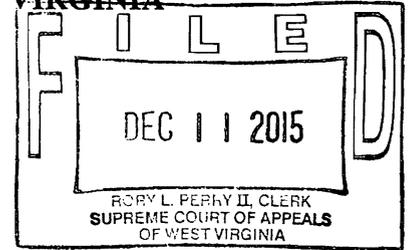


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0696



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

vs.

KENNETH ALLEN MARCUM,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. SUMMARY OF THE ARGUMENT	5
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	5
IV. ARGUMENT.....	6
A. Petitioner Is Wrong On The Applicable Standard Of Review	6
B. Petitioner Forfeited His Claim Regarding The Lack Of A Pre-Sentence Report When He Failed To Object And, Even If His Claim Is Not Forfeited, The Circuit Court Has Discretion Regarding Sentencing And The General Rule Is That Sentences Run Consecutively	7
C. Petitioner’s Guilty Plea Was Entered On Competent Advice Of Counsel And The Factual Basis Provided At The Guilty Plea Was Not Required To Be A Determination Of Guilty Beyond A Reasonable Doubt.....	13
V. CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	6
<i>Myers v. Frazier</i> , 173 W. Va. 658, 319 S.E.2d 782 (1984)	13, 15
<i>State ex rel. Burton v. Whyte</i> , 163 W. Va. 276, 256 S.E.2d 424 (1979)	13, 15
<i>State ex rel. Farmer v. McBride</i> , 224 W. Va. 469, 686 S.E.2d 609 (2009)	8
<i>State ex rel. Farmer v. Trent</i> , 209 W. Va. 789, 551 S.E.2d 711 (2001)	14
<i>State v. Allen</i> , 208 W. Va. 144, 539 S.E.2d 87 (1999)	8
<i>State v. Campbell</i> , No. 15-0031, 2015 WL 5555574 (W. Va. Sept. 21, 2015) (memorandum decision)	9, 10
<i>State v. Goodnight</i> , 169 W. Va. 366, 287 S.E.2d 504 (1982)	7
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	6
<i>State v. Hedrick</i> , No. 14-0484, 2015 WL 5928508 (W. Va. Oct. 7, 2015).....	6, 7
<i>State v. James Edward C.</i> , No. 13-0969, 2014 WL 2404319 (W. Va. May 30, 2014) (memorandum decision)	8, 9
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	7
<i>State v. Rogers</i> , No. 14-0373, 2015 WL 869323 (W. Va. Jan. 9, 2015) (memorandum decision)	7, 8
<i>State v. Wasson</i> , No. 14-0950, 2015 WL 5928446 (W. Va. Oct. 8, 2015).....	6, 7
 Statutes	
W. Va. Code § 61-3-12 (2009)	9
W. Va. Code § 61-3-13 (1994)	9
W. Va. Code § 61-3-30 (2004)	9
W. Va. Code § 61-10-31 (1971)	9
W. Va. Code § 61-11-21 (1923)	8
 Other Authorities	
W. Va. R. App. P. 10 (2010)	9
W. Va. R. Crim. P. 11 (1995)	12

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Defendant Below, Petitioner.

RESPONDENT'S BRIEF

COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief.

I.

STATEMENT OF THE CASE

Petitioner was indicted of four (4) counts: [1] Destruction of Property [\geq \$2,500.00]; [2] Conspiracy to Destruction of Property [\geq \$2,500.00]; [3] Entry of Building other than Dwelling; and [4] Grand Larceny. (App. at 4-6.)

Petitioner pled guilty to Conspiracy and Attempt (Grand Larceny). (App. at 12.) Petitioner read and signed a Petition to Enter Guilty Plea, stating that he had consulted with an attorney prior to accepting a plea, that he could invoke his rights to trial by jury, and that he was waiving his rights. (App. at 7-15.) The Petition to Enter Guilty Plea clearly states that the Circuit Court had discretion regarding sentencing:

I know and understand that this Court will not be bound by any agreement or recommendation by the Prosecuting Attorney which pertains to the sentence I will receive if I plead guilty in this case, that the matter of sentencing is strictly for the Court to decide, and that the Court will not be obligated or required to give any effect whatever to such recommendations.

I understand that I cannot withdraw this plea if I am not satisfied with the sentence that is imposed or the disposition that is made. I understand that I cannot withdraw this plea if the Court does not follow the recommendation of the Prosecuting Attorney on the sentence, the disposition or on probation. I understand that if probation is denied I cannot withdraw this plea.

(App. at 13-4.)

Petitioner's counsel filed an Attorney's Statement in Support of Guilty Plea. (App. at 16-7.) Petitioner's counsel stated that in his opinion, there is "admissible evidence available to the State and disclosed to [him] in this case which is sufficient to support a guilty verdict on the offense for which the plea is offered, or an included greater offense." (App. at 16.) Petitioner also filed a Statement in Support of Plea of Guilty. (App. at 18-21.)

On November 17, 2014, the Circuit Court held a Plea Hearing. (App. at 56-72.) The Circuit Court inquired of Petitioner whether he read, understood, and signed the Plea Agreement, the Petition to Enter Guilty Plea, the Defendant's Statement in Support of Guilty Plea, the Attorney's Statement in Support of Guilty Plea, and the Plea Form. (App. at 56-9.) Petitioner answered affirmatively. *Id.* The Circuit Court's colloquy with Petitioner covered his understanding of his rights, including the rights he was waiving by pleading guilty. (App. at 59-65.) The Circuit Court expressly inquired of Petitioner whether he understood the Court's discretion regarding sentencing:

Q: Do you understand that if the Court doesn't want to the Court does not have to accept the State's recommended sentence, and, if that happens, you don't have the right to withdraw your plea? Do you understand?

A: Yes, ma'am.

(App. at 62.) Petitioner pled guilty and the Circuit Court accepted his plea. (App. at 62-6.) The Circuit Court entered a Plea Order, which accepted Petitioner's guilty plea to one (1) count of Conspiracy [Destruction of Property] and one (1) count of Attempt [Grand Larceny]. (App. at 22-3.)

On January 22, 2015, the Circuit Court held a Sentencing Hearing. (App. at 43-55.) At the beginning of the Hearing, the Circuit Court noted that Petitioner was incarcerated and inquired how long he had been incarcerated. (App. at 44.) The State responded that Petitioner had violated his home confinement. *Id.* Petitioner failed to go to his appointments with probation and failed to report to the Day Report Center. (App. at 45.) Because of Petitioner's failure to report, the State was unable to do a pre-sentence investigation report. *Id.* Petitioner's counsel proffered that Petitioner's failure to go to his appointments and to report was due to his lack of transportation. (App. at 44-5.) However, Petitioner admits that in addition to failing to show up for his appointment, Petitioner failed to return any of the telephone calls made to Petitioner. Pet'r's Br. at 2.

Next, the State informed the Circuit Court that the amount of restitution for the Destruction of Property count was \$2,580.00, which was based off an estimate that was obtained prior to the Indictment. (App. at 48-9.) The victim testified that he had a private individual do the repairs, which totaled \$478.00. (App. at 50.) Then, the Circuit Court sentenced Petitioner. (App. at 52-3.)

The Circuit Court entered a Sentencing Order, which sentenced Petitioner to a term of one (1) to five (5) years for Conspiracy [Destruction of Property \geq \$2,500.00] and to a term of one (1) to three (3) years for Attempt [Grand Larceny], with the terms to run consecutively. (App. at 24-6.) Petitioner was ordered to pay restitution, including a total of \$478.00 to Randy

Gillman for the Destruction of Property. (App. at 25-6.) Petitioner's counsel was given ten (10) days to file written objections to the Sentencing Order. (App. at 26.) No written objections were filed. (App. at 2.) The Circuit Court also entered a Commitment Order, which listed Petitioner's sentence, including that his sentence run consecutively. (App. at 73-5.)

