IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

No. 31326

FILED
March 2, 2004
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff below, Appellee,

V.

TONY DEAN ARBAUGH, JR.,
Defendant below, Appellant.

Appeal from the Circuit Court of Pendleton County
Honorable Donald H. Cookman
Case No. 97-F-18
REVERSED AND REMANDED WITH DIRECTIONS

Submitted: February 10, 2004
Filed: March 2, 2004

Amanda H. See
See & See
Moorefield, West Virginia
Counsel for Appellant

Darrell V. McGraw, Jr.
Attorney General
Robert D. Goldberg
Assistant Attorney General
Charleston, West Virginia
Counsel for Appellee

The opinion of the Court was delivered PER CURIAM

CHIEF JUSTICE MAYNARD AND JUSTICE DAVIS dissent and reserve the right to file dissenting opinions.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "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, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

2. "Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law." Syllabus point 1, *Bennett v. Warner*, 179 W. Va. 742, 372 W. Va. 920 (1988).

3. "The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." Syllabus point 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999).

Per Curiam:

Tony Dean Arbaugh, Jr. (hereinafter "Mr. Arbaugh") appeals the denial of his W. Va. R. Crim P. 35(b) motion by the Circuit Court of Pendleton County, West Virginia. In this motion, he requested a reduction in sentence in the nature of a grant of probation so that he could pursue a rehabilitation program under the auspices of Youth System Services, Inc. Having read the briefs, reviewed the record, and heard oral argument, we reverse and remand with directions to the circuit court to grant Mr. Arbaugh probation to follow his proposed rehabilitation plan. We further direct that the rehabilitation plan proposed by Mr. Arbaugh should include specific provisions that Mr. Arbaugh undergo both sexual offender counseling and substance abuse counseling.

I.

FACTUAL AND PROCEDURAL HISTORY

The appellant in this case, Mr. Arbaugh, has lead a long and painful life. He endured a long history of sexual assault at the hands of two of his adult male family members, beginning when he was seven or eight years old. These assaults included oral sex, sodomy, mutual masturbation, and "dry humping." Mr. Arbaugh was also sexually assaulted by one of his teachers for a period of four years. *Arbaugh v. Board of Educ.*, No. 31346, slip. op at 3, ___ S.E.2d ___, ___, ___ W. Va. ___, ___ (Dec. 3, 2003). As a result of these attacks, Mr. Arbaugh began acting out sexually against his younger half brother.[1]

[1]We note that at least during some of the time that Mr. Arbaugh was abusing (continued...)

As a result of this conduct, a delinquency petition was filed on February 28, 1997, when Mr. Arbaugh was fifteen years old.[2] After a hearing, Mr. Arbaugh was transferred to adult jurisdiction on April 7, 1997. On June 25, 1997, he waived his right to grand jury indictment and accepted the filing of an information charging him with first degree sexual assault. On this same day, he plead guilty under the information to one count of first degree sexual assault. In exchange for this plea, the State dropped an additional nine counts of first degree sexual assault and agreed not to oppose Mr. Arbaugh's placement in a non-secure facility and disposition under W. Va. Code § 49-5-13(e) (2001 Repl. Vol.).[3] The State also agreed that, if he did not present a security risk or create any further problems, it would recommend placement in a youthful offender center upon his 18th birthday.

On September 4, 1997, the court sentenced Mr. Arbaugh to an indeterminate term of fifteen to thirty-five years and restitution. The court, however, suspended sentence due to Mr. Arbaugh's age and his enrollment in the Chestnut Ridge Treatment Center.

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[1](...continued)
his brother, the two of them were supposed to be in the custody of the Department of Health and Human Resources, but that the Department did not know where the two children were located.

[2]While Mr. Arbaugh was 15 when the petition was filed, the petition covered conduct of Mr. Arbaugh from when he turned 14.

[3]W. Va. Code § 49-5-13(e) permits a circuit court to make a disposition of a juvenile transferred to adult jurisdiction under the juvenile proceedings act.

The court ordered that, once finished at Chestnut Ridge, Mr. Arbaugh was to reside in a secure juvenile facility. The court ordered sentence reevaluation when Mr. Arbaugh turned eighteen.

On August 20, 1998, the court placed Mr. Arbaugh in a group home run by Stepping Stones, Inc. Unfortunately, Mr. Arbaugh's behavior digressed while at Stepping Stones. Therefore, the State filed a motion to reconsider disposition. The circuit court transferred Mr. Arbaugh to the Eastern Regional Juvenile Facility.

After he turned eighteen, the circuit court transferred Mr. Arbaugh to the Anthony Center under the Youthful Offender Act, W. Va. Code §§ 25-4-1 to -12 (Repl. Vol. 2001) The court said it would review the sentence when Mr. Arbaugh was released from the youthful offender program.

