

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER: 15-0696

STATE OF WEST VIRGINIA,

v.

KENNETH ALLEN MARCUM,

NOV 12 2015

BRIEF IN SUPPORT OF
PETITION FOR APPEAL

FROM THE CIRCUIT COURT OF
MINGO COUNTY, WEST VIRGINIA

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA


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I.

ASSIGNMENT OF ERROR

- (1) The Court erred when it did not follow the State's recommended sentence because the defendant failed to report to the Southwestern Day Report for an initial assessment and to the Mingo County probation office so that his Pre-sentence Investigation Report and LS/CMI could be prepared.
- (2) The Court erred by sentencing the defendant on a felony offense to which the defendant pled guilty even though the Court learned at sentencing that the offense committed by the defendant was really a misdemeanor instead of a felony.

II.

STATEMENT OF THE CASE

This is a criminal case wherein the defendant was indicted on: one (1) count of Felony Destruction of Property [\geq \$2,500]; one (1) count of Conspiracy (Destruction of Property [\geq \$2,500]); one (1) count Entry of Building Other Than Dwelling; and one (1) count Grand Larceny. (A.R. 04-05) The Court imposed the following additional conditions on the defendant's bond: (1) electronic home confinement and (2) an initial assessment by the Southwestern Day Report Center.

The defendant entered into a plea agreement wherein he pled guilty to Conspiracy (Destruction of Property [\geq \$2,500]) with the co-conspirator being his brother, and Attempt [Grand Larceny] and the State recommended that the two sentences would "run concurrently and not consecutively." (A.R. 22-23) However, the Court sentenced the defendant to consecutive instead of concurrent sentences of imprisoned in a state correctional facility for an indefinite term of not less than one (1) year nor more than three (3) years on the guilty plea to Attempt

[Grand Larceny], plus restitution in the amount of \$6,628.00, and not less than one (1) year nor more than five (5) years on the guilty plea to [Conspiracy - Felony Destruction of Property], plus restitution in the amount of \$478.00. (A.R. 24-26)

Petitioner's Motion for Reconsideration of Sentence was filed on April 20, 2015 and a hearing on said motion was held on May 12, 2105. On June 18, 2015, the court entered its Order Denying Motion for Reconsideration of Sentence.

III. SUMMARY OF ARGUMENT

As part of the defendants' bond, the Court placed the defendant on electronic home confinement and ordered him to attend the Southwestern Day Report Center for an initial assessment. However, the defendant failed to report for his initial assessment.

After the defendant entered his guilty plea, the Court ordered the Mingo County probation office to prepare a Pre-sentence Investigation Report and LS/CMI. The probation office attempted to set up an appointment for the defendant by calling the telephone number that he had provided at his plea hearing; however, the defendant never returned the telephone calls and never appeared for an interview with the probation office. Thus, the probation office did not prepare a Pre-sentence Investigation Report and LS/CMI. The reason the defendant gave for not appearing at Southwestern Day Report Center and the probation office was that he was working and had no transportation.

The testimony before the Grand Jury (A.R. 38) and the subsequent indictment (A.R. 04) state that the destruction of property caused a loss in value of \$2,551.09.

However, the victim appeared at the sentencing hearing and informed the court that the cost to repair the damages to his truck was \$478.00 and not \$2,551.09. (A.R. 49-50)

Nevertheless, the Court sentenced the defendant to imprisonment in a state correctional facility for an indefinite term of not less than one (1) year nor more than five (5) years on the Conspiracy, a felony conviction, even though the Court ordered restitution in the amount of \$478.00, a misdemeanor amount.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves results that are against the great weight of the evidence, oral argument under Rev. R.A.P. 19 is appropriate. However, pursuant to Rev. R.A.P. 18(a), the Court may find that oral argument is not necessary because the facts and legal arguments are adequately presented in the brief and record and the decisional process would not be significantly aided by oral argument.

V.