On April 20, 2015, Petitioner filed a Motion for Reconsideration of Sentence. (App. at 2, 27-30.)¹ Petitioner argued for running the sentences "concurrently instead of consecutively" on the basis that he "only agreed to plead guilty to Conspiracy [Destruction of Property ≥ \$2,500.00] because he believed the sentence would run currently (sic) with the sentence for Attempt [Grand Larceny]." (App. at 28-9.) Although Petitioner alleged that the restitution amount of \$478.00 was less than the Prosecution's estimate of \$2,581.89 that was obtained, Petitioner never actually argued that his sentence should have been a misdemeanor sentence rather than a felony sentence regarding Destruction of Property. (App. at 27-30.)

On May 12, 2015, the Circuit Court held a Hearing on Petitioner's Motion for Reconsideration of Sentence. (App. at 68-72.) Petitioner argued that the Circuit Court should sentence Petitioner to concurrent sentences rather than consecutive sentences or be granted probation. (App. at 69-70.) At the Hearing the Circuit Court stated that "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." (App. at 70.)

The Circuit Court treated Petitioner's Motion for Reconsideration as a Rule 35(b) Motion for reduction of Sentence. (App. at 32-3.) The Circuit Court entered an Order Denying Motion for Reconsideration of Sentence. *Id.* This appeal followed.

¹ The Motion for Reconsideration of Sentence provided in the Appendix is not signed and neither is the Certificate of Service that accompanies the Motion.

II.

SUMMARY OF THE ARGUMENT

This case is not subject to appellate review because Petitioner has not asserted that either of his sentences is beyond the statutory limits or is based on an impermissible factor. As such, this Court should affirm Petitioner's conviction and sentence.

Even if this case were subject to appellate review, Petitioner's claims should be denied because Petitioner failed to report to the Day Report Center, failed to attend any of his appointments with probation, and failed to return any telephone calls, making a pre-sentence report impossible. Moreover, the general rule is that sentences run consecutively and Circuit Courts have discretion in sentencing. As such, this Court should affirm Petitioner's conviction and sentence.

The Circuit Court was not required, pursuant to Rule 11(f) of the West Virginia Rules of Criminal Procedure to make a factual finding beyond a reasonable doubt of Petitioner's Guilt. Petitioner understood the charges and the penalties for each charge and entered a guilty plea on the advice of counsel. Petitioner's counsel even filed an Attorney's Statement in Support of Guilty Plea, which affirmed that the evidence was sufficient to support a guilty verdict for the offense which the plea is offered. As such, this Court should affirm Petitioner's conviction and sentence.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument. This matter is appropriate for a Memorandum Decision.

IV.

ARGUMENT

Petitioner asserts two (2) assignments of error: [1] error to depart from the State's recommended sentence and [2] error to sentence Petitioner to felony offense that he pled guilty to committing. Pet'r's Br. at 1. This Court should reject both of Petitioner's claims as well as Petitioner's proposed standard of review.

A. **Petitioner Is Wrong On The Applicable Standard Of Review.**

Petitioner's citations regarding the standard of review are inapposite. *See* Pet'r's Br. at 3-4. Petitioner cites to *Jackson v. Virginia*, 443 U.S. 307 (1979). *Id.* While Petitioner is correct that this Court adopted *Jackson's* standard of review in *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), the standard of review for both *Jackson* and *Guthrie* relates to claims involving sufficiency of the evidence. *Jackson*, 443 U.S. at 318-19; *Guthrie*, 194 W. Va. at 667-68, 461 S.E.2d at 173-74. A sufficiency of the evidence claim arises where, following the presentation of evidence at a trial, a criminal defendant asserts that the evidence was insufficient to support a conviction. *See id.* Here, Petitioner is not raising a sufficiency of the evidence claim in this appeal as there was no trial and no evidence offered to a jury. *See* Pet'r's Br. Rather, Petitioner's two (2) assignments of error are claims regarding errors in sentencing following a plea deal. *Id.* As such, the standard of review for sufficiency claims is not applicable.

