

**State of West Virginia
Supreme Court of Appeals**

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

vs) No. 090239 (Mason County 05-F-19)

**John Michael Wheeler
Defendant Below, Petitioner**

FILED

May 2, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mason County, wherein Petitioner John Michael Wheeler appeals the circuit court's rulings denying him the opportunity to raise the issues of allegedly conflicting risk assessments in the pre-sentence report and the diagnostic report prepared by the Anthony Center, and concurrent rather than consecutive sentencing at a re-sentencing hearing. The State has filed its response to this petition for appeal.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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 convicted by guilty plea of sexual assault in the third degree and sexual assault in the first degree, and sentenced to consecutive terms of one to five and fifteen to thirty-five years in prison on June 26, 2006. An appeal was not prosecuted on Petitioner's behalf; however, counsel for Petitioner did file a Rule 35(b) motion, which was denied by the circuit court. New counsel was later appointed, and a re-sentencing was scheduled to restart the time for appeal. At the re-sentencing, Petitioner's current counsel attempted to re-argue the merits of Petitioner's original sentence, including discrepancies within the Pre-Sentence Investigation Report and for concurrent rather than consecutive sentences, over the

objections of the State, but the circuit court refused to hear argument on the merits of the sentence, stating that the time for a Rule 35(b) motion had expired.

Petitioner contends that pursuant to Rule 32(c)(3) of the West Virginia Rules of Criminal Procedure, the circuit court should have allowed him to argue these discrepancies and to argue for concurrent rather than consecutive sentences. The State responds, arguing that the purpose of a re-sentencing hearing is to consider technical questions of law or to correct improper sentences. A re-sentencing hearing such as the one in the present case, is not conducted to allow a defendant to mitigate the original sentence, but to restart a defendant's appeal period. We find no error in the circuit court's ruling in this matter.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 2, 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