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IN THE SUPREME COURT OF APPEALS

CHARLESTON

KRISTAFFER AVERY BLECK

Defendant Below, Appellant

v.

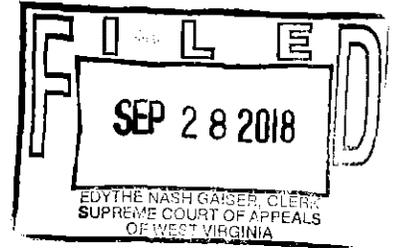
COURT NO. 18-0481

STATE OF WEST

Plaintiff Below - Appellee.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY,  
WEST VIRGINIA

PETITIONER'S BRIEF



SUPREME

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## **ASSIGNMENT OF ERROR**

- A. That the Court abused its discretion in using a dismissed and expunged charge in its decision to incarcerate the Defendant instead of placing him on probation.**

## STATEMENT OF THE CASE

At the April 2017 term of the Jefferson County Grand Jury the Defendant was indicted for robbery in the 1<sup>st</sup> degree, felony conspiracy, assault in the commission of a felony and burglary (JA p. 7).

On the 31<sup>st</sup> day of January 2018 he signed a plea agreement where he agreed to plead no contest to felony conspiracy, assault in the commission of a felony and burglary. On the same day he pled guilty to the three charges (JA p. 15). The Court then ordered that a pre-sentence report be filed and scheduled a sentencing for April 9, 2018 (JA p. 16.)

Prior to the sentencing the probation officer filed a pre-sentence report (JA p. 27).

On April 3, 2018 counsel for the Defendant filed a Motion for Probation (JA p. 18).

On April 9, 2018 the Court refused to place the Defendant on probation and sentenced him to an indeterminate sentence of two (2) to fifteen (15) years (JA p. 52).

Counsel for the Defendant filed a motion for reconsideration on April 16, 2018 (JA p. 43).

In the Court's sentencing order filed April 27, 2018 the Court denied Defendant's motion (JA p. 52).

## SUMMARY OF ARGUMENT

The Court in making its decision as to what an appropriate sentence would be reviewed the probation officer's report and noticed that the Defendant had been charged with a domestic assault in 2010 that had been dismissed (JA Sentencing transcript p. 29).

The Court stated:

"I do believe that I have considered all of the factors which are relevant to the imposition of sentence. I have taken into consideration the PSI and also the testimony today; the statements made by Mr., Bleck's mother and wife and the testimony given by the victim in this case; and I find based upon the fact that this was a crime of violence with a laceration to the throat, if this was the first violent act of the Defendant I might consider probation, but we had a 2010 domestic assault that was also part of our record in the PSI, I do find that the State has granted a plea agreement that gives Mr. Bleck the benefit of him accepting responsibility but he still needs to serve some time for his conduct in this event."

Defense counsel filed a request for reconsideration and in the exhibit attached to the motion it showed that the second charge for the Defendant on the September 30, 2010 charge and April 4, 2011 deleted because of *West Virginia Code 61-11-25* (expungement statement) (JA p. 153).

The reference of an expunged charge was improper and an abuse of discretion.

The ruling by the Court is reviewed for an abuse of discretion.

**STATEMENT REGARDING ORAL ARGUMENT**

This is a case of first impression and should be set for oral argument.

## ARGUMENT

Counsel below in his motion for reconsideration made all of the arguments available in this case. I will attempt to restate them here in summary form.

## FACTS

It is clear from a review of the records that the Petitioner cooperated at all the stages of the proceedings. That cooperation coupled with the Defendant's lack of a violent criminal record resulted in the low bail of \$16,000.00.

More importantly the State recommended and the Court agreed to a post conviction bond that carried over (J.A. 117 Plea Hearing p. 24).

Mr. Kobayashi said:

Again, the State recommended to the Court that Mr. Bleck's personal recognizance bond from Magistrate Court carry over as his post-conviction bond. (Conviction Order at 2 (Feb. 1, 2018). Put another way *W.Va. Code § 62-1C-1(b)* precludes post-conviction bail where, as the State had pointed out at the plea hearing, there has been "use of violence to a person" in this case. But, the State nonetheless successfully sought Mr. Bleck's release.

He went on to say:

On April 9, 2018, this Court sentenced the Defendant to the penitentiary for an aggregate indeterminate sentence of not less than 2 years nor more than 15 years. (WV Div. of Corrections Cert. Commit. Order (April 9, 2018) the Court found that had this been the Defendant's first violent offense, he would have been granted probation. However, because the Defendant's criminal record showed a prior domestic violence arrest in 2010, the Court sentenced him to the penitentiary.