The proper standard of review for Petitioner's claims is abuse of discretion: "[t]he Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Wasson*, No. 14-

0950, 2015 WL 5928446 at *1 (W. Va. Oct. 8, 2015) (quoting Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)); Syl. Pt. 1, *State v. Hedrick*, No. 14-0484, 2015 WL 5928508 at *1 (W. Va. Oct. 7, 2015) (quoting, Syl. Pt. 1, *State v. Watkins*, 214 W. Va. 477, 590 S.E.2d 670 (2003); Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)).

Moreover, “[s]entences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 366, 287 S.E.2d 504, 505 (1982). In this case, Petitioner has not asserted that either of his sentences is beyond the statutory limits or is based on an impermissible factor. *See* Pet’r’s Br. As such, Petitioner’s claims are not subject to appellate review and this Court should deny Petitioner’s claims.²

B. Petitioner Forfeited His Claim Regarding The Lack Of A Pre-Sentence Report When He Failed To Object And, Even If His Claim Is Not Forfeited, The Circuit Court Has Discretion Regarding Sentencing And The General Rule Is That Sentences Run Consecutively.

“ ‘ “One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result” in the imposition of a procedural bar to an appeal of that issue.’ ” *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (citations omitted). Petitioner did not object at the Sentencing Hearing to a lack of a pre-sentence investigation report. (App. at 43-52.) As such, Petitioner forfeited any claim of error. Even Petitioner’s citation to *State v. Rogers*, No. 14-0373, 2015 WL 869323 (W. Va. Jan. 9, 2015) (memorandum decision), demonstrates that this Court should deny Petitioner’s claims. In *Rogers*, the criminal defendant was “not administered a LS/CMI risk and needs

² Even though Respondent believes that *Goodnight* forecloses Petitioner’s claims, Respondent will answer the substance of Petitioner’s assignments of error so that this Court does not “assume that the respondent agrees with the petitioner’s view of the issue” as provided for in Rule 10(d) of the West Virginia Rules of Appellate Procedure.

assessment prior to sentencing.” *Id.* at *2. This Court, in *Rogers*, found that the failure to object resulted in forfeiture of any claim of error. *Id.* at *3. Here, Petitioner did not raise the issue until his Motion for Reconsideration of Sentence and even then, did not argue that it was error to not have a pre-sentence investigation report. (App. at 27-30.)

Moreover, in his concurrence, Justice Loughry pointed out that this Court has previously “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.’” *Id.* at *4 (emphasis in original).

Therefore, Petitioner has forfeited any claim of error regarding his claim that the Circuit Court should not have sentenced him without a pre-sentence investigation report or that the Circuit Court was required to sentence him to concurrent sentences in the absence of a pre-sentence investigation report.

However, even if Petitioner did not forfeit his claim of error by failing to raise it for the Circuit Court, Petitioner’s claim still fails because the general rule is that sentences run consecutively. W. Va. Code § 61-11-21 (1923); Syl. Pt. 7, *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 686 S.E.2d 609, 612 (2009) (*per curiam*); Syl. Pt. 3, *State v. Allen*, 208 W. Va. 144 147, 539 S.E.2d 87, 90 (1999). The exception to the rule, allowing for concurrent sentencing, is entirely within the Sentencing Court’s discretion. *Id.* In this case, the Circuit Court followed the general rule and sentenced Petitioner to consecutive sentences. (App. at 24-6.) The Circuit Court was not obligated to run Petitioner’s sentences concurrently as that decision was within the discretion of the Circuit Court.

