

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff below, Respondent**

v.) No. 101256 (Gilmer County 09-F-35)

**Jermaine Graham,
Defendant below, Petitioner**

FILED

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

MEMORANDUM DECISION

Jermaine Graham appeals the prison sentence he received for his convictions of two counts of Delivery of a Controlled Substance. The State filed a timely summary 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.

Petitioner was indicted for four counts of Delivery of a Controlled Substance within 1,000 feet of a school, and one count of Possession of a Controlled Substance with Intent to Deliver. On March 9, 2010, petitioner pled guilty to two counts of Possession with Intent to Deliver [as lesser included offenses of Delivery within 1,000 feet of a school]. The remaining charges, and the element of being near a school, were dismissed. A pre-sentence investigation was performed. Thereafter, in the sentencing order filed June 3, 2010, the circuit court imposed the statutory sentences of one to five years on each count, to run consecutively, for a total effective sentence of two to twenty years in prison. The circuit court denied petitioner's request for home confinement and refused a motion for reconsideration of sentence.

Petitioner argues that the circuit court abused its discretion by refusing to grant him probation or home confinement. Petitioner argues that he has only one prior criminal

conviction – misdemeanor Destruction of Property – and while released on bail during the pendency of this case, he did not get into any additional trouble. Petitioner argues that he turned to selling drugs because of his inability to find gainful employment after he moved to West Virginia in 2005. Petitioner argues that he has a family to support, and he wants to move to New York in the hope of obtaining employment. The State argues that the circuit court did not abuse its discretion; that to support himself, petitioner has done nothing for four years but sell drugs; and that nothing in the record indicates that petitioner supported his family prior to his arrest.

“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). The circuit court imposed the sentences specified by statute. Upon a review of the record and the parties’ arguments, we find that the circuit court did not abuse its discretion in imposing these sentences and denying alternative sentencing. Moreover, we find no evidence of, and petitioner does not assert, that the circuit court relied on some impermissible factor.

For the foregoing reasons, we 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