

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

vs.

Docket No. 15-0958

PATRICK SHAWN COLLINS,

Defendant Below, Petitioner.

PETITIONER'S BRIEF

Patrick Shawn Collins,
Huttonsville Correctional Center
PO Box 1
Huttonsville, WV 26273

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ASSIGNMENTS OF ERROR

Did the Circuit Court of Gilmer County, West Virginia commit fundamental error, make erroneous factual findings, misapply the law and/or abuse its discretion when it denied the Petitioner's Rule 35 (b) motion for reconsideration of sentence?

STATEMENT OF THE CASE

1. The petitioner was convicted on July 15, 2006 of third degree sexual abuse in Lewis County Circuit Court and sentenced to a term of ninety days in the regional jail. (App. P2)
2. In 2007 and 2008, the Petitioner was convicted of failure to register and sentenced to two terms of one to five years with the sentences probated with an assignment to the Anthony Correctional Center for Youth. (App. P6-P12)
3. Upon completion of the Anthony Center program the Petitioner was placed on probation for a period of five years. (App. P6-P12)
4. The Petitioner was sentenced in Gilmer County Circuit Court on June 1, 2012 to a term of ten to twenty-five years for failure to register as a sex offender. (App. P3)
5. On September 25, 2012 the Petitioner had his probation revoked in Gilmer County and the two one to five year sentences were ordered to be served consecutively to one another and concurrently to the term in Gilmer County described in (4.) above) (App. P6-P12)
6. On July 1, 2015, the court below granted habeas relief to the Petitioner in the form of allowing him to file Rule 35 (b) motion for reconsideration.
7. On August 25, 2015, the Petitioner filed a Rule 35 (b) motion for reconsideration (App. P17) that was denied by the court below on September 9, 2015. (P1)
8. Accordingly, this appeal follows.

SUMMARY OF THE ARGUMENT

The Petitioner will argue that the court below, disallowing the dictates of *State v. Arbaugh*, 215 W. Va. 132; 595 S.E.2d 289 (2004), abused its discretion when it denied the Petitioner's motion for correction of sentence as the petitioner was (a) only twenty years old when he was convicted of misdemeanor third degree sexual abuse, (b) has not committed a sexual offense since, (c) has a viable plan of action if released and (d) there is no proof whatsoever that the Petitioner is a threat to commit a new sexual offense if probation was granted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asks this Court for Rule 19 arguments as this case involves the application of settled law and submits that the decision may be appropriate for memorandum decision if this Court does not develop new law in regards to the decision.

ARGUMENT

Standard of Review

"[i]n 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." Syllabus Point 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996). Syl. Pt. 1, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010).

Petitioner's Case and Reasons for Granting the Rule 35 (b) Motion

In this case, the Petitioner readily admits that he was convicted, at age twenty, of having consensual sex with a fourteen year old girl. He served ninety days in jail and afterwards was convicted of failing to register as a sex offender on more than one occasion, was granted probation, and had it revoked on a subsequent conviction for failure to register. However, there

are factors that warranted the granting of Rule 35 (b) motion for reduction of sentence which are as follows:

The Petitioner has not committed a sex crime since he was twenty years old

The Petitioner has not committed a sexual offense since he was punished for the third degree sexual abuse conviction in 2006 for which he served ninety days in jail. He has, again, admitted committing the crime of failure to register three times in nine years. However, failure to register is not a crime of moral turpitude since the statute is a regulatory or administrative provision requiring only registration by a specified class of persons and no moral norm exists requiring sex offenders to register or to provide information to the community. In fact the crime is, according to the Fourth Circuit Court of Appeals, much like the offense of failure to register for the military draft and does not (a) constitute a *malum in se* offense or (b) implicate any moral value beyond the duty to obey the law. (See *Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014)) Therefore, failure to register cannot be considered in the same dimension as a sexual offense which has the higher moral connotations associated with it.

The Petitioner is not a threat to commit a new sexual offense

Nowhere in the record, or otherwise, is it suggested that the Petitioner has attempted to commit a sexual offense since his conviction in 2006. Additionally, none of the circumstances of his failure to register convictions point to the Petitioner trying to shield himself from authorities as he set up an evil scheme to reoffend society. In fact, there is some question as to whether the Petitioner even knew he had to register before the first registry violation.

