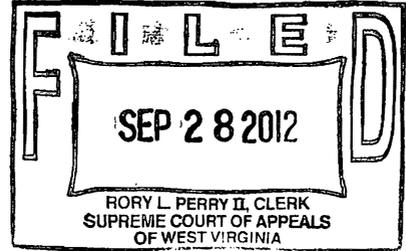


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0658



STATE OF WEST VIRGINIA

*Plaintiff Below,
Respondent,*

v.

JOSHUA R. CARVER

*Defendant Below,
Petitioner.*

SUMMARY RESPONSE

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SUMMARY RESPONSE

Comes now the respondent, the State of West Virginia, by, Andrew D. Mendelson, assistant attorney general, pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure, and files the following summary response to the petition for appeal.

I.

STATEMENT OF THE CASE

A. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.

This is an appeal by Joshua Ray Carver (“the Petitioner”) from an order of the Circuit Court of Randolph County finding that the Petitioner had violated the terms of his supervised release by having sexual contact with an unemancipated minor under the age of eighteen (18) years and sentenced him to serve six (6) months in the state penitentiary. (App. at 2.)

B. FACTS.

Petitioner was indicted by a Randolph County Grand Jury on June 30, 2008, for five felony counts of Sexual Assault in the third degree, a violation of W. Va Code § 61-8B-5(a)(2), based on his having sexual intercourse, on five separate occasions, with a fifteen year old girl while he was twenty one years old. (*Id.* at 22-23.) Pursuant to a plea agreement, on December 2, 2009, the Petitioner pled guilty to four counts of Sexual Abuse in the third degree, a misdemeanor, in violation of W. Va. Code § 61-8B-9. (*Id.* at 24.) The plea agreement signed by the Petitioner and his counsel, contained a provision under section eight (8) which stated,

That the Defendant understands that pursuant to this agreement and the entry of this plea he will be convicted of a sexual offense and will therefore be subject to several statutory provisions relating to sex offenders, such as HIV testing and counseling pursuant to (W. Va. Code, § 16-3C-2), restrictions on eligibility for probation pursuant to the requirements of W. Va. § 62-12-2, and submissions of blood samples for DNA analysis pursuant to W. Va. Code, §15-2B-1, et seq., in addition to registration requirements and other limitations and punishments, all of which the Defendant has discussed with counsel prior to entering into this Agreement.

(*Id.* at 26.)

Before sentencing the trial judge ordered a Sex Offender evaluation be done on the Petitioner. (*Id.* at 30.) After a review of the pre-sentence investigation report and the sex offender evaluation, the lower court sentenced the Petitioner to ninety days on each count to be served consecutively for an effective sentence of three hundred and sixty (360) days incarceration. Additionally, the lower court ordered the Petitioner, upon completion of the term of incarceration, be placed on extended supervision pursuant to W. Va. Code § 62-12-26, for a term of fifty years. (*Id.* at 43.) The Petitioner also signed, along with his counsel, the Notice of sexual offender requirements, requiring him to register for life. (*Id.* at 41.) No objection was made to any of the sentencing provisions.

Importantly, an Order of Notification of Supervised Release was signed by the Petitioner and his counsel on August 18, 2010. (*Id.* at 58.) An additional order entered on July 8, 2010, signed by the Petitioner, details the terms and conditions as set forth by the Randolph County Probation Officer that are to be followed on the Petitioner's supervised release. (*Id.* at 59.) Again, no objection was raised to those orders.

Subsequently, on February 9, 2012, a violation report was issued by the probation department. (*Id.* at 16). The violation report alleged that the Petitioner had sexual intercourse with a female under the age of eighteen. (*Id.* at 18.) On March 9, 2012, a hearing was held in which Petitioner's counsel moved to dismiss the revocation petition arguing that the Petitioner had completed his sentence and that there was no additional incarceration left for him to serve. The lower court denied the motion and a preliminary hearing was held with probable cause found to hold the Petitioner for a final revocation hearing and bond was set. (*Id.* at 13-14.) At the final revocation hearing held on March 27, 2012, the lower court found by clear and convincing evidence that the Petitioner had violated the terms and conditions of his supervised release by having sexual contact with an unemancipated minor under the age of eighteen (18) years and ordered the Petitioner to serve six (6) months in the state penitentiary. (*Id.* at 3.) With credit for time served and good time calculated the Petitioner discharged this sentence on May 9, 2012. (*Id.* at 68.)

The Petitioner's brief raises the constitutional issue of whether a person can be incarcerated for violating supervised release when he has served the maximum jail sentence for the underlying sentence without the protection of a new charge and a trial by jury. Additionally, the Petitioner argues it is disproportionate to the offense for which he was convicted.

II.

ARGUMENT

A. W. Va. Code § 62-12-26 is not unconstitutional as the terms and conditions of the Petitioner's supervised release were part of the sentence imposed upon his conviction of four violations of W. Va. § 61-8B-9. The Petitioner's two month period of incarceration for violating the terms of his supervised release was not disproportionate to his conviction.

1. Standard of Review

This Court has stated:

Review of questions of statutory interpretation and of the constitutionality of W. Va. Code § 62-12-26 is *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.I.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. Argument

The Petitioner argues that the statute is unconstitutional as applied to him solely because the involuntary application of post-release supervision and the revocation thereof is cruel and unusual punishment and disproportionate to his offense. In *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) this Court stated that in determining whether a given sentence violates proportionality, courts look to the nature of the offense, the legislative purpose, and a comparison of the sentence with other jurisdictions and with other offenses. *Id.* at Syl. Pt. 5. Upon such review, the *James* Court determined that the post-release supervision statute is not facially unconstitutional on cruel and unusual punishment grounds.

