STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 101234 (Berkeley County 09-F-92)

John A. Nicholson,
Defendant Below, Petitioner

FILED
February 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner John A. Nicholson appeals his convictions for one count of Sexual Assault in the First Degree, three counts of Sexual Assault in the Second Degree, three counts of Sexual Assault in the Third Degree, three counts of Incest, and four counts of Sexual Abuse by a Parent, Guardian or Custodian. The State filed a timely response.

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 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.

In his first assignment of error, petitioner asserts that the circuit court erred and violated his right of confrontation by denying his request for victim J.N.'s medical records. The circuit court performed a pre-trial, *in camera* review of these records and found that while the records contained references to the sexual abuse allegations, those references were not exculpatory and there was no indication that J.N. was suffering any disease or defect which would have made her unable to accurately remember or report the abuse. At trial, J.N. testified that she was taking prescription medications that, along with the passage of time, impacted her ability to remember details about some of the alleged incidents. J.N. could not recall the names of her medications. Based upon J.N.'s testimony, the trial court permitted petitioner's counsel to cross-examine J.N. about the medications and her ability to recall. J.N. gave consistent testimony about three alleged incidents, but had difficulty in remembering three other alleged incidents. The jury ultimately

convicted petitioner of crimes for three incidents of abuse against J.N., while also acquitting him of crimes for three other incidents of alleged abuse against J.N. This Court concludes that, even if there was error with regard to the medical records, petitioner was not prejudiced.

In his second assignment of error, petitioner argues that the circuit court should have granted his motion pursuant to Rule 14(a) of the Rules of Criminal Procedure to sever the trial of counts pertaining to victim A.M. from counts pertaining to victim J.N. This Court finds that the trial court correctly denied the motion. The allegations of each victim and the circumstances of the crimes were very similar. Even if severance had been granted, the allegations of the other victim would have been admissible pursuant to Rule of Evidence 404(b).

In his third assignment of error, petitioner argues that the circuit court erred by denying his motion for a continuance to enable him to obtain a psychological evaluation. This motion was filed one week before trial and petitioner did not present sufficient evidence to justify the motion. We find no error.

Petitioner was indicted for crimes arising from six incidents of sexual misconduct against two minor victims. Pre-trial, the prosecutor alluded to an additional four incidents of sexual misconduct against J.N. In his fourth assignment of error, petitioner argues that the circuit court erred by denying a motion for bill of particulars that would require the State to provide information about the additional four alleged incidents. The State responded that it had no evidence to disclose about those incidents. The alleged four additional incidents were not raised at trial, thus even if there was error, it was harmless.

At petitioner's trial, the State presented expert testimony from two scientists at the West Virginia State Police Laboratory. These experts testified that material found on J.N.'s jeans was seminal fluid, and that DNA testing of the seminal fluid established that it came from petitioner. In his fifth assignment of error, petitioner argues that he was denied his right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution because the circuit court did not require the State to present the testimony of every employee of the State Police Laboratory who worked on the sample and on the testing. The circuit court ruled that the State did not need to present the testimony of laboratory technicians who were involved in the testing procedures. The circuit court ruled that the testifying scientific experts, having examined the testing that was perform in their own labs, could offer their expert opinions and were subject to cross-examination.

Petitioner relies on *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009), where the United States Supreme Court considered the admission into evidence of affidavits of forensic drug analysis without any supporting testimony. The Supreme Court held that these affidavits were testimonial in nature, and their

admission without the testimony of the analysts who prepared them violated the Confrontation Clause and the holding in *Crawford v. Washington*, 541 U.S. 36 (2004). However, the facts in the case *sub judice* are distinguishable from those in *Melendez-Diaz*. Here, the scientists ultimately responsible for the scientific opinions that were rendered at trial did testify at trial and were subject to cross-examination. Petitioner apparently believes that the laboratory technicians who work for these experts also had to testify, but a majority of the Supreme Court rejected this idea in *Melendez-Diaz*:

> . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid hands on the evidence must be called. . . .

Id., 129 S.Ct. at 2532 n. 1 (citation omitted).

Finally, petitioner asserts in his sixth assignment of error that his indeterminate sentence of 113 to 315 years in the penitentiary is excessive and unconstitutionally disproportionate under the subjective, "shocks the conscience" test. Upon a consideration of petitioner's criminal history and the facts of these crimes, the circuit court imposed the statutory sentences for each count and ran the sentences consecutively. Petitioner asks this Court to modify his sentences to have them run concurrently. A trial court has broad discretion when imposing sentence. "Sentences 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). "When 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." Syl. Pt. 3, *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979); Syl. Pt. 3, *State v. Allen*, 208 W.Va. 144, 539 S.E.2d 87 (1999). Petitioner argues that he would have received a shorter sentence if he had committed seven counts of Murder in the Second Degree, but it is the Legislature's prerogative to specify punishment for crimes. Petitioner does not point to any impermissible factor that the circuit court considered when imposing sentence. Petitioner was convicted of seven counts of sexual misconduct against two minor girls. We do not find that the circuit court abused its discretion by imposing the sentences consecutively.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin
Justice Menis E. Ketchum