The Petitioner had a viable release plan if released from prison

In his motion for reduction of sentence (App. P17) the Petitioner advises the court below that his ultimate goal “is to finish my degree in Business Management... and eventually open a restaurant.” He also informed the court that he has support in the form of Tammy Jo Hill Cash a friend he met at Glenville State College. (App. P18) So he presented the court below with a viable release plan:

State v. Arbaugh

In *State v. Arbaugh*, 215 W. Va. 132; 595 S.E.2d 289 (2004) this Court overturned a court’s decision to deny a Rule 35 (b) motion for reduction of sentence for the following reasons: *Arbaugh*, the defendant, had a viable plan for release, had not committed any new sexual offense, and the court had no evidence that pointed to Mr. Arbaugh being a sexual threat to anyone at present or in the future.¹

Similarities and dissimilarities of Petitioner's case and *Arbaugh*

Granted there are some dissimilarities between the Petitioner's situation and *Arbaugh*. For instance, there is no indication whatsoever that the Petitioner was molested as a child or that he committed his crime as a juvenile. But, there is are a few glaring similarities between the two cases:

1. The Petitioner had been to the Anthony Center, completed it, and then had his probation revoked for actions that had nothing to do with sexually motivation.

¹ Arbaugh had been sexually assaulted repeatedly as a youth and in turn, as a juvenile, acted out on his half-brother which resulted in his being sentenced to a term of fifteen to thirty-five years for sexual assault and the term was eventually probated for a period of five years. He eventually violated his parole, but did not commit any new offenses, sexual or otherwise.

2. The Petitioner had presented a viable release plan that was goal oriented and sustainable.
3. The petition was not a sexual threat to the community at the time of the motion for reduction, is not now a danger to reoffend sexually, nor is there any indication that he will be a menace in the future.
4. The Petitioner has a drinking problem that should be addressed.
5. However the most noticeable comparison between the two cases is that the court below, as in Arbaugh's case, is willing to throw in the towel on the Petitioner despite evidence that the Petitioner has some redeemable qualities and is not a threat to society.

Argument Summation

It was a blatant abuse of discretion for the court below to deny the Petitioner's motion for reduction of sentence. The Petitioner committed a crime at a young age, served his sentence and then committed crimes that did not involve violations of moral turpitude or evil intent. It is cases like this that illustrate some of the reasons that prisons in this State are overcrowded. To make a young man fully serve a sentence of ten to twenty-five years for violating a regulatory crime is unconscionable. And this court is the only tribunal capable of righting this wrong and as previously decided, has an affirmative duty to guard the Petitioner's interests, as no one else is willing to:

"prisoners are no one's constituents and wield little, if any, political clout. Consequently, society frequently forgets about, or even ignores these people, its unfortunate charges. It is therefore incumbent upon this Court ever to be vigilant in the protection of their legal rights." State ex rel. *Riley v. Rudloff*, 212 W. Va. 767, 779, 575 S.E.2d 377, 389 (2002) (quoting *Ray v. McCoy*, 174 W. Va. 1, 4, 321 S.E.2d 90, 93 (1984)) as quoted in *Arbaugh* at 595 S.E.2d 294.

Therefore, the Petitioner asks this Court to reach into the ring, pick up the towel and give him another chance to get his life in order and be the hard working taxpaying citizen he is intends to become.

CONCLUSION

Therefore, for the reasons enumerated herein the Petitioner asks this Court to remand this case back to the Gilmer County Circuit Court with instructions to reverse its decision denying the Petitioner's motion for reduction of sentence and release the Petitioner on probation with stipulations that the Petitioner address his alcohol problem and attend college and/or any other relief this Court deems appropriate and just.

Respectfully submitted this 8 day of January, 2016.



Patrick Collins

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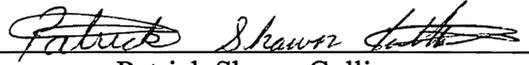
PATRICK SHAWN COLLINS,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

This is to certify that the Petitioner has served, by first class mail on January 8, 2016, a true copy of the Petitioner's Brief upon the Respondent at the following address:

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Appellate Division
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Patrick Shawn Collins