No. 23404 -- State of West Virginia v. Michael Head

Cleckley, Justice, concurring:

I note only one significant area of difference from the majority's otherwise admirable explication of this elusive subject.

The majority states that "[a] motion made under Rule 35(b) of the West Virginia Rules of Criminal Procedure is directed to the sound discretion of the circuit court and, generally, is not reviewable absent an abuse of discretion . . . . The abuse of discretion standard on Rule 35 motions continues the deference we have traditionally accorded trial courts in matters of sentencing." The majority concedes that our appellate review under Rule 35(b) is circumscribed. Although the majority suggests that the standard of review is an abuse of discretion, which was characterized by us recently as less than appellant friendly, by adopting this standard without elaboration it has another effect which is not salutary. For we cannot lose sight that the abuse of discretion standard has many faces and, in our application of the standard, it can range anywhere from careful

scrutiny to almost no scrutiny. I concur to emphasize that in the context of Rule 35(b) it should be the latter. Let me explain.

At the time a Rule 35(b) motion is filed, a final sentence order has been entered. Independently of Rule 35(b), the sentencing order itself is subject to appellate review, both as to its constitutionality and its compliance with the West Virginia Rules of Criminal Procedure and the applicable statutory provisions. But, we also describe the standard of review used to review the final sentencing order as an abuse of discretion. It creates a paradox to foist another "abuse of discretion" standard on a circuit court whose response may very well be "the sentence I impose during trial was appropriate." See, United States v. DeCologero, 821 F.2d 39, 41 (1st Cir. 1987) (holding that the function of the pre-guidelines Rule 35(b) of the federal rules was merely "to allow the district court to decide if, on further reflection, the sentence seems unduly harsh"); accord, United States v. Smith, 650 F.2d 206, 208 (9th Cir. 1981).[1] In my judgment, there

[1]Prior to 1987, Rule 35(b) of the Federal Rules of Criminal Procedure was identical

are many perfectly legitimate reasons for summary rejection of a Rule 35(b) motion, despite the presentation of an otherwise persuasive or sympathetic case by a defendant. This is particularly so where the grounds asserted in such a motion do not implicate an illegally imposed sentence or one that is tainted with an unlawfully corrupt motive. In principle, it cannot be reasonably expected that a trial court must exercise the same type of constrained discretion on a Rule 35(b) motion that it applied at the sentencing phase of trial.[2] To require this of our circuit courts is unreasonable, and would only lead to further docket congestion because of the time and resources that would necessarily have to be devoted to entertaining a motion for reduction of sentence in the same light and with the same panoply of rights associated with a sentencing hearing proper. A Rule 35(b) hearing is not, nor was it ever intended to be, a sentencing hearing. As one court appropriately and succinctly put it, Rule 35(b) was

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to our current Rule 35(b). The change in the federal provision was done to reflect the adoption of the Federal Sentencing Guidelines.

[2]Even at the trial phase the trial court has great discretion. Because credibility and demeanor play a crucial role in determining whether a person is genuinely contrite, and because the sentencing judge has the unique opportunity of observing the defendant and evaluating his or her desirability for leniency in a live context, all rulings and findings of the trial court are entitled to great respect and should not be disturbed unless it is without foundation.

"not meant to guarantee the defendant an instant replay of the sentencing process." DeCologero, 821 F.2d at 41. Thus, 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, see State ex rel. Hoover v. Berger, ___ W.Va. ___, ___ S.E.2d ___ (No. 23737 11/15/96) ("a circuit court by definition abuses its discretion when it makes an error of law"), or that its ruling was marred by a fundamental defect which inherently results in a miscarriage of justice.[3] No other claim of abuse of discretion should be reviewable under Rule 35(b).

As a matter of policy, it is undesirable to suggest that we will give any further review to a complaining defendant, and this Court should call upon its legal wisdom to forthrightly and unequivocally say so. For in the final analysis, a Rule 35(b) motion is essentially a plea for leniency from a presumptively valid conviction. United States v. Colvin, 644 F.2d 703, 705 (8th Cir. 1981). It is not our role to undermine the valid exercise of constrained discretionary authority by circuit courts, when they have

[3]Indeed, in Koon v. United States, ___ U.S. ___, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996), for sentencing under the Guidelines the United States Supreme Court abolished "de novo" review and established a "unitary abuse of discretion standard." As the Fourth Circuit stated in United States v. Hariston, 96 F.3d 102, 106-107 (4th Cir. 1996), "[t]his review for abuse of discretion, however, includes a legal analysis ... '[a] court by definition abuses it discretion when it makes an error of law,' our overall review

imposed sentences that fall legitimately within the four corners of our federal and state constitutions, applicable statutory provisions and our criminal procedure rules. Circuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there. In being true to the judicial limitations of our constitutional role, we must let "[t]he matter of commutation or melioration ... be addressed to the chief executive," Colvin v. Commonwealth, 57 S.W.2d 487, 489 (Ky. 1933), and allow "[t]he length of the prison sentence [to] rest[] in the sound discretion of the trial court unless partiality, prejudice, oppression, or corrupt motive is shown." State v. Johnson, 156 S.E. 353, 354 (S.C. 1930). If we unconditionally micro-review the latter, we will be unceremoniously putting on the garb of the former.

The tenor of my comments here are consistent with the manner in which federal appellate courts understood the degree of deference that

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is thus for abuse of discretion." (Citation omitted).

was to be accorded federal district court rulings on motions to reduce sentences, prior to the adoption of the Federal Sentencing Guidelines and the alteration of Rule 35(b) under the federal rules. In United States v. Lewis, 743 F.2d 1127, 1129 (5th Cir. 1984), it was said that a district court's ruling under Rule 35(b) would be reversed "`only for illegality or gross abuse of discretion.'" Quoting, United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir. 1974) (emphasis added). See, United States v. Stump, 914 F.2d 170, 172 (9th Cir. 1990) (gross abuse of discretion standard); United States v. Distasio, 820 F.2d 20, 24 (1st Cir. 1987) (gross abuse of discretion standard). In an unpublished opinion, the court in United States v. Rosch, 70 F.3d 1275, 1995 WL 695973 (7th Cir. 1995) held that: "The court has almost unlimited discretion under Rule 35(b) to reduce a sentence, and its ruling will not be disturbed except for clear abuse of discretion." (Citations omitted) (emphasis added). This is the nature of the deference we must accord circuit courts on the issue of a reduction in sentence.

The present case is an excellent example of what type abuse of discretion claim we should review. I agree with the majority's opinion that the error committed in this instance is one of law, and it squarely falls within the purview of our appellate authority to correct. It is fundamental law that a "court by definition abuses its discretion when it makes an error of law." Koon, ___ U.S. at ___, 116 S.Ct. at 2047 (citation omitted). However, we should not let this case send a signal that this Court will readily scrutinize all reduction in sentence rulings with the microscope used herein. The glasses worn by the Court in this case are to be reserved for clear legal error or gross abuse of discretion. Cases that do not come within the purview of the latter categories should be greeted hostilely by this Court with blindfolds.