

**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

CHARLESTON, WEST VIRGINIA

State of West Virginia, Plaintiff Below,
Respondent

NO.) 12-0833

Robert Lee Lester, Defendant Below,
Petitioner

PETITIONER'S BRIEF OF ROBERT LEE LESTER

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II. ASSIGNMENTS OF ERROR

1. Robert Lee Lester was convicted on April 9, 2008 of Third Degree Sexual Assault and Third Degree Sexual Abuse. He was sentenced to serve one to five years in the penitentiary for Third Degree Sexual Assault and a consecutive ninety days for Third Degree Sexual Abuse. He was not probated nor paroled and discharged the sentences. He then began a ten (10) year period of extended supervision pursuant to West Virginia Code Section 62-12-26.

The Court has now, on May 23, 2012, revoked his extended supervision and Ordered that he serve in the custody of the West Virginia Division of Corrections a period of two (2) years, with credit for time since his detention on March 15, 2012, and thereafter be under the supervision of the Sex Offender Intensive Supervision Office for the balance of the ten (10) year period previously imposed.

2. The defendant represents that this is a violation of the West Virginia Constitution Article III, Section 5 and is cruel and unusual punishment. (Transc. Pg. 7). He already completely served the sentence authorized by the Legislature pursuant to West Virginia Code Sections 61-8B-5(a)(2) and 61-8B-9. The revocation of the period of supervised release has resulted in further incarceration.

The revocation is a denial of due process. The defendant was not afforded a public trial by an impartial jury and a judgment of his peers. The State was not required to prove the charges beyond a reasonable doubt, but is only required to present proof of clear and convincing evidence to the Judge, all in violation of the United States

Constitution Amendments V and VI and West Virginia Constitution Article III, Section 10.
(Transc. Pg. 7)

West Virginia Code Section 62-12-26 is overly vague in its provisions regarding the administration of supervised release and the revocation thereof as it provides no direction for credits for time served on supervised release, detention, good time credits, parole credits, parole eligibility, or release. (Transc. Pg. 8). There are no guidelines for the lower Court to follow in determining additional incarceration. (Transc. Pg. 8, also see Pg. 42)

West Virginia Code Section 62-12-26 violates the Double Jeopardy provisions of the United States Constitution Amendment V and West Virginia Constitution Article III, Section 5 that "No person shall...be twice put in jeopardy of life or liberty for the same offense." (Transc. Pgs. 7-8)

This Court should find incarceration of the defendant in violation of the Constitutions and laws for any and all other reasons raised in his hearing of revocation.

III. STATEMENT OF THE CASE

On August 3, 2007, Robert Lee Lester, age 19 years (DOB 10-12-87) was arrested and accused of Sexual Assault in the Third Degree of Melanie N., age 13 years (DOB 12-18-93), having occurred on June 13, 2007, while the defendant and the victim were boyfriend and girlfriend, and while the defendant was staying at the victim's house at the time.

On October 23, 2007, the defendant was indicted on two counts of Sexual Assault in the Third Degree. Following a jury trial on April 8 and 9, 2008, the defendant was found

guilty of the felony offense of Third Degree Sexual Assault, as charged in Count 1 of the Indictment, and the misdemeanor offense of Third Degree Sexual Abuse, a lesser included offense within the charge set forth in Count 2 of the Indictment. On April 28, 2009, the Court received and filed the report of a sixty-day diagnostic evaluation and classification which had been conducted in aid of sentencing. Then, at the sentencing hearing conducted on May 22, 2009, the defendant was committed to the Anthony Center for Youthful Offenders. Pursuant to West Virginia Code Section 62-12-26, the Court further ordered a ten year period of sex offender supervision. On August 10, 2010, the defendant was returned as unfit for the Anthony Center program. Thereupon, on September 9, 2010, the defendant was committed to the state penitentiary to serve the balance of the sentences previously imposed, namely one to five years for the offense of Third Degree Sexual Assault and a consecutive ninety days for the offense of Third Degree Sexual Abuse. The defendant discharged said sentences, whereupon the extended supervision pursuant to West Virginia Code Section 62-12-26 commenced. (Transc. Pg. 3)

Thereafter, on February 9, 2012, in response to the State's first Petition to Modify or Revoke Supervised Release alleging substance abuse issues, the terms of the defendant's supervised release were modified to require substance abuse treatment. The State's 2nd petition to Modify or Revoke Supervised Release was filed on March 23, 2012, alleging inter alia that, contrary to Sex Offender Condition No. 20, the defendant had had contact with the victim in the underlying case.

