

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

**Alvin Chambers,
Petitioner Below, Petitioner**

vs) **No. 11-1082** (Webster County 10-P-24)

**David Ballard, Warden
Mount Olive Correctional Complex,
Respondent Below, Respondent**

FILED

March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Alvin Chambers, by counsel, Christopher G. Moffatt, appeals his denial of habeas corpus relief after the circuit court issued an order *nunc pro tunc* correcting its prior order which erroneously reflected petitioner's sentence. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State, by counsel Desiree Halkias Divita, has filed its response on behalf of Warden Ballard.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

In 2005, petitioner was sentenced on two counts of third degree sexual assault and two counts of sexual abuse by a parent, guardian or custodian. The two sexual assault counts were to run concurrently and the two sexual abuse counts were to run concurrently, but the sexual assault counts and the sexual abuse counts were to run consecutively. Petitioner was therefore sentenced to twenty to forty years imprisonment.

Petitioner then filed a direct appeal to this Court, which was refused. Petitioner next filed a habeas petition, but did not attack his sentence in said petition. After an omnibus hearing, the circuit court denied petitioner habeas relief. In the denial of habeas relief by order dated December 12, 2007, the circuit court stated that "[i]t is further ADJUDGED and that the aforementioned sentences shall run CONCURRENTLY and the defendant shall receive credit for all time served, as set forth in the Sentencing Order in 05-F-12." Petitioner appealed the denial of habeas relief to this Court, which was refused. Petitioner later wrote to the circuit judge in an effort to reduce his sentence. This letter prompted the circuit court to review petitioner's file, and at that time, the circuit court

determined that in the order denying habeas corpus relief that it had erroneously ordered the sentences to run concurrently, as opposed to the sexual assault counts running consecutively with the sexual abuse counts. This effectively cut petitioner's sentence in half. Thereafter, the circuit court issued a *nunc pro tunc* order dated April 28, 2009, amending the order denying post-conviction habeas relief and reinstating the original sentence, wherein the two sexual abuse counts were to run consecutively with the two sexual assault counts.

Petitioner filed a habeas petition challenging this order, arguing that the April 28, 2009, order doubled his sentence in violation of the principles of double jeopardy. The circuit court denied habeas relief by order dated February 23, 2011, stating that the circuit court acted within its powers pursuant to Rule 36 of the West Virginia Rules of Criminal Procedure. The circuit court notes that petitioner has exhausted his appeals without attacking his sentence. The April 28, 2009, order did not change petitioner's sentence, and did not violate double jeopardy, but merely corrected the clerical error and reinstated the proper sentence.

On appeal, petitioner argues that the circuit court erred by increasing petitioner's sentence fourteen months after reducing the same when the increase was without notice or opportunity to be heard, and when petitioner had already begun serving his sentence. Petitioner argues that the circuit court erred in not allowing him the opportunity to be heard prior to effectively doubling petitioner's incarceration. Petitioner had already begun serving his sentence and relied on the circuit court's order running all sentences concurrently. Petitioner argues that his double jeopardy rights have been violated.

The State responds, arguing that the circuit court did not increase petitioner's sentence, but instead corrected an error in an order which set forth an incorrect sentence. The circuit court merely reinstated the original correct sentence, which petitioner was already serving, rather than lengthening petitioner's sentence. The State further argues that Rule 36 allows the circuit court to correct its clearly erroneous order, as petitioner did not even challenge his sentence, either via direct appeal or via his prior habeas proceedings.

Rule 36 of the West Virginia Rules of Criminal Procedure states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." In the present case, the original sentence ran the two sexual abuse sentences consecutively with the two sexual assault sentences, and even noted in the order that the sentence was twenty to forty years. However, the order denying habeas relief ran all sentences concurrently. This Court finds that the order running all sentences concurrently was clearly in error, as petitioner had not even challenged the length of his sentence, either in his direct appeal or in his habeas petition. Therefore, the proper procedure was for the circuit court to correct its error pursuant to Rule 36 upon discovery of said error. This Court finds no violation of double jeopardy principles, as the circuit court merely reinstated the previous sentence.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

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

NOT PARTICIPATING:

Justice Margaret L. Workman