After Mr. Arbaugh successfully completed the youthful offender program, the court placed him on five years probation. The probation terms required, *inter alia*, adherence to all the probation officer's rules and regulations, that he not violate any laws nor have any alcohol or drugs, and that he obtain counseling.

On December 11, 2000, the State petitioned to revoke probation. At the revocation hearing, Mr. Arbaugh admitted to having used marijuana and alcohol, failing

to obtain on-going counseling, and failing to pay his five dollar a month probation fee. Based on these violations, and several other violations, the court revoked probation.

On February 1, 2001, Mr. Arbaugh timely filed a motion under W. Va. R. Crim P. 35(b) to reduce his sentence by granting him probation to pursue another rehabilitation program.[4] At the Rule 35(b) hearing, Mr. Arbaugh presented the testimony of Paul Flanagan, who works for Youth Systems Services (hereinafter "YSS"). Mr. Flanagan is a graduate of the Criminal Justice Police in the United Kingdom and is a volunteer with the Marist Brothers, a Roman Catholic religious community. Mr. Flanagan explained that YSS is a unique consulting program that for the last thirty years has worked with over 16,000 youngsters and averaging 600 annually. YSS has won many national awards and is one of only six private detention facilities in the United States. Mr. Flanagan explained that YSS was not asking to be paid for this program for Mr. Arbaugh, but chose to do it because they believed that Mr. Arbaugh "can be saved and can be brought around to a pro-social life. The pro-social adult to serve in the community."

Mr. Flanagan explained that Mr. Arbaugh's YSS program would consist of removing him from the Eastern Panhandle to the Northern Panhandle so as to remove him

[4]Rule 35(b) provides in pertinent part that "[c]hanging a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

from the influences that initially caused his conduct. Mr. Arbaugh would reside in community apartments coupled with a variety of skill development programs so as to prepare him for independent living. He would be employed as a janitor at a local Catholic high school, and would work under the supervision of Brother Dan O'Riordian. Mr. Arbaugh would also be provided supportive services through the Marist Brothers and would have access to designated YSS staff "24/7" for crisis situations. YSS would provide the circuit court with any required reports. Notwithstanding the fact that Mr. Arbaugh had a rehabilitation program in place (that would not cost the State any money), the circuit court denied Mr. Arbaugh's Rule 35(b) motion explaining that Mr. Arbaugh had been

> provided everything that the Court was aware of before and the Court has showed him mercy before and is very sympathetic to his situation, but nonetheless feels that also the Court has an obligation to the public and because of that the Court is not going to – to grant his relief request.

It is from this order Mr. Arbaugh seeks appellate relief.

II.

STANDARD OF REVIEW

The standard of review in this case is found in syllabus point 1 of *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996):

> 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.

III.

DISCUSSION

Mr. Arbaugh argues that the circuit court abused its discretion in failing to grant his Rule 35(b) motion to reduce his sentence to probation.[5] The State counters that the Youthful Offender Act mandates that once an original probation is revoked then a circuit court is without jurisdiction to again grant probation and is obligated to execute the sentence. It alternatively argues that the circuit court did not abuse its discretion in granting probation given Mr. Arbaugh's past rehabilitation programs. We find that the circuit court abused its discretion.[6]

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[5]We recognize that Mr. Arbaugh has raised several other issues in his brief. However, we find these other issues "are meritless, were not preserved at trial or are not properly briefed in this Court. Thus, we decline to address them." *State v. Varner*, 212 W. Va. 532, 536 n.4, 575 S.E.2d 142, 146 n.4 (2002) (per curiam).

[6]We also note that the State asserts in a footnote in its brief that Mr. Arbaugh waived the denial of his Rule 35(b) by failing to raise it in his petition for appeal. However, the State cites us no authority or even argument for this position; thus, we decline to address it. *See, e.g., State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.").

We first reject the proposition that the Youthful Offender Act, W. Va. Code §§ 25-4-1 to 12, prohibits a circuit court from granting probation under Rule 35(b) after it has revoked a probation it originally granted under the Act. The State cites W. Va. Code § 25-4-6's language that upon successful completion of the youthful offender program, "the court shall immediately place the offender on probation. In the event the offender's probation is subsequently revoked, the judge shall impose the sentence the young adult offender would have originally received had the offender not been committed to the center and subsequently placed on probation." The State asserts that the language "shall impose the sentence" to support the claim that the legislature's intent was to prevent any subsequent probation once the original Youthful Offender Act probation is revoked. We must disagree with the State.

Even assuming the State is correct in its reading of W. Va. Code § 25-4-6, we have long recognized that our judicially promulgated rules of practice are constitutionally based and supersede any conflicting statutory provisions. As we held in syllabus point 1 of *Bennett v. Warner*, 179 W. Va. 742, 372 W. Va. 920 (1988), "[u]nder article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law." We have more recently and more specifically held, "[t]he West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this

jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999). Therefore, we find the State's argument in this regard without merit. Consequently, we turn now to whether or not the circuit court abused its discretion under Rule 35(b).

