STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff below, Respondent

v.) No. 101236 (Marion County 09-F-16 & 09-F-230)

Lawrence Gregory Reynolds,
Defendant below, Petitioner

FILED
March 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Lawrence Gregory Reynolds appeals the circuit court's orders sentencing him to prison and denying his motion for reconsideration of sentence. 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, the briefs, 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.

Pursuant to a plea agreement, petitioner pled guilty to Driving Under the Influence, Third or Subsequent Offense; pled guilty to Possession with Intent to Deliver a Controlled Substance; and entered an *Alford*/*Kennedy* plea to Wanton Endangerment involving a Firearm. As part of the plea agreement, the State agreed to stand silent on the issue of sentencing, but the State reserved the right to allow the police officers involved in these matters to speak on the issue of sentencing. Thereafter, a pre-sentence investigation was performed and a sentencing hearing was held on January 11, 2010.

At the sentencing hearing, petitioner requested home confinement. Although the State had previously agreed to stand silent, the prosecutor recommended that petitioner be incarcerated. During this hearing, petitioner's then-counsel did not object to the prosecutor's sentencing recommendation. The court sentenced petitioner to one to three years in prison

for DUI Third or Subsequent Offense, one to fifteen years in prison for Possession with Intent to Deliver, and five years in prison for Wanton Endangerment with a Firearm. The court ordered that two of the sentences run concurrently for a total effective sentence of six to twenty years in prison. The sentencing hearing was adjourned.

After a brief period of time, the circuit court and parties returned to the courtroom and reopened the record of the sentencing hearing. The prosecutor indicated that because of the plea agreement he should not have made any sentencing recommendation, that this was an unintentional mistake on his part, and he asked that his recommendation be withdrawn. The court stated that it would ignore the prosecutor's recommendation. Moreover, the court stated that when deciding upon the sentence, the matters that had been of the greatest concern to the court were petitioner's ten prior felony convictions and the fact that law enforcement officers were endangered by petitioner's conduct. In accordance with the plea agreement, a police officer then expressed his opinion that home confinement would present a safety issue to both petitioner and law enforcement. The officer explained that his opinion was based upon the circumstances of petitioner's act of Wanton Endangerment with a Firearm, which petitioner committed while out on bond. Following the officer's testimony, the circuit court ruled that it would not change the sentence.

The sentencing order was entered February 25, 2010. Petitioner filed a motion for reconsideration of sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. The motion asserted that the prosecutor breached the plea agreement, and discussed petitioner's poor health and remorse. The circuit court denied the motion for reconsideration on May 26, 2010. This petition for appeal was filed on September 24, 2010.

"The Supreme Court of Appeals 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). "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). This Court applies a three-pronged standard of review to orders denying Rule 35 motions: "We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syl. Pt. 1, in part, State v. Head, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Petitioner argues that because the prosecutor violated the plea agreement, his sentence should be vacated and his case remanded for re-sentencing. He cites case law which holds that a defendant has an enforceable right not to have the terms of the plea bargain breached. Syl. Pt. 4, *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998); Syl., *State ex rel. Gray v.*

McClure, 161 W.Va. 488, 242 S.E.2d 704 (1978). Upon a review of the record and arguments, we find that the circuit court remedied the prosecutor's error and gave petitioner the benefit of his plea bargain. The circuit court agreed to ignore the prosecutor's recommendation, thus there was no improper basis for the sentencing decision. The court imposed the statutory sentence and expressed its basis for denying the motion for alternative sentencing. Given the nature of petitioner's crimes and criminal record, a six to twenty year prison sentence is not an abuse of discretion.

For the foregoing reasons, we find no error and affirm.

Affirmed.

ISSUED: March 11, 2011

CONCURRED IN BY:

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