the Petitioner in accord with the Petitioner's desired sentence. As previously stated, such a warning of a defendant by the trial court is required by Rule 11(e)(1)(B) of the W. Va. R. Crim. P. -- when a "non-binding" or "B-type" plea agreement is tendered to the court.

A "non-binding" or "B-type" plea agreement is one in which the attorney for the state agrees to "[m]ake a recommendation or agree not to oppose the defendants' request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the

court[.]” W. Va. R. Crim. P. Rule 11(e)(2) states that “[i]f the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw plea.”

In contrast to a “non-binding” or “B-type” plea agreement, a “binding” or “C-type” plea agreement, made pursuant to W. Va. R. Crim. P. Rule 11(e)(1)(C), is an agreement wherein “the attorney for the state will . . . [a]gree that a specific sentence is the appropriate disposition of the case.” In such a case, the court will either accept the agreement and plea and “embody in the judgement and sentence the disposition provided for in the plea agreement” -- or reject the agreement and “afford the defendant the opportunity to then withdraw the plea[.]” W. Va. R. Crim. P. 11(e) (3) and (4).

In the case of a “binding” or “C-type” plea agreement, the court is not required to warn a defendant that the defendant will not be permitted to withdraw the plea -- because under a “binding” or “C-type” plea agreement, the defendant retains that right.

In the instant case, the record shows that the Petitioner’s counsel apparently labored under a serious misunderstanding -- which was that under *all* types of plea agreements, a defendant retains the right to withdraw his plea if the court’s sentence is not to his liking. Thus, the Petitioner’s counsel said in a colloquy with the court during the Rule 35 hearing:

The Court: You mean if you don’t get it, you get to withdraw your plea and go to trial?

Petitioner’s Counsel: That’s correct.

....

The Court: Under a (B) plea?

Petitioner's Counsel: *Under all pleas*, yes, sir.

(Supp. App. at 9-10, emphasis added.)

Based on this apparent misunderstanding, the Petitioner's counsel led the Petitioner to believe that even though there was a disagreement between the Petitioner's counsel and the prosecution as to whether their putative plea agreement was binding or non-binding, the Petitioner could withdraw his pleas if the court's sentence was not to the Petitioner's liking:

Petitioner: My understanding, if I didn't get that, I could withdraw my plea.

(App. Item No. 4 at 13.)

Additionally, and possibly also based on this apparent misunderstanding, the Petitioner's counsel allowed the Petitioner to enter his pleas in the expectation that the circuit court would decide what type of plea agreement had been made -- *after* the pleas were entered. The Petitioner's counsel was willing to have his client plead guilty and "take his chances" about both what kind of plea agreement the Petitioner had -- and what his sentence would be:

Petitioner's counsel: Your Honor, I thought . . . that when there was [a] question [by] the Court as to exactly what [kind of plea agreement] we had[,] that we made a comment that we should go ahead and go through with the sentencing and that the Court would rule on that issue.

(Supp. App. at 19.)

It appears that the Petitioner's counsel's view was: if the Petitioner could withdraw his pleas, regardless of the type of agreement he had, then what difference did the type of agreement really make?

As noted, after the Petitioner was sentenced, the Petitioner's counsel made a Rule 35 Motion for sentence reconsideration, and a hearing was held on that motion on February 14, 2011. The

transcript of that hearing was not requested by the Petitioner's counsel -- although the circuit courts' Order and accompanying Memorandum following the hearing were included in the Appendix prepared by the Petitioner's counsel.

At the Rule 35 motion hearing, as previously noted, the Petitioner's counsel stated that counsel had advised the Petitioner that if the court did not sentence the Petitioner according to the Petitioner's expectations, the Petitioner could withdraw his pleas. (Supp. App. at 6-7.)

Moreover, the Petitioner's counsel did not say a word at the Rule 35 hearing about the court's failure to specifically warn the Petitioner, pursuant to W. Va. R. Crim. P. 11(e)(2), prior to the Petitioner's entry of his pleas, that the Petitioner could not withdraw those pleas.

At the Rule 35 hearing, the trial judge saw no reason to offer the Petitioner the benefit of a binding, "C-type" plea agreement, when it was clear that no such agreement had been reached. *See generally*, Supp. App.; *see also* App. Item No. 7. Therefore, the trial judge denied the Rule 35 motion, including the Petitioner's request to withdraw his pleas. (*Id.*)

The trial judge's conclusion that the Petitioner could not withdraw his pleas, however, at least implies that a Rule 11(e)(2) "warning" should have been given at the time the Petitioner entered his plea.

As noted, in two separate post-plea hearings that addressed the issue of whether the Petitioner could withdraw his pleas, the Petitioner's counsel did not mention the circuit court's failure to specifically give the Petitioner a W. Va. R. Crim. P. Rule 11(e)(2) warning at the plea hearing. Thus, **the sole issue raised by the Petitioner on appeal was never presented to the circuit court**, despite ample opportunity for the Petitioner's counsel to have done so.

Issues that are not first specifically presented to and ruled upon by a trial court are not preserved for appellate review, absent exceptional circumstances. *See, e.g., State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) (“[T]he Appellant’s claim of error . . . is precluded from appellate review based on his failure to state this authority as ground for his objection before the trial court.”). At best, the Petitioner’s claim of error, if otherwise proper, is only subject to “plain error” review:

The plain error doctrine . . . enables this Court to take notice of error . . . even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Syllabus Point 4 (in part), *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988).