On May 23, 2012, the defendant admitted on the record that, during the month of March 2012, he had contact, including sexual intercourse, with the victim in the underlying case in knowing violation of Sex Offender Condition No. 20. (Transc. Pg. 33) He was allowed to preserve his right to appeal that the statute is unconstitutional. (Transc. Pg. 5)

The Court sentenced the defendant to the custody of the West Virginia Division of Corrections for a period of two (2) years, with credit for time served since his detention on March 15, 2012; and ordered the defendant shall be under the supervision of the Sex Offender Intensive Supervision Office for the balance of the ten (10) year period previously imposed. (Transc. Pg. 42)

In Court, the defendant advised the Court that he wanted permission from the Court to have contact with the victim, that he loves her, and wishes to marry her; and he believes the victim feels the same toward him. (Transc. Pg. 32, 38)

The defendant seeks to have the Court rule that West Virginia Code Section 62-12-26 is unconstitutional and violates the defendant's rights by incarcerating him after he was tried, served his sentence, and is now being incarcerated again under the extended supervision release provisions of West Virginia Code Section 62-12-26.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under Rev. R.A.P. 18(a)(3), Oral argument is not necessary in this case 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.

V. ARGUMENT

In the Assignments of Error, the Petitioner asserts that his sentence of a ten (10) year period of extended supervision pursuant to West Virginia Code Section 62-12-26, and the revocation thereof and confinement in the penitentiary for two (2) years violates the West Virginia Constitution Article III, Section 5 as cruel and unusual punishment, and that West Virginia Code Section 62-12-26 violates the Double Jeopardy provisions of the United States Constitution Amendment V and West Virginia Constitution Article III, Section 5.

The Court in State v. James, 227 W. Va. 407, 710 S.E.2d 98 (2011), addressed these issues. The Court found in the three (3) cases before the Court that there weren't any constitutional violations.

The Court seemed to view West Virginia Code Section 62-12-26 as imposing "a new and additional penalty to the sentence of a person convicted of the enumerated offenses. *Id.* at syll. pt. 14, considered whether it violated the United States Constitution Amendment V Double Jeopardy Clause "by failing to allow credit for time served while defendant was on supervised release *Id.* at syll. pt. 24. While the Court did not decide the matter as the event had not yet occurred, in the instant case, it has occurred. The defendant has had his supervised release revoked, and is now serving two (2) years in the penitentiary after having served his previous sentence of one (1) to five (5) years in the penitentiary, after which he will again be subject to several years of extended supervised release pursuant to West Virginia Code Section 62-12-26. (He is further subject to the Court extending his supervised release to fifty (50) years, and if violated,

could be ordered to serve in the aggregate fifty-five (55) years in the penitentiary for Third Degree Sexual Assault of his girlfriend.) This sentence is clearly disproportionate to the facts of his crime.

In *State of Maine v. Benjamin S. Cook*, 28A. 3d 834(2011), the Supreme Court of Maine in reviewing a similar statute found that the sentencing court should be required to undertake an analysis before imposing a term of supervised release. The Maine statute like that in West Virginia is silent “concerning what the legislature intended that a sentencing Court consider before imposing a term of supervised release in the first instance, or how the Court is to determine how long the term should be in a given case”.

In the instant case, the Circuit Court imposed the two (2) year confinement in the penitentiary for his violation of supervised release because

“The Court is imposing a period of two (2) years because that is essentially the medium of the underlying sentence of one (1) to five (5) years that the law provides for third degree sexual assault. The Court is also considering all of the other factors in this case including the defendant’s age, all of the prior Court hearings in this case, the need for sexual offender treatment.” (Transc. Pg. 43)

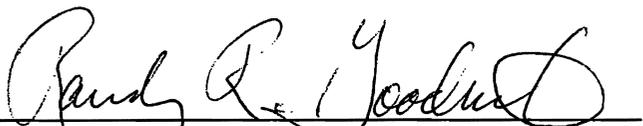
The State had recommended five (5) years in the penitentiary for the violation, which if good time credit applies would be two and a half years (2½ years). (Transc. Pg. 35)

VI. CONCLUSION

West Virginia Code Section 62-12-26 imposes disproportionate additional new punishments upon Mr. Lester far beyond any reasonably anticipated punishment for the offense he committed, and with little to no constitutional protections, it would seem that if not unconstitutional that some guidelines and analysis should be available to

determine the length of extended supervised release and the appropriate terms of incarceration upon revocation that a defendant could anticipate being subjected to. The defendant requests that his sentence of two (2) years in the penitentiary be vacated, that his term of supervised release be ended, and that he be released from further supervision and incarceration, having previously served his sentence of one (1) to five (5) years in the penitentiary for the offense of which he was convicted.

Respectfully submitted
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By Counsel,



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VII. CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2012, true and accurate copies of the foregoing Petitioner's Brief was hand delivered to William C. Means, Senior Assistant Prosecuting Attorney by placing a copy in the Prosecuting Attorney's box located in the Circuit Clerk's Office at the Preston County Courthouse.



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