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CIRCUIT COURT
BROOKE COUNTY

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

v.

**CASE NO. 13-F-63
Judge Jason A. Cuomo**

NICHOLAS VARLAS,

Defendant.

SENTENCING ORDER

On the **3rd day of December, 2018**, came the State of West Virginia, by and through the Assistant Prosecuting Attorney for Brooke County, WV, Ryan W. Weld, Esq., and as well came the Defendant, Nicholas Varlas, in person and by counsel, Stanton D. Levenson, Esq., pursuant to a duly noticed hearing on sentencing.

WHEREUPON, the Court did note that the Probation Officer of the Court had prepared a pre-sentence investigation ("PSI") report, which the Court had received and reviewed. The Court addressed the parties in regard to whether there were any objections to the contents of the report and counsel advised they had reviewed the report, that Defendant had reviewed it with his attorney and there were no objections to its contents. The Court thereafter adopted the findings of the PSI report into its Findings of Fact.

WHEREUPON, the Defendant's attorney was given an opportunity to make an argument for sentencing, to call any and all witnesses in support thereof, and Defendant was given an opportunity to allocute prior to sentencing.

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WHEREUPON, the Court permitted the State of West Virginia to address the Court prior to sentencing.

WHEREUPON, the Court did note that the victim had a right to make a statement in open court if she chose, but that her impact statement was included within the PSI which the Court reviewed.

I. **FACTUAL AND PROCEDURAL BACKGROUND**

On **November 4, 2013**, a Brooke County grand jury returned an indictment against the Defendant charging him with two (2) felony offenses committed on or about August 12, 2012: Count One - Sexual Assault in the Second Degree; and Count Two - Attempt to Commit Sexual Abuse in the First Degree.

On **September 4, 2014**, appearing before the Honorable Martin J. Gaughan, was convicted and found guilty by a jury on both counts. The Court Ordered a pre-sentence investigation to be conducted. On **December 18, 2014**, a sentencing hearing was held and Judge Gaughan sentenced the Defendant as follows: to serve not less than one (1) nor more than three (3) years on the Attempt to Commit Sexual Abuse in the First Degree conviction; and to serve not less than ten (10) nor more than twenty-five years on the Sexual Assault in the Second Degree conviction -- to be run consecutively,¹ with the

¹ Specifically, the Order issued by Judge Gaughan stated, in pertinent part:

4. That the ten to twenty five year sentence for "Sexual Assault in the Second Degree" be suspended in lieu of a five-year period of probation *to begin upon the defendant being paroled or completing his sentence for the felony offense of "Attempted Sexual Abuse in the First Degree."* (emphasis by the undersigned) (See Sentencing Order entered January 5, 2015, pg. 4, ¶ 4)

While the above Order did not specifically state that the sentences were to be run "consecutively," the undersigned interprets the above-quoted language as requiring consecutive sentences. Additionally, in the absence of a sentencing Order specifically stating that the sentences are to run consecutively, the law presumes that the sentences are to run consecutively. (See W. Va. Code § 61-11-21 --when a person is convicted of two or more offenses, they are required to be run consecutively, unless in the discretion of the

sentence on the not less than ten (10) nor more than twenty-five (25) years to be suspended and the Defendant to be placed upon probation for a period of five (5) years after he completed the sentence of not less than one (1) nor more than three (3) years. Upon completion of the five (5) year probation term, the Defendant would be subject to a ten (10) year period of Extended Supervision as a sex offender. The Defendant received credit for time served on post-conviction bond, with a condition of a house arrest, from September 4, 2014 to December 8, 2014. On **April 26, 2016**, Defendant was discharged from incarceration by the WVDOC after completing his sentence of not less than one (1) nor more than three (3) years and, on **May 2, 2016**, he was then placed upon his five (5) year probation term as discussed above.

On **June 16, 2016**, however, the Supreme Court of Appeals for the State of West Virginia reversed Defendant's convictions, based upon the trial court's exclusion of certain evidence, and remanded the case for a new trial before the undersigned.² Accordingly, the Defendant was removed from probation on June 21, 2016.

On **May 22, 2018**, and during the presentation of the State's case-in-chief at the re-trial, the Defendant moved this Court to declare a mistrial based upon what he believed to have been improper and unfairly prejudicial testimony before the jury. This Court agreed and declared a mistrial.

trial court they are run concurrently; see also State v. Housden, 184 W. Va. 171, 399 S.E.2d 882 (1990) (citing with approval State ex rel. Cobb v. Boles, 149 W. Va. 365, 141 S.E.2d 59 (1965)-- Unless the sentencing court states that two or more sentences should run concurrently, there is a presumption that the sentences run consecutively.)

