IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

_____

No. 31121

_____

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

RAYMOND RICHARDSON,
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
Honorable Louis H. Bloom, Judge
Criminal Action No. 99-F-379

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 24, 2003
Filed: November 10, 2003

Darrell V. McGraw, Jr.
Attorney General
Robert D. Goldberg
Assistant Attorney General
Charleston, West Virginia
Attorney for Appellee

Troy N. Giatras, Esq.
Mark L. French, Esq.
Giatras & Webb
Charleston, West Virginia
Attorney for Appellant

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE STARCHER and JUSTICE MAYNARD concur and reserve the right to file concurring opinions.
JUSTICE DAVIS concurs, in part; and dissents, in part; and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syllabus Point 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

2. "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syllabus Point 5, *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983).

Per Curiam:

The appellant in the present proceeding, Raymond Richardson, was sentenced to 30 years in the State Penitentiary for kidnaping. He was also sentenced to five years in the penitentiary, to run concurrently with the kidnaping sentence, for wanton endangerment. On appeal, the appellant claims that the 30-year sentence for kidnaping was disproportionate to the crime committed, and that the sentence is, as a consequence, unconstitutionally impermissible.

I.
FACTS

This appeal arises out of a domestic dispute. Prior to the dispute, the appellant, Raymond Richardson, who was 20-years-old, had been living intermittently with a long-time girlfriend, Angela Franks, who was pregnant with his child. On the day of the dispute, both the appellant and Ms. Franks had been drinking, and the appellant had been entertaining the suspicion that Ms. Franks had been cheating on him.

The dispute erupted into violence after the appellant delivered Ms. Franks to her apartment and after she went to bed. The appellant initially left the apartment, but later reentered it and confronted Ms. Franks. A heated argument ensued, and during the argument, the appellant forcefully struck Ms. Franks several times and forced her to exit the apartment

and walk down a side street to a building owned by his grandfather. In the building, the appellant continued to confront Ms. Franks and made various serious threats against her. Eventually, however, the appellant calmed down, and he and Ms. Franks returned to the apartment where they made love and fell asleep.

The next day, the appellant's mother who had stopped at Ms. Franks' apartment, became alarmed when she observed various bruises and knots on Ms. Franks' face. She then took Ms. Franks to her own home where she fed Ms. Franks and helped her clean up. Subsequently, she persuaded Ms. Franks to go to a hospital.

Following Ms. Franks' visit to the hospital, the incident was reported to the authorities, and the appellant was charged with, and indicted for, kidnaping, wanton endangerment, malicious wounding and domestic battery.

After considerable development of the case, the appellant and the State entered into plea bargain negotiations, and the negotiations resulted in a plea bargain agreement under which the appellant agreed to plead guilty to the charges of kidnaping and wanton endangerment, and the State agreed to drop the malicious wounding and domestic battery charges.

After the parties entered into the plea bargain agreement, the appellant actually entered guilty pleas to the kidnaping and wanton endangerment charges, as provided in the plea bargain agreement.

Prior to sentencing the appellant on the pleas, the Circuit Court of Kanawha County conducted a sentencing hearing at which Ms. Franks, the victim, in essence, pled with the court that the court impose a minimal sentence upon the appellant. She stated:

> I feel even though what he did to me was wrong, I'm over it, you know. It's been two and a half years. I've moved on with my life. I'm going to school. I've got kids to raise. This has been going on for far too long. He's learned his lesson. It's over. I'm not physically hurt by it still. Nothing mentally was wrong with me. My son is perfectly healthy. I mean, I could see if something was wrong with one of us physically to where I can't do anything or something was wrong with my son, to give him the type of sentencing that they want to give him but there's no point. I go to visit him, me and my children– . . . I go up to the jail. I have contact visits and regular visits. . . .

Ms. Franks also testified that in her visits with him:

> He seems fine. There's no rage. There's no temper. He knows what he did. I know what he's done. We've both sat and talked about it. He's apologized umpteen amount of times. I'm just tired of it. He's tired of it. There's no need for him to be there. He needs – I feel he needs to be out. . . . It wasn't the way I wanted it to be, but it's over. That's how I feel. I really feel it should just be over.

