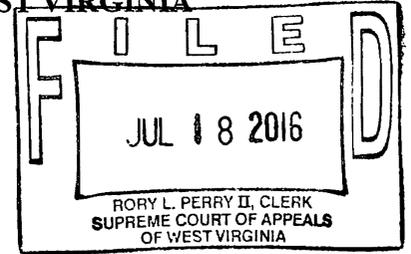


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0696



State of West Virginia,

Plaintiff Below, Respondent

vs.

Kenneth Allen Marcum,

Defendant Below, Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

COMES NOW, the Petitioner, Kenneth Allen Marcum, by counsel, Jerry M.

Lyall, filing his Supplemental Brief.

QUESTION

Whether, in an appeal from denial of a Rule 35(b) motion, this Court has jurisdiction to consider assignments of error unrelated to the circuit court's denial of the Rule 35(b) motion?

DISCUSSION

“A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility sua sponte to examine the basis of its own jurisdiction.” Syllabus Point 1, James M.B. Carolyn M., 193 W.Va. 289, 291, 456 S.E.2d, 16, 18 (1995).

“Where neither party to an appeal raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly

or indirectly where it is otherwise lacking.” Syllabus Point 2, James M.B. Carolyn M., 193 W.Va. 289, 291. 456 S.E.2d, 16, 18 (1995).

“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.” Rule 35(b) of the West Virginia Rules of Criminal Procedure

“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.” Syllabus Point 1 of State v. Head, 198 W.Va. 298, 480 S.E.2d 507 (1996).

“A motion made under Rule 35 (1996) of the West Virginia Rules of Criminal Procedure is directed to the sound discretion of the circuit court and, generally, is not reviewable absent an abuse of discretion.” Id. at 301, 510.

“As a general rule, the sentence imposed by a trial court is not subject to appellate review. However, in cases ... in which it is alleged that a sentencing court has imposed a penalty beyond the statutory limits or for impermissible reasons, appellate review is warranted. Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

State v. McClain, 211 W.Va. 61, 64, 561 S.E.2d 783, 786 (2002). Moreover, with regard to this Court's review of the circuit court's sentencing determination, this Court explained that: 'The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syllabus Point 1, in part, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997)." State v. Georgius, III, 225 W.Va. 716, 696 S.E.2d 18 (2010).

"The majority concedes that our appellate review under Rule 35(b) is circumscribed. Although the majority suggests that the standard of review is an abuse of discretion, which was characterized by us recently as less than appellant friendly, by adopting this standard without elaboration it has another effect which is not salutary. For we cannot lose sight that the abuse of discretion standard has many faces and, in our application of the standard, it can range anywhere from careful scrutiny to almost no scrutiny. I concur to emphasize that in the context of Rule 35(b) it should be the latter."

State v. Head, 198 W.Va. 298, 305, 480 S.E.2d 507, 514 (1996) (Cleckley, J., concurring).

"Indeed, as Justice Cleckley notes in his concurring opinion in State v. Head, 198 W.Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring) (citation omitted), 'I believe that the only way a circuit court can abuse his discretion on a Rule 35(b) motion is to commit a legal error, or that its ruling was marred by a fundamental defect which inherently results in a miscarriage of justice.' State v. Arbaugh, 215 W.Va. 132, 137, 595 S.E.2d 289, 294.

“Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syllabus Point 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

“To be clear, rulings issued by trial courts, as a rule, must contain the requisite findings of fact and conclusions of law ‘to permit meaningful appellate review.’ Syl. Pt. 3, in part, Fayette County Nat. Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997). ‘Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.’ Id. at 350, 484 S.E.2d at 233.” State v. Redman, 213 W.Va. 175, 178, 578 S.E.2d 369, 372 (2003).

In relevant part, the following conversation occurred during the plea hearing on November 2014:

COURT: Okay; What you’re pleading to is Count 2 of the indictment. It’s conspiracy destruction of property. All right. Do you know what conspiracy means?

DEFENDANT: Yes, ma’am.

COURT: Okay; How did you conspire to do that?

DEFENDANT: Well, I was mad so I kicked the guy’s truck.

COURT: Did you talk to anybody else about doing that?

DEFENDANT: No. They was there when I went there. My brother went with me but I didn’t have no plan on kicking it, and I left.

COURT: Where did you go?

DEFENDANT: I left there and went to my girlfriend’s house.

COURT: I meant where did you go to do that?

DEFENDANT: Marrowbone Junction;

COURT: And who went with you?

DEFENDANT: My brother was with me.

COURT: Okay; Did you all talk about that before you got there a little bit?

DEFENDANT: I was mad at the guy. I knocked on his doors first, though.

DEFENSE COUNSEL: Your brother knew you were going to do it?

DEFENDANT: Yes. He knew I was mad at him.

COURT: Okay; He knew you were mad. Was he with you when you went to the guy's house?

DEFENDANT: Yes.

COURT: And when you went there to do that did he know you were there to do that?

DEFENDANT: Not actually to kick the truck.

COURT: But he knew you were going to do something?

DEFENDANT: Yes.

The circuit court asked no further questions regarding the conspiracy, made the normal findings that the plea was entered into understandingly, knowingly, intelligently and voluntarily and accepted the plea. Based on the answers of the Defendant, the circuit court made a legal error in accepting his plea to conspiracy because the Defendant never testified that he and his brother agreed or conspired damage the truck. The Defendant further testified that he had no plan to kick the truck, and his brother only knew he was going to do something and did not actually know he was going to kick the truck.