West Virginia Code § 62-12-26 states,

(a) 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: *Provided*, That the period of supervised release imposed by the court pursuant to this section for a defendant convicted after the effective date of this section as amended and reenacted during the first extraordinary session of the Legislature, 2006, of a violation of section three or seven, article eight-b, chapter sixty-one of this code and sentenced pursuant to section nine-a of said article, shall be no less than ten years: *Provided, however*, That a defendant designated after the effective date of this section as amended and reenacted during the first extraordinary session of the Legislature, 2006, as a sexually violent predator pursuant to the provisions of section two-a, article twelve, chapter fifteen of this code shall be subject, in addition to any other penalty or condition imposed by the court, to supervised release for life: *Provided further*, That pursuant to the provisions of subsection (g) of this section, a court may modify, terminate or revoke any term of supervised release imposed pursuant to subsection (a) of this section.

Syllabus Point 9, of *James, supra*, holds that,

West Virginia Code § 62–12–26 (2009) does not facially violate due process principles of the Fourteenth Amendment to the Constitution of the United States or Article III, Section 10 of the Constitution of West Virginia. The terms of the statute neither infringe upon a criminal defendant's right to jury determination of relevant factual matters, nor are the provisions of the statute regarding conditions of unsupervised release unconstitutionally vague.

The petitioners in *James* expressed concern that an individual who is convicted of a sex offense faces incarceration, sexual offender registration, followed by supervised release with the possibility of further incarceration if the provisions of supervised release are violated. The Court in *James* applied the subjective and objective tests enunciated in *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983) and *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). *James*, 227 W. Va. at 416, 710 S.E.2d at 107. The Court determined that post-release supervision was not so disproportionate to the offense that it shocked the conscience of the court and offended society (the subjective test). The Court noted that supervision is less restrictive on liberty than incarceration and that the period of supervision is contingent upon the facts and circumstances of

each case. The Legislature determined that supervision was necessary to protect society over and above incarceration. The appropriate period of supervised release is left to the determination and sound discretion of the sentencing court. (*Id.* at 418, 710 S.E.2d at 109.) Hence, the Court found that the statute was not facially unconstitutional on cruel and unusual punishment grounds.

Nevertheless, in the instant appeal, the Petitioner argues that “to the extent that the Petitioner can face close to a fifty (50) year term of incarceration in this matter, the defendant asserts that the same would be unconstitutional as it is disproportionate and cruel and unusual violation of our constitution.” (Pet’r’s Br. at 11.) The Petitioner further argues that it is unconstitutional to require the defendant to serve additional incarceration without affording him the right to a jury trial and all other constitutional protections, regarding a supervised release violation.

The Petitioner’s argument ignores the important societal goals involved with supervised release. The Legislative purpose of W. Va. Code § 62-12-26 is not strictly retributory in nature. This Court has stated, “[s]upervised release is a method selected by the Legislature to address the seriousness of these crimes to the public welfare and to provide treatment during the transition of offenders back into society with the apparent goal of modifying the offending behavior.” *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011). W. Va. Code § 62-12-26 has been determined to be a constitutional exercise of the Legislature’s prerogative in determining what steps are necessary to protect the public. Supervised release is imperative to monitoring and also possibly altering the behavior of these convicted sex offenders.

Additionally, under the plain reading of the supervised release statute, the Petitioner’s period of supervised release is imposed as part of the sentence. Much like one is not entitled to a jury trial and its related constitutional provisions for violating either probation or parole, one is not entitled

to that protection for violation of supervised release. Violation of supervised release does not necessarily entail committing a crime. One is entitled to the same level of constitutional due process as is afforded to one who violates probation, that is, notice, a hearing from a neutral examiner, the opportunity to defend, and a revocation upon clear and convincing evidence.

W. Va. Code § 62-12-26(g)(3) (2011), states that the rules applicable to the revocation of probation are to be utilized in a final supervised release revocation hearing.

As this Court held in Syl. Pt. 12, in the case of *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976),

The final revocation proceeding required by the due process clause of the Fourteenth Amendment and necessitated by W. Va. Code, 62-12-10, As amended, must accord an accused with the following requisite minimal procedural protections: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing officer; (6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation.

The Petitioner received these constitutional protections in this case.

III.

CONCLUSION

The circuit court did not err in denying the Petitioner's Motion to Dismiss on the grounds that there was no additional incarceration left for the defendant to serve and that the revocation proceedings violated his constitutional rights. The record before this Honorable Court shows that the Petitioner along with his counsel agreed to the imposition of supervised release. The Petitioner understood what he was required to do, or more importantly what he was required not to do and went

ahead and violated the terms of his supervised release. All of the Petitioner's due process rights were protected, the proper procedures were followed and the rulings of the court below should be affirmed.

Respectfully submitted,
STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

By counsel,

DARRELL V. McGRAW, JR.
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CERTIFICATE OF SERVICE

I, ANDREW MENDELSON, Assistant Attorney General, do hereby certify that I have served a true copy of the "SUMMARY RESPONSE" upon Petitioner's Counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this ___ day of September, 2012, addressed as follows:

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