Additionally, this Court has upheld the imposition of consecutive sentences where a plea resulted in a much lesser sentence than the crimes for which he was indicted. *State v. James*

Edward C., 13-0969, 2014 WL 2404319 at *2 (W. Va. May 30, 2014) (memorandum decision). Here, under the Indictment, Petitioner faced a sentence of one (1) to ten (10) years for Destruction of Property [\geq \$2,500.00]; a sentence of one (1) to five (5) years for Conspiracy to Destruction of Property [\geq \$2,500.00]; a sentence of one (1) to ten (10) years for Entry of Building other than Dwelling; and a sentence of one (1) to ten (10) years for Grand Larceny, for a total of four (4) to thirty-five (35) years. (App. at 4-6) (citing W. Va. Code \S 61-3-30(b) (2004); W. Va. Code \S 61-10-31 (1971); W. Va. Code \S 61-3-12 (2009); and W. Va. Code \S 61-3-13(a) (1994)). Instead, because of Petitioner's plea deal, Petitioner did not plea to and was not sentenced for Destruction of Property [\geq \$2,500.00] or Entry of Building other than Dwelling. (App. at 4-6, 24-6.) Additionally, Petitioner only had to plead guilty to Attempted Grand Larceny instead of Grand Larceny. *Id.* As such, Petitioner was only sentenced to a term of one (1) to five (5) years for Conspiracy [Destruction of Property \geq \$2,500.00] and to a term of one (1) to three (3) years for Attempt [Grand Larceny], for a total of two (2) to eight (8) years. *Id.* Nonetheless, Petitioner wishes this Court would eliminate the discretion of the Circuit Court and further reduce his sentence to a term of one (1) to five (5) years. Pet'r's Br. at 4-7. This Court should decline to do so.

To the extent that Petitioner focuses on his brother's charges as it relates to Petitioner's plea and as it relates to any new charges, such factual claims are not in the record and this Court should disregard all such claims. The West Virginia Rules of Appellate Procedure require arguments to "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." W. Va. R. App. P. 10(c)(7) (2010); *State v. Campbell*, No. 15-0031, 2015 WL 5555574 at *2 (W. Va. Sept. 21, 2015) (memorandum decision). If a Petitioner has failed to

adequately support his or her claim “by specific references to the record,” then “[t]he Court may disregard [those] errors.” *Id.* As such, this Court should disregard any and all claims related to Petitioner’s brother.

To the extent that Petitioner argues that “[a] positive point is that [he] was employed at a local sawmill during all this time and was riding to and from work with a co-worker,” Petitioner is incorrect. *See* Pet’r’s Br. at 7. The fact that Petitioner could obtain transportation to get to work calls into question Petitioner’s assertions that he could not go to his appointments with probation and that he could not report to the Day Report Center because he did not have transportation. (App. at 44-5.) Petitioner’s convenient inability to secure transportation to his appointments and for reporting is highlighted more by his failure to return any of the telephone calls made to Petitioner. Pet’r’s Br. at 2. Petitioner cannot now argue that it was error for the Circuit Court to sentence him without a pre-sentence investigation report when the State was deprived of the ability to provide the report by Petitioner’s failure to go to his appointments, report, or return any telephone calls. (App. at 45.) To hold that a criminal defendant can prevent sentencing or can require a Court to impose concurrent sentences by failing to attend his appointments with probation, failing to report to the Day Report Center, and by failing to return telephone calls, is bad policy and would open the floodgates to criminal defendants attempting to game the system.

Moreover, Petitioner misstates the facts:

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.”