Additionally, any “confusion” at the Petitioner’s plea hearing about what kind of plea agreement the Petitioner’s counsel had (or had not) reached with the prosecution, and about the range of possible consequences flowing from the Petitioner’s pleading guilty, was the result of the Petitioner’s counsel’s conduct -- and not the result of any error by the circuit court. Thus, any assumed error by the trial judge in not giving a Rule 11(e)(2) warning -- along with not being preserved for appellate review -- is properly seen as “invited error:”

In *State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996), this Court stated:

“Invited error” is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to make the evidence admissible but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

Deviation from the doctrine of invited error is permissible when application of the rule would result in a manifest injustice. . . .

“However, the doctrine is not without exception. A court is required to reverse a conviction, despite the ‘invited error’ in ‘exceptional circumstances’. To demonstrate ‘exceptional circumstances’, the party inviting the error must demonstrate that reversal ‘is necessary to preserve the integrity of the judicial process or to prevent a miscarriage of justice’.”

In the appellate context, whether the circumstances of a particular case justify deviation from the normal rule is left largely to the discretion of the appellate court.

Id. at 627-28, 482 S.E.2d at 612-13 (citations omitted).

Moreover, it is black-letter law that a court’s failure to give a West Virginia Rules of Criminal Procedure 11(e)(2) warning at a defendant’s plea hearing is subject to “harmless error” analysis. *See* Syl. Pt. 3, *State v. Valentine*, 208 W. Va. 513, 541 S.E.2d 603 (2000), which states that the omission of the statement required by Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure *must* be deemed harmless error unless there is some realistic likelihood that the defendant labored under the misapprehension that his plea could be withdrawn.¹

Principles established in other cases also have a bearing on the issues in the instant appeal. In *State v. Whitt*, 183 W. Va., 286, 395 S.E.2d 530 (1990), this court held that a defendant who had not been sentenced, and whose guilty plea had been tendered to the court but had not been finally accepted, should have been allowed to withdraw his guilty plea, due to the “*confused status* of the

¹The Court’s decision in *Valentine* referred to a previous decision in *State v. Stone*, 200 W. Va. 125, 488 S.E.2d 400 (1997). *Stone* held that harmless error analysis may be applied to failure to give the 11(e)(2) warning to a defendant if the factual evidence is clear that no substantial rights of the defendant were disregarded. 200 W. Va., at 129, 488 S.E.2d at 404, quoted in *Valentine*, 208 W. Va. at 515, 541 S.E.2d at 605. *See also State ex rel Farmer*, 209 W. Va., 789, 797, 551 S.E.2d 711, 719 (2001) (“harmless error in the context of Rule 11 may be found only when the factual evidence is clear that no substantial rights of the defendant were disregarded.”). *See also* Syl. Pt. 7, *State ex rel Brewer v. Starcher*, 195 W. Va., 185, 485 S.E.2d 185 (1995).

guilty plea and the plea bargain agreement . . .” 183 W. Va. at 289, 395 S.E.2d at 533 (emphasis added).

In Syl. Pts. 1, 2 and 3 of *State v. Olish*, 164 W. Va. 712, 266 S.E.2d 134 (1980), this Court stated:

1. In a case where the defendant seeks to withdraw his guilty plea before sentence is imposed, he is generally accorded the right if he can show any fair and just reason.
2. Where the guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid *manifest injustice*. [emphasis added].
3. If the State will suffer substantial prejudice if the guilty plea is withdrawn prior to the time the sentence is imposed, this is a limiting factor which the court should consider in determining whether to grant the motion to withdraw the guilty plea.

Accord, *State v. Harlow*, 176 W. Va. 559, 346 S.E.2d 350 (1986).

Additionally, this court has stated that, “[w]hen a trial court explains the maximum possible sentence provided by law, to a defendant (who is pleading guilty) *such explanation must . . . not [be] confusing . . .*” Syl. Pt. 2, *Riley v. Ziegler*, 161 W. Va. 290, 241 S.E.2d 813 (1978) (emphasis added).

Because the Petitioner did not appear or testify at the Rule 35 motion hearing about his understanding at the time he entered his pleas; and because the Petitioner’s counsel failed to bring the West Virginia Rules of Criminal Procedure 11(e)(2) warning issue before the circuit court in that (or any other) hearing, the record in the instant case may not be adequate to determine whether the absence of the W. Va. R. Crim. P. 11(e)(2) warning, or any other confusion at the time of the plea hearing, resulted in a situation where there a “reasonable likelihood” that the Petitioner did not

understand the consequences of his pleading guilty, *see State v. Valentine, supra*; and that a “miscarriage of justice” or “manifest injustice” would result if the Petitioner is not permitted to withdraw his pleas, *see State v. England and State v. Olish, supra*.

Based on the foregoing discussion, the Respondent submits that the record therefore supports either the affirmance of the circuit court’s rulings -- or, at the most, the remand of the instant case to the Circuit Court of Raleigh County for a determination by the circuit court as to whether the Petitioner, when he entered his guilty pleas and due to his counsel’s conduct and advice, reasonably labored under the misapprehension that the Petitioner could withdraw those pleas if the sentence he received was not in accord with his expectations.

If the circuit court determines that this was the case, and if other considerations such as prejudice to the State, *see Syl. Pt. 3 of State v. Olish, supra*, do not militate for a different result, then the holdings of *State v. Valentine, supra*, and the other cases cited herein suggest that the Petitioner might be allowed to withdraw his pleas. If, however, the circuit court determines that the Petitioner personally understood (or, under the circumstances, should have personally understood) that his pleas could not be withdrawn, regardless of the sentence imposed by the judge, or if unfair prejudice to the State would result, then the Petitioner should not be permitted to withdraw the pleas.

VI.

CONCLUSION

For the foregoing reasons, the circuit court’s rulings should be affirmed; or the instant case should be remanded to the Circuit Court of Raleigh County with instructions.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent

by counsel,

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CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Response Brief of the 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 2nd day of August, 2011, addressed as follows:

To: Charles B. Mullins II, Esq.
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THOMAS W. RODD