

13-0614

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 1

STATE OF WEST VIRGINIA

v.

Case Nos. 99-F-28 & 99-F-175

MITCHELL COLES,
Defendant.

**ORDER DENYING DEFENDANT'S
MOTION FOR CORRECTION OF SENTENCE**

Presently pending before the Court is a "Motion for Correction of Sentence" (Motion) filed by the Defendant, *pro se*, on November 2, 2011, and his "Supplemental Motion for Correction of Sentence" filed on November 16, 2012. On December 16, 2011, the "State's Response to Defendant's Motion for Correction of Sentence" was filed. After a review of the pertinent case law and the parties' submissions, the Court hereby **DENIES** the Defendants Motion for Correction of Sentence, and finds as follows:

In Case No. 99-F-28, the Defendant was charged by indictment with three counts of attempted obtaining money by false pretenses (Counts 1, 3, and 4), one count of obtaining money by false pretenses (Count 2), and one count of engaging in a fraudulent scheme (Count 5). In Case No. 99-F-175, the Defendant was charged with two counts of felony false pretenses, one count of engaging in a fraudulent scheme, a felony, and three counts of obtaining goods or services by false pretenses, a misdemeanor. On December 28, 1999, the Defendant pled guilty pursuant to a plea agreement to several charges, and on March 6, 2000, the Defendant was sentenced for these several charges.

The Defendant's sentence imposed by the Court was as follows: 1-10 years in the state penitentiary for obtaining money by false pretenses, Count 2 of Case No. 99-F-28; and 1-10 years in the state penitentiary on the charge of engaging in a fraudulent scheme, Count 5 of Case No. 99-F-28, said sentence to run consecutively to the sentences first stated above. The Defendant also received a sentence of 1-10 years in the state penitentiary on each of the two counts of felony false pretenses, as charged in Case No. 99-F-175; 1-10 years on the felony count of engaging in a fraudulent scheme, as charged in the Case No. 99-F-175; and 1 year in the Monongalia County Jail on each count of the three misdemeanor false pretenses charges in Case No. 99-F-175. All of the sentences imposed in Case No. 99-F-175 were ordered to run concurrent with each other, but consecutive to the sentences imposed in Case No. 99-F-28. The effect of the sentencing structure imposed by the Court was a sentence of 3-30 years in the penitentiary.¹ The Defendant was further ordered to make restitution as outlined in the Victim Impact Statement, which restitution totaled more than \$15,000. The effective sentence date was February 8, 1999.

Since his sentencing, on March 8, 2000, the Defendant has requested reductions and/or corrections of his sentences on at least four other occasions:

First Request: On September 28, 2000, the Defendant filed his first "Motion for Reduction of Sentence." Defendant's request asserted that he was remorseful for his actions, that he had been sufficiently punished, and that he had an excellent institutional record. By Order entered September 28, 2000, the Court denied the Defendant's first motion and found that, while the Court

¹ The Court would note that it could have sentenced the Defendant to consecutive sentences which would have totaled a sentence of 8-53 years.

accepted the Defendant's assertions as true, the Defendant victimized "at least nine businesses," and did not "operate in a smalltime fashion but engaged in substantial fraudulent conduct[.]" The Court further held that based on his prior conviction of a similar fraudulent scheme larceny while a student at Penn State University, the Defendant apparently did not learn anything from his first conviction of similar crimes.²

Second Request: On February 6, 2001, the Defendant filed his second "Motion for Reduction of Sentence." By Order entered April 2, 2001, the Court noted that "a comparison of the [Defendant's first and second motions] shows that they are very similar, and in fact identical in parts." Essentially the same arguments were made, with emphasis upon additional efforts at rehabilitation. The Court denied the Defendant's motion and held that the "Defendant was given full consideration by this Court at the time of sentencing. In fact, the Court considers the sentence to be lenient, given the multitude of offenses and history of similar conduct by the Defendant."

Third Request: The Defendant's third "Motion for Reconsideration/Modification of Sentence" was filed on December 19, 2006. By Order entered on January 24, 2007, the Court denied the Defendant's request because it was

² The Court's finding that the Defendant had not learned from his prior crimes has subsequently been confirmed by the Defendant's own conduct. According to the Defendant, he was originally eligible for parole after serving three years of his sentence. In April 2007, the Defendant was granted parole at which time he returned to Philadelphia, Pennsylvania. The Defendant was on parole for two years. However, he was again convicted of a felony, this time in the state of Virginia. In December 2010, the Defendant was returned to the West Virginia Division of Corrections to fulfill the remainder of his sentence. See *Correspondence from M. Coles to E. Rollo dated June 18, 2012, attached as Exhibit 26 to Defendant's Writ of Mandamus.*

filed beyond the 120 day time period proscribed by Rule 35(b) of the West Virginia Rules of Criminal Procedure.”³

Fourth Request: On May 27, 2011, the Defendant filed his fourth request, a “Motion for Reconsideration/Modification of Sentence.” By Order entered, June 21, 2011, the Defendant’s request was again denied as it was beyond the 120 day time period set forth in Rule 35(b) of the West Virginia Rules of Criminal Procedure.

The Defendant now seeks a reduction of his sentence based on double jeopardy grounds. Specifically, the Defendant alleges that, despite a knowing and voluntarily plea of guilty, he has not waived the right to raise a double jeopardy argument, and that, based on *State v. Rogers*, 547 S.E.2d 910 (W.Va. 2001), the Defendant’s sentence, in Felony No. 99-F-28, violates double jeopardy because he was sentenced twice for the same offense. The State, however, alleges that the *Rogers* case is not analogous to the present matter, that the Defendant received a significant benefit from the parties’ plea agreement (namely that several counts contained in Felony No. 99-F-28 were dismissed), and that the Defendant negotiated voluntarily and knowingly the terms of the agreement for which he was ultimately sentenced.

In light of the history of this case, the parties’ submissions, and the relevant legal authority, the Court is of the opinion to **DENY** the Defendant’s motion. The Defendant ‘s crimes for which he pled in Case No. 99-F-28 were against numerous

³ Rule 35(b) of the W.Va. R. Crim. P. states that “(a) motion to reduce a sentence may be made... within 120 days after the sentence is imposed... or entry of an order by the supreme court dismissing or rejecting a petition for appeal[.]” Accordingly, the only timely motion for reconsideration filed by the Defendant was his first, the merits of which the Court considered in detail prior to denying the motion on September 28, 2000.

victims, as outlined in the Plea Agreement, and Sentencing Order. Thus, the charge in Count 2 of Case No. 99-F-28 (committed against One Valley Bank) is not based on all of the same facts and circumstances as Count 5 of Case No. 99-F-28 because there were other acts against other victims (including crimes against Huntington National Bank, Sound Investments, Kroger's of Morgantown, and United National Bank). Therefore, the charge in Count 2 (False Pretenses) and Count 5 (Fraudulent Scheme) are inapposite to the facts and circumstances contained in *State of West Virginia v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (2001).

The Circuit Clerk shall provide a copy of this Order to Edmund J. Rollo, Esquire, counsel for the Defendant, and to the office of the Prosecuting Attorney of Monongalia County.

Enter this 2nd day of May, 2013.



SUSAN B. TUCKER, CHIEF JUDGE

ENTERED May 2 2013

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