Pet'r's Br. at 6-7 (emphasis added). However, the Circuit Court never said anything about a link between Petitioner's failure to report and consecutive sentences at the Sentencing Hearing. (App. at 43-54.) Moreover, the Circuit Court said nothing about a link between Petitioner's failure to report and consecutive sentences in the Sentencing Order. (App. at 24-6.) It was not until the Hearing on Petitioner's Motion for Reconsideration that the Circuit Court made the comment, quoted by Petitioner in his brief as if it occurred at the Sentencing Hearing, that Petitioner's failure to show up prevented a pre-sentence report and, as a result, made it difficult to depart from the general rule of consecutive sentences. (App. at 70.) In other words, the Circuit Court was using hindsight to determine if there was any basis to reconsider the imposition of consecutive sentences and it was apparent to the Circuit Court that Petitioner's own actions demonstrated that it would be irrational to impose a more lenient sentence than the statutory default on a person who fails to attend his appointments with probation, who fails to report to the Day Report Center, and who fails to return telephone calls. *See id.*

Finally, Petitioner's argument that "[t]he 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," ignores that facts and the law. Pet'r's Br. at 7. As to the facts, Petitioner ignores the fact that the Plea Agreement was crystal clear that the Circuit Court had discretion regarding sentencing:

I know and understand that this Court will not be bound by any agreement or recommendation by the Prosecuting Attorney which pertains to the sentence I will receive if I plead guilty in this case, that the matter of sentencing is strictly for the Court to decide, and that the Court will not be obligated or required to give any effect whatever to such recommendations.

I understand that I cannot withdraw this plea if I am not satisfied with the sentence that is imposed or the disposition that is made. I understand that I cannot withdraw this plea if the Court does not follow the recommendation of the

Prosecuting Attorney on the sentence, the disposition or on probation. I understand that if probation is denied I cannot withdraw this plea.

(App. at 13-4.) Petitioner ignores the fact that the Circuit Court made sure that Petitioner understood that discretion of the Circuit Court regarding sentencing:

Q: Do you understand that if the Court doesn't want to the Court does not have to accept the State's recommended sentence, and, if that happens, you don't have the right to withdraw your plea? Do you understand?

A: Yes, ma'am.

(App. at 62.) For Petitioner to suggest that the did not base the sentence on the Plea Agreement is to have this Court turn a blind eye to the actual language used which makes discretion of the Circuit Court regarding sentencing one (1) of the terms of the Plea Agreement. As such, the Circuit Court, in imposing consecutive sentences, was merely invoking one (1) of the terms of the Plea Agreement, which provided that the State's recommendation of concurrent sentencing was only a recommendation and was not binding.

As to the law, Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure clearly provide that plea agreements may contain a recommendation or request for a particular sentences, but "that such recommendation or request shall not be binding upon the court." W. Va. R. Crim. P. 11 (1995). Petitioner would have this Court ignore the law, which leaves sentencing to the discretion of the Circuit Court.

Therefore, because the general rule is that sentences run consecutively; because a Circuit Court has discretion regarding sentencing; because the Plea Agreement was clear that the Circuit Court was not bound to impose concurrent sentences; because Petitioner's plea resulted in a much lesser sentence than the crimes for which he was indicted; because Petitioner fails to cite to any portion in the record that relates to claims regarding his brother's charges; because the West Virginia Rules of Appellate Procedure require specific citations to the record; because failure to

cite to the record may result in disregarding such claims; because Petitioner was able to secure transportation at times, but was conveniently not able to get transportation to any of his appointments with probation or to report to the Day Report Center; because Petitioner failed to return any of the telephone calls made to him; and because the lack of a pre-sentence report was not due to any actions or inactions on the part of the State, but rather to Petitioner's failure to report and to return phone calls, this Court should affirm Petitioner's conviction and sentence.

C. Petitioner's Guilty Plea Was Entered On Competent Advice Of Counsel And The Factual Basis Provided At The Guilty Plea Was Not Required To Be A Determination Of Guilty Beyond A Reasonable Doubt.

