



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff below/Respondent,

Vs.

No. 13-0311

REBECCA FI
Defendant below/Petitioner

APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
HONORABLE CHRISTOPHER C. WILKES, JUDGE
CASE NO. 11-F-46

BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

- I. Whether the Circuit Court of Berkeley County committed reversible error by sentencing Petitioner to incarceration followed by an extended term of probation? Petitioner respectfully contends that said sentence is improper and violates the Eighth Amendment of the United States Constitution and Article III of the West Virginia Constitution.

- II. Whether the Circuit Court of Berkeley County committed reversible error by awarding the victim “restorative” restitution?

STATEMENT OF THE CASE

Petitioner Rebecca F was indicted by a Berkeley County Grand Jury during the February, 2011 term of Court, on nineteen (19) separate criminal offenses; Counts 12-19 allege acts of Identity Theft. (A.R. 17-24).

On April 2, 2012, Petitioner did enter a plea agreement regarding Counts 12-19 of the indictment; the relevant terms of said plea agreement being as follows:

1. The defendant will plead guilty by [alford circumstances] to eight counts of identity theft as indicted.
2. It is understood that other counts of the indictment will not be dismissed but will be set for trial as docketed by the Court. It is further understood, that this does not resolve any outstanding or ongoing investigations regarding identity theft wherein this defendant may be the perpetrator although it may involve the same victim, or other current or former family members. This agreement does not resolve any outstanding or unresolved identity theft issues which are unknown to the State, the victim, the family members, or any other party at this time.
3. The State will **recommend** that the defendant shall receive a sentence of five years in the penitentiary on each of the eight counts with a fine of one thousand dollars on each count. The State will however bind that the sentences shall run with four counts running concurrently with each other but consecutive to the remaining four counts which shall also be concurrent with each other for an actual sentence of ten years. The Court may determine how the fines are to be assessed.
4. The defendant may argue for alternative sentencing.

(A.R. 14-16).

On April 20, 2012, Petitioner entered a plea of guilty to counts 1-11 pursuant to the parties' plea agreement. (A.R. 183-212). As a result of the plea agreement, the remaining counts in the indictment were not dismissed and Petitioner is currently awaiting trial on counts 12-19 of the indictment.

On July 9, 2012, a sentencing hearing was scheduled to be held, however the circuit court did continue said sentencing hearing so that Petitioner could undergo a diagnostic testing evaluation at the Lakin Correctional Center to aid the Court in sentencing. (A.R. 60-70). The Berkeley County Probation Department prepared certain Presentence Investigation Reports and Addendum to aid the court in sentencing. (A.R. 32-58). The Lakin Center also prepared a written report for the court to assist in sentencing. On January 14, 2013, the Court did reconvene for sentencing and Petitioner was sentenced. (A.R. 70-103). Over the objection of Petitioner, the Court did sentence Petitioner to serve five (5) years of actual time in the penitentiary followed by an extended term of probation. (A.R. 231-235).

More specifically, that Petitioner was sentenced to the following:

Count 12	Five (5) years of incarceration
Count 13	Five (5) years of incarceration
Count 14	Five (5) years of incarceration
Count 15	Five (5) years of incarceration
Count 16	Five (5) years of incarceration
Count 17	Five (5) years of incarceration
Count 18	Five (5) years of incarceration
Count 19	Five (5) years of incarceration

(A.R. 231-235).

Counts 12, 13, 14, and 15 were ordered to run concurrent with each other and counts 16, 17, 18, and 19 were ordered to run concurrent with each other. (A.R. 233).

The sentences for Counts 12, 13, 14, and 15 were ordered to run consecutive with counts

16, 17, 18, and 19. (A.R. 233). The sentences for counts 16, 17, 18, and 19 were suspended for a five year term of probation. (A.R. 233). Further, the court ordered that Defendant serve actual incarceration for count 12 and 13 and suspend the sentence of counts 14 and 15 for a five year term of probation. (A.R. 233).