The circuit court refused to grant Mr. Arbaugh probation because Mr. Arbaugh had been

> provided everything that the Court was aware of before and the Court has showed him mercy before and is very sympathetic to his situation, but nonetheless feels that also the Court has an obligation to the public and because of that the Court is not going to – to grant his relief request.

While we appreciate the circuit court's concerns, we cannot agree with them. There is no evidence in the record that Mr. Arbaugh was a sexual threat to anyone. None of his alleged probation violations indicated that he was a sexual threat to the community, and we cannot find under the facts of this case that simply based on his past acts that Mr. Arbaugh is a future threat. *See State v. Sapps*, 820 A.2d 477, 501 n.82 (Del. Fam. Ct. 2002) (citing Sue Righthand & Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature* 30-31 (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention 2001)) ("[S]uggesting that once a juvenile's sex offending has been officially recognized, subsequent detected sexual recidivism is

relatively infrequent. Also, stating that some studies to date reflect that very few who commit sex offenses as juveniles go on to commit such offenses as young adults.").

The most serious of his probation violations was the use of alcohol and marijuana. While we do not condone these acts, we cannot turn a blind eye to the heinous atrocities perpetrated upon Mr. Arbaugh. He suffered numerous sexual assaults committed against him while he was only seven or eight years old. These assaults continued over a period of at least six or seven years, and were committed by at least two relatives and a teacher. Although these assaults were known to his family, they did nothing to intervene on his behalf. We cannot ignore that Mr. Arbaugh was a juvenile who was himself the victim of prolonged and extensive sexual assault when he acted out against his step-brother. Finally, we cannot ignore that at least some of Mr. Arbaugh's assaults on his brother occurred when they were supposed to be in the custody of the Department of Health and Human Resources (hereinafter "DHHR"), although the two brothers had run away and DHHR was unaware of their whereabouts.

"We have stated that 'the law treats juveniles differently than others. "From the earliest time infants were regarded as entitled to special protection from the State."'" *State ex rel. Garden State Newspapers, Inc., v. Hoke*, 205 W. Va. 611, 618, 520 S.E.2d 186, 193 (1999) (quoting *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 654, 453 S.E.2d 631, 637 (1994) (quoting *State v. Boles*, 147 W. Va. 674, 678, 130 S.E.2d 192,

195 (1963)). We have also articulated the duty we as a Court have to those society might chose to forget or ignore, "'[p]risoners are no one's constituents and weld little, if any, political clout. Consequently, society frequently forgets about, or even ignores these people, its unfortunate charges. It is therefore incumbent upon this Court ever to be vigilant in the protection of their legal rights.'" *State ex rel. Riely v. Rudoff*, 212 W. Va. 767, 779, 575 S.E.2d 377, 389 (2002) (quoting *Ray v. McCoy*, 174 W. Va. 1, 4, 321 S.E.2d 90, 93 (1984)).

We agree with the State that Mr. Arbaugh's rehabilitation has not been without its bumps, but "[g]iven [his] serious needs, the implicit expectation that he would respond instantly to treatment . . . shows a . . . lack of understanding or appreciation for either trauma or adolescent psychology." *United States v. Juvenile*, 347 F.3d 778, 789 (9th Cir. 2003). Considering Mr. Arbaugh's tender age and extreme victimization, we cannot, we will not, surrender any opportunity to salvage his life and to turn him into a productive member of society. *See id.* 778-89 (citation omitted) ("[T]he [Trial] Court . . . failed to consider [the appellant's] own history of victimization[.]") 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." We can conceive of no greater miscarriage of justice than

subjecting Mr. Arbaugh under the facts of this case to a term of imprisonment without affording him every opportunity to rehabilitate himself. "Compassion is still an element of the law. The quality of mercy should not be strained on the facts before us." *People v. Monday*, 70 Mich. App. 518, 523, 245 N.W.2d 811, 814 (1976).

Given that Mr. Arbaugh's motion for probation was supported by a rehabilitation plan which has won national acclaim, we must conclude that the circuit court abused its discretion in not granting Mr. Arbaugh probation to follow this program. However, we also wish to note that given the circuit court's obvious concern with Mr. Arbaugh's marijuana use, that the YSS plan should be amended to specifically include a substance abuse counseling plan as well as a sexual offender counseling plan. Thus, we direct the circuit court to grant Mr. Arbaugh probation to follow the YSS rehabilitation plan. We further direct that the YSS plan should include specific provisions that Mr. Arbaugh undergo both sexual offender counseling and drug and alcohol abuse counseling.

IV.

CONCLUSION

The judgment of the Circuit Court of Pendleton County is reversed and remanded with directions.

Reversed and remanded with directions.