Pursuant to West Virginia case law cited above, the circuit court abused its discretion by committing a legal error, thus, the Supreme Court has jurisdiction to consider the denial of the Rule 35(b) motion.

The victim in the conspiracy to commit destruction of property [\geq \$2,500] attended the sentencing hearing on January 22, 2015. Although the State represented to the circuit court that restitution for the destruction of property damages was \$2,580, the victim finally acknowledged that he had a private individual repair the truck for \$487.

Even though the victim admitted at the sentencing hearing that the damages to his truck amount to \$487 - a misdemeanor offense, the circuit court found the Defendant guilty of Count 2 of the Indictment (Conspiracy to Commit Destruction of Property [\geq \$2,500]) – a felony offense, and sentenced him to not less than one (1) year nor more than five (5) years in a state correctional facility.

The maximum penalty for a misdemeanor is a definite sentence of one (1) year. Thus, the circuit court's sentencing of the Defendant was not within the statutory limits for the actual crime committed, and as such, appellate review of the Rule 35(b) motion is warranted. Additionally, it was a legal error and an abuse of discretion to sentence the Defendant to a felony offense while knowing the offense was a misdemeanor. Because of this abuse of discretion, the Supreme Court of Appeals has jurisdiction to consider this error which was unrelated to the circuit denial of the Rule 35(b) motion.

The hearing on the Defendant's Motion for Reconsideration of Sentence [Rule 35(b) Motion] was conducted on May 12, 2015. After being informed that the Defendant did not show up for his presentence conference and consultation, the circuit court stated: "I mean, there's nothing for me to base any kind of rational sentence on if he doesn't

show up and participate in that, so he puts me in a bad position to where I have no choice but to run consecutive rather than concurrently.”

The circuit court did not delineate exactly what part of the presentence conference and consultation would provide information on which to base a rational sentence. Should the circuit court be referring to Level of Service/Case Management Inventory (“LS/CMI”) which is included in the presentence report, the Supreme Court of Appeal of West Virginia has made it clear in its August 22, 2013 memorandum that an LS/CMI assessment is merely a tool that may be used by circuit judges during sentencing, and is to be administered as soon as possible after the sentencing in cases where there is a binding plea agreement or when the presentence investigation has been waived. State v. Rogers, No. 14-0373 (2015) (Loughry, II, J., concurring). In this case, the sentence was not binding and it is believed that the consecutive sentences were imposed for an impermissible reason, and appellate review of the Rule 35(b) motion by an appellate court (Supreme Court of Appeal of West Virginia in the case at hand) is warranted.

Applying the foregoing West Virginia case law to the case before the Court, the circuit court’s June 18, 2015, Order Denying Motion for Reconsideration of Sentence did not contain findings of fact and conclusions of law sufficient to show that the circuit court adequately considered the assignments of error in his Rule 35(b) motion. Thus, the circuit court abused its discretion by not considering all assignments of error and basing its decision on impermissible factors, including not having a presentence investigation.

Simply, the circuit court did not address the specific assignments of error or the merits of the Petitioner’s Rule 35(b) motion. In the circuit court’s Order Denying Motion for Reconsideration of Sentence, the circuit court’s Findings of Fact #1 stated the date the

Defendant pled guilty, the felony offenses and their corresponding West Virginia Code sections. Findings of Fact #2 stated the sentencing date, terms of sentence for each of the two (2) offenses, amount of time given for time served and amount of restitution (\$6,628.00 to Ernestine Richardson). However, the circuit court failed to mention the amount of restitution (\$478.00) previously ordered to Randy Gillman for the felony conviction for Conspiracy [Destruction of Property]. Findings of Fact #3 stated that “[t]he Court did not follow the State’s recommendation of concurrent sentences and instead sentenced consecutive sentences.” Findings of Fact #4 Stated that the “Defendant, in his Motion, requests his sentences run concurrent.”

Conclusions of Law #1 of the circuit court’s Order Denying Motion for Reconsideration of Sentence quoted Rule 35(b) of the West Virginia Rules of Criminal Procedure and Conclusions of Law #2 stated, “The Court, after considering the record and Defendant’s circumstances outlined in his Motion hereby DENIES Defendant’s instant Motion.”

The circuit court abused its discretion when it denied the Defendant’s Rule 35(b) motion. The sentences imposed by the circuit court were for impermissible reasons, and the circuit court did not consider assignments of error in the Rule 35(b) motion in its denial of the Rule 35(b) motion; therefore, the Petitioner believes this Court has jurisdiction to consider the assignment of error not considered by the circuit court.

CONCLUSION

The Supreme Court of Appeals of West Virginia has jurisdiction to consider assignments of error unrelated to the circuit court’s denial of a Rule 35(b) motion if the circuit court has: (1) abused its discretion; (2) imposed a penalty beyond the statutory limits; (3) imposed a penalty for impermissible reasons; or (4) committed a legal error.

Respectfully submitted,

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By Counsel,



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CERTIFICATE OF SERVICE

I, Jerry M. Lyall, counsel for Kenneth Allen Marcum, Defendant/Petitioner, do hereby verify that I have served a true copy of PETITIONER'S SUPPLEMENTAL BRIEF upon the following parties, by depositing said copy in the United States mail, with first-class postage prepaid, on this 18th day of July 2016, addressed as follows:

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