

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

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

v.) No. 101401 (Wood County 08-F-81)

**Ralph McMullen
Defendant Below, Petitioner**

FILED

April 1, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Ralph McMullen files this timely appeal from the circuit court's order revoking his home confinement and remanding him to the custody of the Department of Corrections. Petitioner asserts that his sentence is excessive given the evidence presented and the nature of the incident, and he seeks a reversal of the circuit court's sentencing order. Petitioner has designated a portion of the record for purposes of his appeal. Respondent State of West Virginia 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 on one count of forgery, one count of conspiracy to commit forgery, three counts of uttering, and one count of conspiracy to commit uttering. He was charged in an information with failure to provide notice of registration changes as a sex offender and failure to appear. He was also charged in a recidivist information based upon his prior conviction for delivery of a controlled substance.

Petitioner pled guilty to failure to provide notice of registration changes as a sexual offender, failure to appear, conspiracy to commit forgery, and to the recidivist information. The other charges were dismissed. On November 25, 2009, petitioner was sentenced to periods of

incarceration, as follows: two to five years (as enhanced by the recidivist information) for failure to register as a sex offender, one to five years for failure to appear, and one to five years for conspiracy to commit forgery. All sentences were ordered to run consecutively for an effective sentence of four to fifteen years. The circuit court then granted petitioner's motion for alternative sentencing, suspended the sentences of imprisonment, and ordered petitioner to serve those sentences on the electronically-monitored Home Incarceration Program pursuant to the terms and conditions as set forth in the sentencing order.

On February 8, 2010, a motion was filed to revoke petitioner's home confinement. The motion stated that petitioner admitted to his home confinement officer that he had driven another person, David Reed, to Ohio, for Reed to purchase crack cocaine.¹ The circuit court held a hearing on the motion to revoke during which petitioner admitted the charges against him. On March 12, 2010, the circuit court entered an order in which it found that petitioner's admissions constituted clear and convincing evidence of substantial violations of the home incarceration program. On May 28, 2010, the circuit court entered an order revoking petitioner's home confinement and imposing the original sentences of imprisonment with credit for time served.

Petitioner argues that the circuit court erred in revoking his home confinement. He states that while he admitted the allegations in the motion to revoke home confinement, he did not commit a crime himself and was in compliance with the other conditions of his home confinement. Conversely, the State asserts that the circuit court was correct in revoking petitioner's home confinement because he violated three conditions of his home confinement by driving to Ohio without permission. The State acknowledges that petitioner was not charged with a crime, but adds that the circumstances would have allowed him to be charged as an accessory or co-conspirator.

Under West Virginia Code §62-11B-9, a person who violates the terms and conditions of home incarceration is subject to the same revocation procedures applicable to a probationer. Accordingly, this Court applies the standard of review in situations of probation revocation and reviews the revocation decision under an abuse of discretion standard, the underlying facts under a clearly erroneous standard, and questions of law and interpretations of statutes and rules under a *de novo* standard. Syl. Pt. 1, *State v. Hosby*, 220 W.Va. 560, 648 S.E.2d 66 (2007) (*per curiam*), citing Syl. Pt. 1, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997). Applying this

¹ The motion to revoke home confinement reflects that David Reed and three other individuals were arrested by Ohio authorities, but that petitioner was not being charged with any crime in Ohio at that time.

standard, the Court cannot find that the circuit court erred in revoking petitioner's home confinement.

Petitioner also argues that his sentence is excessive, disproportionate to the character and degree of the offense, and constitutes cruel and unusual punishment. "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 State argues that the circuit court did not abuse its discretion and that an effective sentence of four to fifteen years for three felonies and a habitual criminal charge was within statutory limits, was not based on any impermissible factor, and was neither disproportionate nor shocking.

Having reviewed the record and the parties' arguments on appeal under the pertinent standards of review, this Court cannot find any error or an abuse of discretion in either the revocation of petitioner's home confinement or the imposition of the previously suspended sentences. Accordingly, we affirm.

Affirmed.

ISSUED: April 1, 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