



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1413

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

vs.

NICHOLAS RYAN ROBEY,

*Defendant Below,
Petitioner.*

SUMMARY RESPONSE

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SUMMARY RESPONSE

Comes now the State of West Virginia, by counsel, 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 Petitioner's Brief.

Respondent agrees with the Petitioner's recitation in his Statement of the Case both procedurally and factually as cited to the Appendix.

I.

ARGUMENT

The lower court did not abuse its discretion and properly sentenced the petitioner after finding that he was not similarly situated to his co-defendants. After consideration of mitigating and aggravating factors at sentencing, specifically that the petitioner hit the eighty eight year old deceased victim not once, not twice but three times in the head with a baseball bat, the Petitioner was appropriately sentenced.

A. Standard of Review

This Court has written:

“The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review. Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 7, *State v. Layton*, 189 W. Va. 470, S.E.2d 740 (1993).

Additionally, in *State v. Buck*, 173 W. Va. 243, 314 S.E.2d 406 (1984), this Court held

Disparate sentences between co-defendants are not per se unconstitutional. Courts consider many factors such as each co-defendants’s respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age, and maturity), and lack of remorse. If co-defendants are similarly situated, some courts will reverse on disparity of sentence alone.

(*Id.* at Syl. Pt. 2.)

B. Argument

Mr. Nicholas Ryan Robey, hereafter (“Petitioner”) asserts that the lower court abused its discretion and committed harmful constitutional error by sentencing him to a disproportionate sentence (life without mercy) compared to his three co-defendants (life with mercy) without supporting findings of fact. (Pet’r’s Br. at 4.) That argument is without merit, as the evidence considered by the lower court persuaded the judge that it was the Petitioner, who during this “home invasion” robbery of the eighty-eight year old victim’s home, beat the victim not once, not twice, but three times in the head with a baseball bat. (App. at 60.) Then, after robbing the house, the

Petitioner and two of his co-defendants ran away after locking the front door, leaving the victim lying in a pool of blood. The victim was found two days later dead, still lying where the Petitioner and his cohorts left him, in his livingroom. (*Id.* at 29, 66.)

In this case, the Petitioner and his co-defendants were not similarly situated as the lower court's sentencing order specifically states, the court's reasoning for the Petitioner's sentence of life without mercy was:

Thereupon, the Court advised the parties that it **would not** make a recommendation that the defendant, Nicholas Ryan Robey, be considered for parole based upon the Court's consideration of the defendant's actions toward the victim, and after having considered the mitigating factors of the defendant's age, support system and history of substance abuse.

(*Id.* at 140.) The evidence heard by the sentencing judge was that this Petitioner was the only one who struck the victim with the baseball bat, thereby directly causing his death.

After the plea hearing, the lower court ordered a presentence investigation report be prepared and sent the Petitioner to the Anthony Correctional Center for the purpose of a diagnostic evaluation and classification. (*Id.* at 49.) The Petitioner's psychological evaluation stated that, "he presented little remorse over the death of the victim, and did not demonstrate any fear or sadness until he was asked about prison." It was at that time that he broke down and stated "I'll never see my twenties outside of prison. . . . I deserve it though." (*Id.* at 60.) This evaluation went on to state that, "Currently, the likelihood of future recidivism is considered high. Factors contributing to recidivism risk include prior legal history, impulsivity, age, and lack of empathy and maturity. Factors that mitigate his risk of future recidivism include intelligence/cognitive skills, employability, and lack of substance abuse issues." (*Id.* at 61.)

The lower court also heard from the deceased victims' son at the sentencing hearing when the victim's son said:

The only thing I want to know is -- so far I've sat through four of these things and not one of the four of you ever showed remorse for what you did. At the beginning of it, you all showed nothing but contempt for the court system.

I feel sorry for your families. I really do. It is your choice that you made. You made that choice. You had an option when you found out my dad was home. You could've just left, but no, you decided otherwise.

The lawyers have tried to say, oh, they're very remorseful. I'm sorry, I haven't seen it, not one time from any of you.

Granted, I was out of the country. I wasn't here. My wife had to take care of it, and for that, I'll never forgive none of you, for the simple fact that she had to deal with it while I'm 7,000 miles away.

I hope the court shows you what you showed my father. No mercy.

Like I say, I apologize to your families, but the bottom line is, what you showed my father is what I hope this court shows you. No mercy.

(Id. at 122-23.)

Moreover, at the sentencing hearing the lower court stated,

And what's even disturbing to the Court in this particular case is that Mr. Leeson's son and grandson were not here in this country at the time this event took place. They were both serving in the armed forces in Iraq and Afghanistan, fighting a war on terror, but the terror that the people have in this country is not going to come from the terrorists hijacking a plane and crashing it into a building. The terror comes from the drug addicts that we have in the community that work for waste management in other places, that take care of our elderly, that work as lifeguards.

(Id. at 132.)

The lower court went on to state that,

With respect to Nicholas Robey, the court is not going to make any recommendation that you be eligible for parole, and the reason for that is, you're the one that swung the bat, not once, not twice, but three times.

With respect to each of the other defendants, the court will make a recommendation that each of you be eligible for parole after serving 15 years.

Quite frankly, I don't know whether I'll be on the bench in 15 years when I get a letter from the parole board, but whatever judge is here, there will be a note put in your file that the court does not feel that each of you deserve to get out at the end of fifteen years.

(*Id.* at 133.)

The Petitioner's counsel agrees that the Petitioner's sentence was not disproportionate to the crime. (Pet'r's Br. at 10.) However, in his brief he asserts that,

There is no indication whatsoever that the honorable lower court in this matter considered the petitioner's prior record, each co-defendant's respective roles in the crime, the presence or absence of remorse, and most significantly in this instance, the rehabilitative potential of the the [sic] Petitioner. The Court made no such findings or statement at sentencing regarding any such factors except that the petitioner was the one who struck the fatal blows.

(*Id.* at 11.) The State asserts that the lower court did consider many factors and not only ordered a presentence investigation report prior to sentencing the Petitioner, but *sua sponte* ordered a psychological evaluation on the Petitioner. Therefore, before the lower court sentenced the Petitioner for this heinous crime, it had the complete picture.

The lower court did not abuse its discretion and certainly did not commit any constitutional error by sentencing the Petitioner to a sentence disproportionate to his co-defendants without supporting findings of fact. In fact, the sentence imposed upon the Petitioner is directly proportionate to his crime and lack of remorse. The Petitioner actually killed the victim. The lower court's sentencing order states its basis for not granting mercy is upon consideration of the Petitioner's actions toward the victim and after considering the mitigating factors. The lower court could not and should not overlook the Petitioner's *actus reus* of hitting an eighty-eight year old man

in the head with a baseball bat, not once, not twice, but three times. The Petitioner left Mr. Leeson to die alone, after all Mr. Leeson did was, as a good samaritan, let the Petitioner into his home to use the phone. (App. at 54.)

II.

CONCLUSION

The State requests for all the reasons stated herein, and apparent on the face of the record, this Court should affirm the judgement of the Circuit Court of Harrison County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel

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CERTIFICATE OF SERVICE

I, Andrew Mendelson, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Respondent's *SUMMARY RESPONSE* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of April, 2013, addressed as follows:

To: Jerry Blair, Esquire
Jerry Blair Law Office
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P.O. Box 1701
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ANDREW D. MENDELSON