² See State v. Varlas, 237 W. Va. 399, 787 S.E.2d 670 (2016) ("Because the essential evidence at issue was improperly excluded from the jury's consideration at the first trial of this matter, a new trial is necessary.")

On **October 21, 2018**, the Defendant was once again found guilty by a Brooke County jury on both counts. This Court granted the Defendant a post-conviction bond and Ordered an updated pre-sentence investigation report be prepared and forwarded to counsel and, upon submission to counsel, the parties were to submit legal briefs on sentencing to the Court and the Court would thereafter set a date for sentencing.

The issue before this Court at sentencing is whether this Court is required to suspend the Defendant's not less than ten (10) nor more than twenty-five (25) year sentence for five (5) years of probation, plus ten (10) years extended supervision, or whether the Court is permitted to sentence the Defendant to 10-25 **without** probation.

II. POSITION OF THE PARTIES

The State argues that, while State v. Eden, 163 W. Va. 370, 256 S.E.2d 868 (1979) and State v. Young, 173 W. Va. 1, 311 S.E.2d 118 (1983), stand for the proposition that it is a violation of a Defendant's due process to sentence him to a harsher sentence after appealing a prior conviction, those cases have been "overruled or significantly limited by subsequent decisions of the United States Supreme Court." (See State's brief, pg. 3, ¶ 13). Specifically, the State argues that "the presumption of vindictiveness . . . was completely dismantled by the U.S. Supreme Court case of Alabama v. Smith, 109 S. Ct. 2201, 490 U.S. 794 (1989) and that this Court is permitted to sentence the Defendant to a "higher penalty" (i.e., without probation) after his re-trial in this case because Smith shifts the burden to the Defendant to prove any such higher penalty he may receive is the result of vindictiveness on the part of this Court and "there is no reasonable likelihood of any vindictiveness whatsoever in this matter." (See State's brief, pgs. 5-6)

The Defendant, on the other hand, argues that Eden is still good law in West Virginia and it prohibits the Court from imposing a harsher sentence on Defendant.

III. EDEN IS STILL GOOD LAW IN WEST VIRGINIA AND THIS COURT IS NOT PERMITTED TO IMPOSE A HARSHER SENTENCE UPON DEFENDANT AFTER RE-TRIAL THAN HE RECEIVED AFTER HIS PRIOR CONVICTION

Contrary to the State's argument, our Supreme Court of Appeals has had occasion to revisit Eden, or at least comment upon it, following the U.S. case of Alabama v. Smith in 1989. In 2013, in State v. Workman, 2013 WL 6183989 (memorandum decision), our Court upheld the Eden prohibition of a circuit court judge imposing a harsher sentence than the original sentence imposed by the magistrate. Although Workman was a memorandum decision, it provides a window into the thinking of our Court when analyzing this issue in the face of the 1989 U.S. case of Alabama v. Smith. Specifically, the Workman Court stated, "While petitioner argues that ordering supervised probation when the magistrate court ordered unsupervised probation violates his due process rights as set for in Eden, we disagree." See Workman, at p. *2.

ACCORDINGLY, this Court believes and **FINDS** that Eden is still valid law in West Virginia and that this Court is prohibited from imposing a harsher sentence upon Defendant following re-trial than what he received following his prior conviction in as much as the same would violate his due process rights under our State Constitution.

IV. IMPOSING A SENTENCE OF NO LESS THAN TEN (10) YEARS AND NO MORE THAN TWENTY-FIVE (25) YEARS UPON DEFENDANT, WITHOUT SUSPENDING IT FOR FIVE (5) YEARS PROBATION, IS NOT A "HARSHER SENTENCE" THAN WHAT DEFENDANT RECEIVED IN HIS ORIGINAL SENTENCE

Despite the continuing viability of Eden in West Virginia, this Court **FINDS** that Eden is inapplicable to the sentencing issue presently before this Court. Specifically, this Court **FINDS** that imposing upon Defendant a sentence of not less than ten (10) years and no more than twenty-five (25) years, *without suspending the same for five (5) years or probation*, is not a "harsher sentence" than his original sentence, in as much as, probation is not a sentence for a crime and has no correlation to the underlying criminal sentence. This issue has been sufficiently litigated in our State and has been codified in a syllabus point.

In syllabus point two of State ex rel. Strickland v. Melton, 152 W. Va. 500, 165 S.E.2d 90 (1968), the Supreme Court of Appeals of West Virginia held, "Probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime." See also State v. Jones, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004) (quoting syl. pt. two of Melton with approval).

In Jett v. Leverette, 162 W. Va. 140, 247 S.E.2d 469 (1978), our Court held as follows at syllabus points 1 and 2:

1. In West Virginia there are fundamental statutory differences between probation and parole in the relationship they bear to the underlying criminal sentence. The term of probation has no correlation to the underlying criminal sentence, while parole is directly tied to it. In effect, there is a probation sentence which operates independently of the criminal sentence.
2. The separation of the probation term from the underlying criminal sentence, coupled with the significant statutory differences between probation and parole, warrants the finding that our State's Double Jeopardy

Clause is not violated by the failure to credit the time spent on probation upon its revocation.

See also State v. Tanner, 229 W. Va. 138, 141, 247 S.E.2d 469, 472 (1978) (quoting with approval at fn. 7, syl pt. 1 of Jett, supra); and State v. Workman, supra (citing with approval all of the above cases in holding, "In the instant matter, both the magistrate court and the circuit court sentenced petitioner to one year in jail for the offense of domestic battery. As such, it is clear that petitioner did not receive a harsher sentence on appeal, the circuit court's imposition of supervised probation notwithstanding. Therefore, no violation of petitioner's due process rights occurred below.")

ACCORDINGLY, the Court does hereby **ADJUDGE and ORDER** as follows:

1. The Defendant, NICHOLAS VARLAS, ([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]), as a result of his conviction at trial for the felony offense of Sexual Assault in the Second Degree, is hereby sentenced to serve not less than ten (10) nor more than twenty-five (25) years in the custody of the Division of Corrections. The Defendant is ORDERED to pay court costs but not required to pay a fine as a result of this conviction;

2. The Defendant, NICHOLAS VARLAS, ([REDACTED] [REDACTED] [REDACTED]), as a result of his conviction at trial for the felony offense of Attempt to Commit Sexual Abuse in the First Degree, is hereby sentenced to serve not less than one (1) nor more than three (3) years in the custody of the Division of Corrections. The Defendant is ORDERED to pay court costs but not required to pay a fine as a result of this conviction. The Defendant will receive credit toward time served on this conviction. It is the Court's understanding that the Defendant has served sufficient time to discharge this sentence and has previously been deemed to have discharged this sentence.

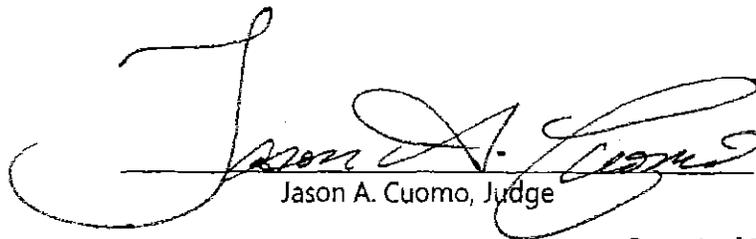
3. The Court hereby ORDERS that the sentences imposed herewith shall run concurrently, not consecutively, such that the Defendant shall receive as credit toward his sentence for not less than ten (10) nor more than twenty-five (25) years on Count One any and all time he served on the sentence that he discharged for not less than one (1) nor more than three (3) years on Count Two.

4. The Court, after having verified in open Court that the Defendant read, understood, signed, initialed, and had no further questions regarding his requirements and terms to register for life as a sex offender, hereby ORDERS that the Defendant shall be required to register as a sex offender for life.

5. The Court, after having verified in open Court that the Defendant read, understood, signed, initialed, and had no further questions regarding his requirements and terms to supervised release, hereby ORDERS that in the event Defendant is released from the Division of Corrections he shall be placed upon supervised release for a period of ten (10) years, the same as he was Ordered by prior Order.

6. The Circuit Clerk is ORDERED to provide attested copies of this Order to: all counsel and parties of record; West Virginia State Police (CDR-CIB, 725 Jefferson Rd., South Charleston, WV 25309); Terry Stuck, Steve Gitlin and Will Hinerman, First Circuit Probation Officers (Brooke County Probation Office, Charles St., Wellsburg, WV 26070); and FBI NICS (P.O. Box 4278, Clarksburg, WV 26032-4278)

DATED this 4th day of December, 2018.


Jason A. Cuomo, Judge