Further, Petitioner was ordered to pay the victim \$10,942.74 in regular restitution and \$10,000.00 for “restorative restitution”. (A.R. 10).

Petitioner now seeks to have her sentence overturned.

SUMMARY OF THE ARGUMENT

Petitioner argues that it was improper for the Circuit Court of Berkeley County, West Virginia to sentence her to the penitentiary and disregard Petitioner's requests for alternative sentence. Prior to the date of sentencing, Petitioner had no real criminal history, held a Bachelor of Science Degree and was seeking a Masters Degree, had been a productive member of society as a school teacher in Berkeley County, West Virginia, and showed remorse and responsibility for her actions. Despite her requests for a reasonable term of probation to be served while suspending all of the ten (10) year penitentiary sentence, the Court chose to require her to actually serve five (5) years of incarceration followed by an extended term of probation

Further, the circuit court erred in ordering Petitioner to pay \$10,000.00 in restorative restitution as the same is not authorized by W. Va. Code §61-11A-4 or §61-11A-5.

STATEMENT REGARDING ORAL ARGUMENT

1. Petitioner affirmatively states that the issue raised in assignment of error 1 is an issue that has been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for Rule 19 of the West Virginia Revised Rules of Appellate Procedure argument and disposition by memorandum decision.

ARGUMENT

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO GRANT PETITIONER'S REQUEST FOR AN ALTERNATIVE SENTENCE

Petitioner respectfully asserts that the Circuit Court committed reversible error when it refused to accept Petitioner's request to have her sentence suspended for a period of probation or, at the very least, home confinement or another alternative sentence. Instead, Petitioner will be punished by serving a penitentiary sentence followed by an unreasonably long term of probation as the result of the crimes which are purely financial in nature.

At sentencing, Petitioner did argue for probation as she showed true remorse and responsibility for her actions. At the time of sentencing, beyond the charges in the indictment, Petitioner was 41 years of age and had no criminal history besides some worthless check charges that were resolved well in advance of sentencing. (A.R. 33, 37-39). Further, her infant child was one-year old and desperately needed to be with his mother, as he does now. (A.R. 223).

Petitioner graduated from high school in 1989 and put herself through college at Fairmont State University. (A.R. 225). In 2002, she graduated from FSU with a Bachelor of Science degree in Psychology with a minor in secondary education. (A.R. 225, 40). In 2005, Petitioner began attending Shepherd University for purposes of obtaining a Master of Arts degree in Curriculum and Instruction. (A.R. 40-41). At the time of sentencing, Petitioner only had two (2) courses left until obtaining said masters degree. (A.R. 41). The longest period of time that Petitioner has ever been without a job is during this period of incarceration. From 2002 to 2006, she was a substitute teacher in

Berkeley County, West Virginia. (A.R. 225). From 2006 until 2010, Petitioner was employed as a full time teacher with the Berkeley County Board of Education. (A.R. 225). Even after her arrest, she continued to work as a call operator. (A.R. 225).

Petitioner's friends and family attended sentencing and submitted written letters to the Court. (A.R. 84). The outpouring of support and respect showed to Petitioner was substantial. Although Petitioner is still awaiting trial for Counts 1-11 of the indictment, for sentencing purposes, the circuit court abused its discretion by sentencing Petitioner to the penitentiary for her first felony convictions for crimes of this nature. Petitioner understands that if she is convicted of counts 1-11 of the indictment that she may be sentenced to serve penitentiary time. However, when looking at her convictions for counts 12-19 of the indictment, it is clear that she should not be serving penitentiary time for these convictions.

Petitioner is gaining very little from serving a sentence in the West Virginia Department of Corrections while her family is immeasurably suffering. Petitioner has a home to return to and positive support system to return to if she is released from incarceration. To make her serve any portion of her sentence through incarceration is simply unjust.

