FILED
August 31, 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) **No. 21-0290** (Marion County 16-F-158)

Robert Higgins,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Robert Higgins, by counsel Ronald H. Hatfield, Jr., appeals the March 12, 2021, order of the Circuit Court of Marion County resentencing him for purposes of appeal. The State of West Virginia, by counsel Patrick Morrisey and Lara K. Bissett, filed a response in support of the circuit court's order.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On October 4, 2016, petitioner was indicted in the Circuit Court of Marion County on six counts of third-degree sexual assault; five counts of sexual abuse by a parent, guardian, or custodian; one count of third-degree sexual abuse; one count of distribution and display of obscene matter to a minor, and one count of the use of a minor in filming sexually explicit conduct. On February 15, 2017, pursuant to a plea agreement with the State, petitioner pleaded guilty to three counts of third-degree sexual assault; one count of sexual abuse by a parent, guardian, or custodian; and one count of the use of a minor in filming sexually explicit conduct. In exchange, the State dismissed the remaining counts of the indictment. The plea agreement further provided that petitioner agreed to register for life as a sex offender and would not object to a thirty-year term

of supervised release following his sentences of incarceration. Finally, the plea agreement allowed each party to freely argue as to the appropriate sentences for petitioner.

The circuit court, by order entered on October 31, 2017, sentenced petitioner to one to five years of incarceration for each of his convictions for third-degree sexual assault; ten to twenty years of incarceration for his conviction for sexual abuse by a parent, guardian, or custodian; and five years of incarceration for his conviction for the use of a minor in filming sexually explicit conduct. The circuit court ruled that petitioner's sentences for third-degree sexual assault would run consecutively to each other and to his sentence for sexual abuse by a parent, guardian, or custodian. The circuit court further ruled that petitioner's sentence for the use of a minor in filming sexually explicit conduct would run concurrently to his other sentences. Accordingly, petitioner is serving an aggregate term of thirteen to thirty-five years of incarceration.

Petitioner appeals the circuit court's March 12, 2021, resentencing order.[1] This Court "reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). We have further held that "[s]entences 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).

On appeal, petitioner raises a single assignment of error: the circuit court abused its discretion in including consecutive sentences in his aggregate term of incarceration because the inclusion of any consecutive sentence caused the aggregate term to be unconstitutionally disproportionate to his offenses. Petitioner argues that all of his sentences should run concurrently to each other. In making this argument, petitioner concedes that his sentences are not reviewable pursuant to Syllabus Point 4 of *Goodnight* because they are "within statutory limits,[2] [and] he is not aware of any impermissible factor considered by the [c]ircuit [c]ourt." *See id.* (Footnote added.) Petitioner further concedes that, pursuant to West Virginia Code § 61-11-21, the circuit court had the discretion to decide whether his sentences would run consecutively or concurrently.[3] As we have repeatedly held,

---

[1]The circuit court resentenced petitioner for purposes of appeal pursuant to this Court's decision in *State v. Higgins*, No. 19-0893, 2020 WL 5092917 (W. Va. Aug. 28, 2020) (memorandum decision).

[2]West Virginia Code § 61-8B-5(b) provides for a one-to-five year sentence of incarceration for third-degree sexual assault. West Virginia Code § 61-8D-5(a) provides for a ten-to-twenty year sentence of incarceration for sexual abuse by a parent, guardian, or custodian. West Virginia Code § 61-8C-2(a) provides for a sentence of incarceration of not more than ten years for the use of a minor in filming sexually explicit conduct.

[3]West Virginia Code § 61-11-21 provides:

When any person is convicted of two or more offenses, before sentence is (continued . . .)

> """[w]hen a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively." Syllabus point 3, *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979).' Syllabus Point 3, *State v. Allen*, 208 W.Va. 144, 539 S.E.2d 87 (1999)." Syl. Pt. 7, *State ex rel. Farmer v. McBride*, 224 W.Va. 469, 686 S.E.2d 609 (2009).

Syl. Pt. 4, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016).

Moreover, petitioner acknowledges that we have held that

> "[a]rticle III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syllabus Point 8, *State v. Vance*, [164] W.Va. [216], 262 S.E.2d 423 (1980).
>
> While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

Syl. Pts. 3 and 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Here, the circuit court did not impose a life recidivist sentence, and all of the statutes pursuant to which petitioner was sentenced set forth a maximum term of incarceration.[4] Accordingly, the State argues that we should decline to review petitioner's disproportionality claim.

Petitioner notes that, in *State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003), and *State v. Richardson*, 214 W. Va. 410, 589 S.E.2d 552 (2003), we deviated from the law established in *Goodnight* and *Wanstreet* to find that sentences within statutory limits could be unconstitutional pursuant to a proportionality analysis. However, in *State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674, 682-83 (2008), we disapproved of *David D.W.* and *Richardson* because each "[was] a deviation from our established law." *Id.* at 507-08 and n.11, 665 S.E.2d at 682-83 and n.11. In disapproving of those decisions, we noted that each was a per curiam opinion which, during their

---

> pronounced for either, the confinement to which he may be sentenced upon the second, or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement, unless, in the discretion of the trial court, the second or any subsequent conviction is ordered by the court to run concurrently with the first term of imprisonment imposed.

[4]*See supra* note 2.

usage, were not meant to change established law.[5] *Id.*; *see Carl T. v. Ballard*, No. 15-0649, 2016 WL 3193467, at *2 (W. Va. Jun. 3, 2016) (memorandum decision) (noting that *David D.W.* and *Richardson* were disapproved by this Court in *Slater*); *State v. Benny W.*, 242 W. Va. 618, 633 n.24, 837 S.E.2d 679, 694 n.24 (2019) (stating "once again . . . that the sentencing analysis in *David D.W.* is of no precedential value, as it was inconsistent with well[-]established [principles] of law"). Therefore, pursuant to Syllabus Point 4 of *Wanstreet*, we find that our constitutional proportionality standards do not apply in this case. *See* 166 W. Va. at 523, 276 S.E.2d at 207. Therefore, as petitioner's sentences were within statutory limits and not based upon any impermissible factor, pursuant to Syllabus Point 4 of *Goodnight*, we find no cause to disturb the circuit court's resentencing order. *See* 169 W. Va. at 366, 287 S.E.2d at 505.

For the foregoing reasons, we affirm the circuit court's March 12, 2021, resentencing order.

Affirmed.

ISSUED: August 31, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn

[5]In Syllabus Point 2 of *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001), we held that signed opinions would be used to announce new points of law. Thereafter, in *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014), we discontinued the use of per curiam opinions. *Id.* at 149, 764 S.E.2d at 309.