ARGUMENT

A. Introduction

The questions before the Honorable Court are whether or not the Circuit Court of Mingo County erred by: (1) not following the State's recommended sentence because the defendant failed to report to the Southwestern Day Report Center for an initial assessment and to the Mingo County probation office so that his Pre-sentence Investigation Report and LS/CMI could be prepared and (2) sentencing the defendant on a felony offense to which the defendant pled guilty even though the Court learned at sentencing that the offense committed by the defendant was a misdemeanor and not a felony

B. Standard of Review

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court articulated a different criminal standard of review concerning the sufficiency of evidence under the United

States Constitution than the one addressed by the West Virginia Supreme Court of Appeals in *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978). “In a sufficiency of the evidence claim under *Jackson*, an appellate court, while reviewing the record in the light most favorable to the prosecution, must determine whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ 443 U.S. at 319, 99 S.Ct. at 2789, 61 L.Ed.2d at 573. (Emphasis in original).” *State v. Guthrie*, 194 W.Va. 657, 667, 461 S.E.2d 163, 174 (1995).

“After contrasting *Starkey* and its progeny with the standard of review announced in *Jackson*, we believe it is desirable to reconcile our differences and to adopt the federal standard of review both as to *Jackson* generally and as to the standard of review in circumstantial evidence cases. By doing so, however, we continue a highly deferential approach: Appellate courts can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt.” *State v. Guthrie*, 194 W.Va. 657, 667, 461 S.E.2d 163, 174 (1995).

C. The Circuit Court erred by not following the State’s recommended sentence because the defendant failed to report to the Southwestern Day Report Center for an initial assessment and to the Mingo County probation office so that his Pre-sentence Investigation Report and LS/CMI could be prepared.

West Virginia Code §62-12-6 is entitled “Powers and duties of probation officers” and in pertinent part states:

(a) Each probation officer shall:

- (1) Investigate all cases which the court refers to the officer for investigation and shall report in writing on each case;
- (2) Conduct a standardized risk and needs assessment, using the instrument adopted by the Supreme Court of Appeals of West Virginia, for any probationer for whom an assessment has not been conducted either prior to placement on probation or by a

specialized assessment officer. The results of all standardized risk and needs assessments are confidential

As part of the plea agreement, the defendant pled guilty to Conspiracy (Destruction of Property [\geq \$2,500]). The defendant's brother (Ance Marcum) was the co-conspirator and his parole was revoked because of these new charges, and he had to serve four hundred six-two (462) days of incarceration due to the parole violation. Upon his release from incarceration, he was arrested on the new charges.

The State was adamant that in any plea agreement the defendant would receive a sentence of not less than one (1) year nor more than five (5) years. Based on the four (4) charges for which the defendant was indicted, Conspiracy was the only possible offense, or lesser included offense, for which the sentence was not less than one (1) year nor more than five (5) years. The defendant agreed to take the plea agreement with the verbal promise that his brother's charge would be reduced so that he would not have to spend any more in jail or prison and the defendant's sentence for Attempt [not less than one (1) year nor more than three (3) years] would run concurrent with the Conspiracy sentence. Subsequently, the defendant's brother pled guilty to Attempt [Destruction of Property \geq \$2,500] and was sentenced to a definite term of twelve (12) months in jail and given credit for four hundred six-two (462) days already served; thus, he did not have to serve any more time in jail.

In *State v. Rogers*, No. 14-0373, page 3 (January 9, 2015), the petitioner argued "that the circuit court abused its discretion in denying his motion for reconsideration of sentence because he was not administered a LS/CMI risk and needs assessment prior to sentencing and that, consequently, the assessment was not included in the pre-sentence investigation report for the

circuit court's consideration in sentencing.”). Petitioner argued that if an LS/CMI assessment had been completed, it would have shown that petitioner is not a risk to the community *Id.* at 2. The petitioner contended that his presentence “report failed to include any objective information regarding petitioner's risk to the community if sentenced to probation or some other alternate sentencing.” *Id.*

In *Rogers*, the Court affirmed the circuit court’s denial of the motion for reconsideration and stated in Footnote 6 that “[g]iven our holding herein, we decline to address whether a LS/CMI risk and needs assessment was required to have been administered to petitioner prior to sentencing and included in the pre-sentence investigation report.”

In concurring with the Court’s decision in *Rogers*, Justice Loughry stated: “Risk and needs assessments are provided for under West Virginia Code § 62-12-6(a)(2) (2014). This Court previously addressed these assessments in a memorandum to all circuit judges dated August 22, 2013. In this memorandum, we made clear that an LS/CMI assessment is merely a tool that may be used by circuit judges during sentencing... Ultimately, we emphasized that circuit judges do not have to use the results of the LS/CMI in their sentencing decisions, emphasizing that the use of the information in an LS/CMI assessment is ‘entirely left to [the circuit judges] discretion.’” *Rogers*, pp.5-6.

The Court did not follow the State's recommendation because the defendant failed to report for his initial assessment at the Southwestern Day Report Center and failed to respond to requests from the probation office to schedule an appointment so that a Pre-sentence Investigation Report and LS/CMI could be prepared. At the sentencing hearing, the court stated: “Well, if I understand you correctly he didn’t show up to his presentence conference or consultation? 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." (A.R. 70)

The court should have based its sentence on the Plea Agreement because the State and counsel for the defendant had spent much time reaching an acceptable plea agreement to both sides. Also, if the court bases its sentencing on the Pre-sentence Investigation Report and LS/CMI, then sentencing should have been delayed until such report could have been repaired. A positive point is that the defendant was employed at a local sawmill during all this time and was riding to and from work with a co-worker.

D. The Circuit Court erred by sentencing the defendant on a felony offense to which the defendant pled guilty even though the Court learned at sentencing that the offense committed by the defendant was really a misdemeanor instead of a felony.

The testimony before the Grand Jury indicated that the destruction of property damage was \$2,551.09 and an estimate from a local repair shop provided to defense counsel during discovery showed the damage to be \$2,581.09 [price to "paint all the truck" and "fix the hole (sic) truck"]. However, the victim appeared at the sentencing hearing and informed the court that the cost to repair the damages to his truck was \$478.00. Nevertheless, the Court sentenced the defendant to imprisonment for not less than one (1) year nor more than five (5) years [Conspiracy - Destruction of Property \geq \$2,500] but ordered restitution in the amount of \$478.00.

After learning from the owner of the truck that the actual damage to the truck was only \$478.00, a misdemeanor, the Court should have revoked the plea agreement or sentenced the defendant on the lesser included charge Destruction of Property [\leq \$2,500.00]. In pertinent part, West Virginia Code §61-10-31 states that:

Any person who violates the provisions of this section by conspiring to commit an offense against the state which is a misdemeanor shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by confinement in the county jail for not more than one year or by a fine of not more than one thousand dollars, or, in the discretion of the court, by both such confinement and fine.”

Based on the value of the damage to the truck (\$478.00) the crime committed by the defendant was a misdemeanor. Pursuant to West Virginia Code §61-10-31, the defendant should have been punished by sentencing him to confinement in the county jail for not more than one (1) year, or by a fine not more than a thousand dollars (\$1,000), or by both such confinement and fine. Therefore, the defendant’s maximum sentence for the Conspiracy should have been one (1) year in the Southwestern Regional Jail and a one thousand dollar (\$1,000) fine.

VI.

CONCLUSION

Because reporting to the Southwestern Day Report Center for an assessment was made a part of the defendant’s bond, the proper remedy for failing to report would have been the issuance of a capias for failure to appear. Increasing the length of the defendant’s sentence by running the two (2) sentences consecutively, instead of concurrently as recommended by the State, is not the proper remedy.

The Petitioner prays that his Petition for Appeal be accepted, that the complete record be reviewed and based on the errors detailed herein by the Circuit Court of Mingo County, West Virginia, that the Sentencing Order and Commitment Order be set aside. The Petitioner requests that the Honorable Court reverse the orders of the Circuit Court of Mingo County, West Virginia and direct that a new sentencing order be entered that reflects a misdemeanor sentence on the Destruction of Property charge because the value of the damage was only \$478.00, much less than the \$2,500 required for felony destruction of property. In the alternative, the Petitioner requests that the Honorable Court order that the two (2) sentences shall run concurrently and not

consecutively. After all, no rational trier of fact could have found the essential elements of the crime Conspiracy (Destruction of Property [\geq \$2,500]) beyond a reasonable doubt as required by *Jackson and Guthrie*.

Dated this the 12th day of November 2015.

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CERTIFICATE OF SERVICE

I, Jerry M. Lyall, do hereby certify that I have served a true and exact copy of the foregoing Brief in Support of Petition for Appeal on this 12th day of November 2015 to the following:

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I, Jerry M. Lyall, do hereby certify that I served a true and exact copy of the Brief in Support of Petition for Appeal in the foregoing case by United States Mail, prepaid, overnight delivery, on the 12th day of November 2015, addressed as follows:

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