Petitioner recognizes that the sentence received by Petitioner is within the statutory limits for said crime. Petitioner further recognizes that this Court has held that criminal sentences within the statutory limits of a crime, unless based on some impermissible factor, will not be subject to appellate review. *See State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007).

Petitioner respectfully requests that this Honorable Court reconsider its previous rulings regarding appellate review of sentences in the absence of an impermissible factor as the sentence Petitioner received in this case should be reviewed. As this Court is well aware, sentencing hearings are governed by Rule 32 of the West Virginia Rules of Criminal Procedure. Pursuant to said Rule, the Court must consider certain statements, evidence, and reports before imposing sentence. As such, in certain circumstances, the trial court may commit error subject to appellate review when a convicted criminal receives a sentence that is within the statutory limits for the crimes he or she was convicted, but as evidenced by the argument and evidence presented at Petitioner's sentencing hearing, said sentence does not benefit society or promote rehabilitation.

Lastly, Petitioner notes that there is currently extreme overcrowding in the West Virginia Division of Corrections and that a reduced sentence would allow justice to be served while more quickly relieving the strained prison system of another inmate. In response to prison overcrowding, on April 13, 2013, Senate Bill No. 371 was passed and deals with modifications to the current West Virginia Code to encourage alternative forms of sentencing including probation, home incarceration, and supervised release. Petitioner respectfully requests that this Honorable Court begin to review sentences handed down by circuit courts to assure the interests of society are being met.

In this case, for counts 12-19, it is obvious that Petitioner is the kind of individual who could succeed and benefit from the alternative sentence necessary to lessen the prison overcrowding problem as well as promote rehabilitation. As noted by the sixty (60) day diagnostic evaluation performed at the Lakin Center, "Ms. F is functioning within the Superior range and is thus capable of complying with the typical

requirements of the sentencing options, further her education, maintaining employment, and participating in a cognitively based therapeutic program, if appropriate.” (A.R. 229). In this case, the Court specifically sent Petitioner to the Lakin Center so that she could be evaluated to see how Petitioner should be sentenced. In response, the Lakin Center issued a report that indicated Petitioner could succeed and benefit from alternative sentencing.

Based on all of the foregoing, Petitioner respectfully contends that said sentence is improper and violates the Eighth Amendment of the United States Constitution and Article III of the West Virginia Constitution.

2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ORDERED PETITIONER PAY \$10,000.00 IN RESTORATIVE RESTITUTION

As a result of the identity theft convictions, Petitioner was ordered to pay \$10,942.74 for restitution. (A.R. 94). However, the Court then ordered that Petitioner was to pay \$10,000.00 to victim as “restorative” restitution. (A.R. 94).

In making its ruling, the Court stated the following:

I’m going to order that restitution be made in the amount of \$10,942.74 and further restitution of \$10,000.00 to the victim in this case because of the attempts and time and the effort she has to make to try to rectify the wrongful credit aspect of it. That not only takes time and money and things like that so it is a restorative restitution is what I’m going to call it. It is not pain and suffering or anything like that, but it is just to help cover for what it takes.

(A.R. 94).

Petitioner respectfully asserts that neither W. Va. Code § 61-11A-4 nor § 61-11A-5 allow or justify the circuit court’s award of the \$10,000.00 of “restorative” restitution. Petitioner respectfully asserts that this \$10,000.00 award of restorative restitution is punitive in nature and explicitly prohibited by the laws governing restitution.

Furthermore, the State in no way met its burden of proving that the \$10,000.00 award of restorative restitution was necessary or cognizable under W. Va. Code § 61-11A-5

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner respectfully requests that the Court reverse the ruling the Circuit Court of Berkeley County, West Virginia and Order that Petitioner's sentence be suspended for an alternative sentence and set aside the Court's award of \$10,000.00 in restorative restitution.

Respectfully submitted,
Rebecca F ,



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CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Brief of Petitioner and Appendix of Record upon the following persons, by courier on this 4th day of June, 2013:

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