Before this case, Mr. Bleck had no prior felony convictions

but rather three misdemeanor convictions dating back six years ago in 2012 (Driving Revoked; successfully completed 1 year of unsupervised probation), in 2011 (DUI; fine imposed); and in 2010 (Obstruction; fine imposed). (PSI Report at 4).

The conviction for Obstruction, in particular, from eight years ago in 2010 indicated that the Defendant was also arrested for Domestic Assault (Count 2). (Id. at 4). According to the Psi Report, the Domestic Assault charge (Count 2) was dismissed as part of a plea agreement where the Defendant plead no contest to "Obstruct an Officer" charge (Count 1). (Id.).

However the Berkeley County Magistrate Court has no record of arrest, charge of dismissal in 2010 against Mr. Bleck for any domestic assault or battery. ( See Ltr. fr Hawkins, Magist. Ct. Clerk to Kobayashi (April 12, 2018) attached as Exhibit A)). It only has record of the one count complaint for Obstruct an Officer in case number 10-M02M-05107\ filed on September 30, 2010, which the Defendant plead no contest to on April 4, 2011. (Id.). "Pursuant to West Virginia Code Section 61-11-25, the Berkeley County Magistrate Court has no other record of arrest, charge, or dismissal concerning Kristafer Avery Bleck for the time period specified." (Id.). "Pursuant to West Virginia Code Section 61-11-25, the Berkeley County Magistrate Court has no other record of arrest, charge, or dismissal concerning Kristafer Avery Bleck for the time period specified." (Id.).

## DISCUSSION

In looking at the law that governs this case is West Virginia Rules of Criminal Procedure 35. The Rule allows the court to reduce a sentence if timely made and properly brought. The Rule states:

(a) Correction of sentence. - The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

(b) Reduction of sentence. - 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 . . . 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.

Generally a sentence imposed by a trial court is not subject to appeal if it is within the statutory limit and if not based upon some impermissible factor (Syl. p.4. State v. Goodnight 169 W.Va. 366 (1982).

In this case the court stated essentially that his sentence was based upon the impermissible factor of the prior charge now expunged. The court said:

The Court: All right, thank you.

If you will remain standing. I do believe that I have considered all of the factors which are relevant to the imposition of sentence. I have taken into consideration the PSI and also the testimony today; the statements made by Mr. Bleck's mother and wife and the testimony given by the victim in this case; and I find based upon the fact that this was a crime of violence with a laceration to the throat, if this was the first violent act of the Defendant I might consider probation, but we had a 2010 domestic

assault that was also part of our record in the PSI, I do find that the State has granted a plea agreement that gives Mr. Bleck the benefit of him accepting responsibility but he still need but he still needs to serve some time for his conduct in this event.

Prior counsel's argument is inescapable. He said:

Here, the Court considered the Defendant's arrest in Berkeley County for domestic assault in 2010. According to the Berkeley County Magistrate Court, no such arrest occurred and cited W. Va. Code § 61-11-25. Section 61-11-25 of the West Virginia Code concerns the "[e]xpungement of criminal records for those found not guilty of crimes or against whom charges have been dismissed.: W. Va. Code § 61-11-25. Of course, there may very well have been an arrest for domestic assault against the Defendant in 2010 but these records have been expunged. Indeed, Section 61-11-25(a) precludes the expungement of dismissed charges in exchange for a guilty plea to another offense. See W. Va. Code § 61-11-25. As such, the Defendant's no contest plea to obstruction was not in exchange for the dismissal of any domestic assault charge as alleged in the PSI report. More importantly, Section 61-11-25(e) states that "[u]pon expungement, the proceedings in the matter shall be deemed never to have occurred." See W. Va. Code § 61-11-25(e). Accordingly, this Court should not have relied in any way on the Defendant's alleged domestic assault arrest in 2010 because, by statute, it never occurred. By holding the Defendant's 2010 arrest for domestic assault against him and thereby sentencing him to confinement because of this allegedly violent history, the Court relied on an impermissible factor in violation of W. Va. Code § 61-11-25. The violent criminal history consistent with W. Va. Code § 61-11-25, and grant him probation as originally intended for a first offense involving violence.

While this argument is hyper-technical the logic is sound.

A defendant in most cases gets the benefit of a pre-sentence report. Rule 32 of the West Virginia Rules of Criminal Procedure.

It goes without saying that the pre-sentence report should be accurate and reflect the true nature of the Defendant's record. The pre-sentence report in this case was based

upon faulty information and the judge relied upon that faulty information in her decision.

A careful rereading of the judge's statement shows clearly that the erroneous report precluded the Defendant from being considered for probation.

## CONCLUSION

It would be fair to have a sentencing where only accurate factors are considered. Using an expunged conviction directly contradicts the purpose of the expungement statute and is impermissible.

**Krastafer Avery Bleck,  
Defendant - Appellant**



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