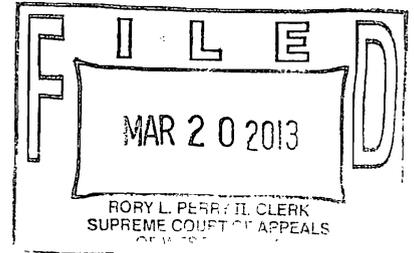


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 13-0081



STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT,

vs.

MATHEW J. ROBEY,
DEFENDANT BELOW, PETITIONER.

PETITIONER'S BRIEF

Mathew J. Robey, DOC No. 51865
Pro se
Huttonsville Correctional Center
Huttonsville WV 26273

PETITIONER'S BRIEF

I. ASSIGNMENT OF ERROR

The Circuit Court erred in denying as untimely Petitioner's Rule 35(b) motion for reduction of sentence, because the motion was filed "within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction," Rule of Criminal Procedure 35(b).

II. STATEMENT OF THE CASE

On March 25, 2011, after a jury trial, Petitioner was sentenced to twenty years for kidnapping (Circuit Court of Roane County Case No. 10-F-06 (Hon. David W. Nibert)). (Appx. 34 (Amended Sentencing Order).) His attorney, Theresa Monk, filed a notice of appeal on May 23, 2011 (SCAWV Case No. 11-0874). Attorney Monk also filed a "Motion for Reconsideration of Sentence," which was denied July 6, 2011.

Petitioner's conviction was affirmed on February 13, 2012, and the mandate was issued on March 15, 2012. (Appx. 10 (Mandate).) On July 13, 2012, exactly 120 days after issuance of this Court's mandate, the circuit clerk below filed Petitioner's *pro se* "Motion for Reduction of Sentence," (Appx. 37 (Docket Sheet)), which was made "pursuant to W.Va. Rules of Criminal Procedure, Rule 35(b),¹" (Appx. 3 (Motion for Reduction of Sentence)). One reason that Petitioner filed the 2012 Rule 35(b) Motion was that the circuit court had stated it was denying

¹ Rule 35(b) states:

A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or *within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction* or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

W.Va.R.Crim.P., Rule 35(b) (emphasis added).

the 2011 Rule 35(b) Motion, in part, because Petitioner had not, as yet, served any time in prison. (Appx. 4 (2012 Rule 35(b) Motion).)

On December 12, 2012, the Circuit Court of Roane County (Hon. David W. Nibert) denied Petitioner's *pro se* "Motion for Reduction of Sentence" as untimely, stating:

In as much as the period of time of 120 days from the date of sentencing allowed by Rule 35(b) of the West Virginia Rules of Criminal Procedure has lapsed, and further, as the Defendant has filed his motion 525 days from the date of sentencing, the Court is of the opinion to, and hereby does, DENY the Defendant's second Motion for Reduction of Sentence.

(Appx. 1.)

Petitioner timely appealed.

III. SUMMARY OF ARGUMENT

A Rule 35(b) motion for reduction of sentence is timely if it is filed "within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction." R.Cr.P., Rule 35(b); Syl. Pt. 2, *Barritt v. Painter*, 215 W.Va. 120, 595 S.E.2d 62 (2004) (per curiam).

A circuit court by definition abuses its discretion when it makes an error of law. *State v. Varner*, 212 W.Va. 532, 575 S.E.2d 142 (2002).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because (1) the dispositive issue has been authoritatively decided, (2) the facts and legal arguments are adequately presented in the briefs and record on appeal, and (3) the decisional process would not be significantly aided by oral argument.

This case is appropriate for a Memorandum Decision.

V. ARGUMENT

A. Standard of Review.

“In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.” Syl. Pt. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syl. Pt. 1, *Barritt v. Painter*, 215 W.Va. 120, 595 S.E.2d 62 (2004) (per curiam).

B. The Circuit Court Abused Its Discretion By Denying as Untimely Petitioner’s Pro Se Motion for Reduction of Sentence.

Rule 35(b) contains *two* dates that trigger the 120-day time limit for filing a motion for reduction of sentence: “[1] within 120 days after the sentence is imposed or probation is revoked, or [2] within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction,” W.Va.R.Crim.P., Rule 35(b). *See also* Syl. Pt. 2, *Barritt, supra* (same).

The mandate upon affirmance of Petitioner’s conviction was issued on March 15, 2012. (Appx. 10 (Mandate).) On July 13, 2012, *exactly 120 days* after issuance of that mandate, the circuit clerk below filed Petitioner’s *pro se* “Motion for Reduction of Sentence,” (Appx. 37 (Docket Sheet)). Therefore, the circuit court made an error of law by denying the Motion as untimely when the Motion was made “within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction,” W.Va.R.Crim.P., Rule 35(b).

“A circuit court by definition abuses its discretion when it makes an error of law.” *State v. Varner*, 212 W.Va. 532, 536, 575 S.E.2d 142, 146 (2002) (concluding that the circuit court erred by finding a motion for a new trial was untimely) (citation omitted).

The Circuit Court abused its discretion by denying as untimely Petitioner’s *pro se* Motion for Reduction of Sentence.

VI. CONCLUSION

WHEREFORE, Petitioner prays this Honorable Court will vacate the December 21, 2012 Order of the Circuit Court of Roane County and remand the case for consideration of the July 13, 2012 Motion for Reduction of Sentence, and will grant such other relief as justice requires.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rev. R.A.P., Rule 37(b), that true and correct copies of the **Petitioner's Brief** and **Appendix** were served by placing them in an envelope, addressed as below, first-class postage prepaid, and giving it to prison officials on March 18, 2012, for delivery to the U.S. Postal Service.

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