Another witness at the sentencing hearing was Dr. David A. Clayman. Dr. Clayman was a clinical and forensic psychologist who assessed the appellant. Dr. Clayman concluded that the appellant was neither a predator nor an excessively violent person. He indicated that the appellant did not have a history of violence, and he expressed the opinion that the appellant's behavior on the night of the incident giving rise to the charges was "aberrant" and he surmised that it was induced by alcohol ingestion. He also stated that his assessment of the appellant for violence and sexual violence predator issues showed that the appellant demonstrated a low risk of repeating the behavior. He further indicated that the longer the appellant spent in prison, the less likely he would be able to engage in socially acceptable behavior upon release.

As has previously been indicated, at the conclusion of the sentencing hearing, the circuit court sentenced the appellant to 30 years in the State Penitentiary for kidnaping, and five years in the State Penitentiary for wanton endangerment.

As has also been stated previously, on appeal, the appellant claims that the 30-year sentence for kidnaping is constitutionally impermissible given the circumstances of this case.

II.
STANDARD OF REVIEW

In Syllabus Point 1 of *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997), this Court stated that: "The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands."

III.
DISCUSSION

Both the United States Constitution and the West Virginia Constitution prohibit sentences which are disproportionate to the crime committed. The Eighth Amendment to the United States Constitution creates the federal prohibition. *See Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). West Virginia's constitutional prohibition is contained in West Virginia Constitution, Article III, § 5, which provides: "Penalties shall be proportioned to the character and degree of the offense."

In *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983), this Court established a so-called subjective test for determining whether a sentence violates the constitutional disproportionality principle. That test questions whether a sentence offends "the conscience and offends the fundamental notions of human dignity." Specifically, in Syllabus Point 5 of *State v. Cooper*, *id.*, the Court stated:

> Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Further, in *State v. Cooper, id.*, the Court suggested that factors affecting the subjective impact of a sentence include the age of the defendant, statements of the victim, and evaluations and recommendations made in anticipation of sentencing.

With these principles in mind, this Court has examined the circumstances of the present case. The facts show that the appellant was twenty years old at the time of the crime charged– close in age to the nineteen-year-old in the *Cooper* case. The victim, Ms. Franks, who is the mother of the appellant's child, has stated that neither she, nor the child, was permanently injured as a result of the incident and has plainly expressed the opinion that a lengthy sentence is unjustified. She has also suggested that it would be in her best interest for the appellant to receive a lesser sentence. Finally, the psychological evidence in the case has indicated that the appellant's behavior on the night of the crime charged was "aberrant" and that the appellant has demonstrated a low risk of repeating it. The psychological evidence also has indicated that the longer the appellant remains in prison, the less he will be able to engage in socially acceptable behavior.

On the wanton endangerment charge, which involved actual acts of violence against Ms. Franks, the appellant was sentenced to five years in the State Penitentiary, as provided by W. Va. Code 61-7-12. On the other hand, for the kidnaping, the charge in issue in the present appeal, the appellant was sentenced to the maximum 30 years in the State Penitentiary allowable under W. Va. Code 61-2-14a(a)(4).[1] Rather plainly, the acts of violence harmed Ms. Franks more seriously than the kidnaping, and it appears that the kidnaping was ancillary to the acts of violence, rather than an end in itself.

Under the overall circumstances, this Court believes that the 30-year sentence for kidnaping imposed upon the appellant does shock the conscience and is constitutionally impermissible under *State v. Cooper, id.* The Court also believes that the ten-year minimum sentence for kidnaping as set forth in W. Va. Code 61-2-14a(a)(4) should have been imposed, rather than the 30-year sentence imposed by the circuit court.

For the reasons stated, the judgment of the Circuit Court of Kanawha County is reversed insofar as it relates to the appellant's kidnaping sentence, and this case is

[1]West Virginia Code 61-2-14a(a)(4) provides for a sentence of from 10 to 30 years.

remanded with directions that the appellant be sentenced to 10 years in the State Penitentiary, to run concurrently with the wanton endangerment sentence, on the kidnaping charge.

Reversed and remanded
with directions.