Petitioner sought to enter a guilty plea, with advise of competent counsel, and the Circuit Court was not required to use Rule 11(f) of the West Virginia Rules of Criminal Procedure to make a factual determination, beyond a reasonable doubt, that Petitioner was guilty. "A guilty plea based on competent advice of counsel represents a serious admission of factual guilt, and where an adequate record is made to show it was voluntarily and intelligently entered, it will not be set aside." Syl. Pt. 3, *State ex rel. Burton v. Whyte*, 163 W. Va. 276, 276, 256 S.E.2d 424, 425 (1979). Moreover, a Circuit Court's finding of a factual basis for the plea is not a determination of guilt beyond a reasonable doubt:

Plea bargaining is far removed from the traditional guilt-finding process attendant to a jury or nonjury trial. The primary purpose of a plea bargain arrangement is to avoid the factual guilt determination process, as well as to avoid the ordeal of multiple trials. The court's role is not to make a formal adjudication of guilt beyond a reasonable doubt on the charge to which the defendant is willing to plead, nor does the court determine whether the defendant is innocent of the charges which the prosecutor is willing to dismiss. The central role of the court in a plea bargain, insofar as the defendant is concerned, is to ascertain that the plea is voluntarily and intelligently made and that the defendant understands its consequences and the constitutional rights he is waiving.

Myers v. Frazier, 173 W. Va. 658, 673, 319 S.E.2d 782, 797 (1984) (noting that "[a]lthough Rule 11(f) requires a court to be satisfied that there is a factual basis for the guilty plea, this does

not mean that the court must be satisfied beyond a reasonable doubt that the defendant is in fact guilty”).

Moreover, in *State ex rel. Farmer v. Trent*, 209 W. Va. 789, 551 S.E.2d 711 (2001), this Court held that the requirement under Rule 11(f) to provide a factual basis of the plea is not “constitutionally necessary” and that in the absence of a claim of factual innocence, “a simple violation of Rule 11(f) may not, standing alone and without a showing of prejudice, serve as a predicate for collateral relief.” *State ex rel. Farmer v. Trent*, 209 W. Va. 789, 796, 551 S.E.2d 711, 718 (2001) (citations omitted).

Petitioner does not claim factual innocence. *See* Pet’r’s Br. Rather Petitioner merely claims that the Circuit “Court should have revoked the plea agreement or sentenced the defendant on the” misdemeanor charge rather than on the felony charge that he pled guilty to committing when the Circuit Court became aware that the victim was able to get his truck fixed by a private person for far less than what it would have cost to fix it at the garage that gave the estimate. Pet’r’s Br. at 7-8. Additionally, in Petitioner’s Attorney’s Statement in Support of Guilty Plea, Petitioner’s counsel opined that there is “admissible evidence available to the State and disclosed to [him] in this case which is sufficient to support a guilty verdict on the offense for which the plea is offered, or an included greater offense.” (App. at 16.) Furthermore, the Circuit Court discussed the two (2) counts that Petitioner was pleading guilty to in his Plea Agreement, including the elements and the penalty and inquired of Petitioner if he understood and Petitioner responded affirmatively. (App. at 59-60.) Petitioner was asked if he was pleading guilty because he believed himself to be guilty and Petitioner responded affirmatively. (App. at 66.)

Petitioner would have this Court convert the Plea Agreement process into a determination by the Circuit Court beyond a reasonable doubt that the Petitioner was guilty in clear contravention of this Court's holdings in *State ex rel. Burton v. Whyte* and in *Myers v. Frazier*. See Syl. Pt. 3, *State ex rel. Burton*, 163 W. Va. at 276, 256 S.E.2d at 425; *Myers*, 173 W. Va. at 673, 319 S.E.2d at 797. This Court should decline to do so.

Therefore, because Petitioner entered his guilty plea on the advice of counsel; because a guilty plea is not a finding of fact beyond a reasonable doubt; because Petitioner's Attorney's Statement in Support of Guilty Plea affirmed that the evidence was sufficient to support a guilty verdict for the offense which the plea is offered; because Petitioner had a Plea Hearing where he affirmed that he understood the charges and the penalties for each charge; and because Petitioner told the Trial Court that he wanted to enter the guilty plea, this Court should affirm Petitioner's conviction and sentence.

V.

CONCLUSION

For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

By Counsel,

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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 11th day of December, 2015, addressed as follows:

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