

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) **No. 11-0306** (Hampshire County 09-F-10)

**Wes Allen Barrett,
Defendant Below, Petitioner**

FILED
October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Wes Allen Barrett appeals the circuit court's order sentencing him to serve two consecutive terms of five years of incarceration following his guilty plea and conviction on two counts of wanton endangerment. Petitioner argues that the circuit court erred by not continuing his case to allow him to undergo the neuropsychological evaluation that was recommended in his Anthony Center Correctional Center Diagnostic Evaluation. The State of West Virginia has filed a response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on May 10, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was indicted on five counts of wanton endangerment after a drive-by shooting into a residence occupied by five people. No one was injured. Petitioner was eighteen-years-old at the time of the shooting. Petitioner confessed to the crime after receiving his *Miranda* warnings. A consent search of petitioner's vehicle yielded three shell casings from the shooting. The rifle used in the commission of the crime was recovered from the residence of petitioner's parents.

Petitioner's medical history relevant to the issues in this appeal includes drug addiction and a skull fracture five years prior to the shooting.

Following his indictment, petitioner's bond was revoked for continued drug usage and he was incarcerated. Prior to his guilty plea, petitioner underwent a psychological evaluation. Psychologist Renee Harris authored a report that was tendered to the circuit court at the time of his guilty plea. Ms. Harris concluded that petitioner "has significant substance abuse problems, which likely contribute to his extreme mood symptoms. It is recommended that a neuropsychological evaluation be completed in order to determine the extent/severity of his brain injury. Pending results of that evaluation, referral to the West Virginia Rehabilitation Services may be beneficial in order to assist [petitioner] in pursuing employment opportunities" Ms. Harris also recommended that petitioner undergo long-term residential drug rehabilitation. She opined that no services would be beneficial to petitioner until he was motivated to overcome his significant substance abuse issues. Her report did not specifically address his competency.

The circuit court reviewed the evaluation performed by Ms. Harris and concluded that there were no findings that would indicate that the petitioner was incompetent. Petitioner's attorney represented to the circuit court at the plea hearing that he was satisfied the petitioner was competent. At the plea hearing, petitioner indicated that he understood the proceedings and that he had ceased to use drugs since he was incarcerated.

Petitioner pled guilty to two counts of wanton endangerment and was sent to the Anthony Center for a sixty-day diagnostic evaluation. Psychologist Frances Allen-Henderson authored a report based upon her evaluation of petitioner in which she indicated that he would not be a good candidate for commitment to the Anthony Center and that he should undergo a neuropsychological assessment to attain further information regarding the extent of his prior brain injury and its implications for his behavior, and to ascertain if there were any particular rehabilitation services available to him.

The circuit court continued the sentencing once on petitioner's motion to allow for the completion of a neuropsychological evaluation. However, upon learning that the waiting list for such evaluation was nine months, the circuit court found that this length of delay was unreasonable and unfair to petitioner, who remained incarcerated. The circuit court thus committed the petitioner to the Anthony Center over petitioner's objection that he did not want to be committed to the Anthony Center. Petitioner was at the Anthony Center for approximately one month when he was returned as unfit because he assaulted another inmate. The Anthony Center reported to the circuit court that "[petitioner] has disciplinary issues that have prevented him from completing successfully." Petitioner admitted the allegations causing him to be unfit. The circuit court then sentenced the petitioner to two consecutive five year terms in prison. Petitioner did not object to the presentence investigation report containing his statement: "I wish I would have killed all the [victims]," and he also stated "[i]f I wasn't on drugs, I would not have done it."

Petitioner argues that the circuit court erred in not continuing his sentencing until after the neuropsychological evaluation could be completed and, that by not doing so, the circuit court set him up to fail by sentencing him to the Anthony Center. Further, petitioner argues that his initial evaluation by psychologist Renee Harris did not constitute a proper competency evaluation. Finally, he contends that his sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution. The State responds that the only reason for a neuropsychological evaluation would be to aid petitioner in his rehabilitation efforts, not in relation to his competency. The State notes that petitioner does not argue that he lacked the ability to properly enter a guilty plea. The State points out that petitioner gave every indication that he was able to communicate with his attorney and understood the proceedings and that his counsel represented to the circuit court that his client was competent.

This Court reviews “sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E. 2d 504 (1982).

There is nothing shocking or disproportionate about petitioner’s sentence. It is within the statutory limits and is clearly within the circuit court’s discretion given the violent nature of the crime. Further, there is no evidence that petitioner’s sentence was based upon any impermissible factors. The circuit court was actually lenient with petitioner given his comment to the probation officer, “I wish I would have killed all the [victims]” and the opinion of the evaluating psychologist that he was not a good candidate for dorm-style rehabilitation of the Anthony Center. The prison sentence later imposed was not an abuse of the circuit court’s discretion.

As for petitioner’s arguments regarding the failure to conduct a neuropsychological evaluation or a further competency evaluation, the Court notes that defense counsel represented to the circuit court that petitioner was competent. The circuit court reviewed the report of psychologist Renee Harris and concluded that there was nothing to suggest that petitioner was incompetent. Petitioner responded appropriately at the plea hearing and his counsel commented that it was “refreshing” to talk to petitioner as he was no longer using drugs. This Court notes that the circuit court did continue the matter for a neuropsychological evaluation, but that the estimated wait for such an evaluation was nine months and that it was improper to keep petitioner incarcerated and awaiting sentencing for that length of time.

Given the specific facts and circumstances of the present case, the circuit court did not abuse its discretion when it did not order the neuropsychological evaluation or further

competency evaluation, particularly in light of the fact that the petitioner does not challenge the validity of his guilty plea.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh