# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**FILED**
**June 24, 2011**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

**vs) No. 101485** (Clay County 09-F-26)

**Billy Stewart, Defendant Below,**
**Petitioner**

## MEMORANDUM DECISION

Petitioner Billy Stewart appeals from his felony conviction for manufacturing a controlled substance (marijuana). Petitioner challenges the sufficiency of the evidence and his sentencing, and he asserts that his trial counsel was ineffective. Petitioner seeks a reversal of his conviction and an acquittal. In the alternative, petitioner seeks a new trial or, if a new trial is not granted, a remand for the imposition of an alternative sentence. The State of West Virginia ("the State") has filed a summary response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on February 23, 2011. 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 charged with the manufacture of a controlled substance (marijuana), which he states was growing approximately 100 yards from his home. The State indicates that the marijuana was growing in a garden approximately forty to fifty yards from, and within plain view of, petitioner's residence.

The property on which the marijuana was growing was inherited by petitioner and nine other heirs upon the death of petitioner's mother several years earlier, but the property had never been sold, partitioned, or divided among the heirs. The State indicates that it

appears that petitioner and his brother Barry were the only two heirs who resided near the property where the illegal crop was confiscated. Petitioner states that there was no evidence at trial directly linking him to the cultivation of the marijuana.

Petitioner did not testify at trial. He was represented by attorney Wayne King, who petitioner states did not call any witnesses on his behalf at trial although it was petitioner's desire that his counsel do so.

On February 2, 2010, the jury returned a verdict finding petitioner guilty of the felony offense of manufacturing marijuana, a Schedule I controlled substance, in violation of West Virginia Code §60A-4-401. Petitioner's post-trial motion was denied.

Petitioner suffered a stroke sometime between his conviction and his sentencing hearing, which was held on June 10, 2010. During his sentencing hearing, petitioner testified that he believed that his adult son, who does not reside with him, planted the marijuana in question. The trial court sentenced petitioner to one to five years in prison and imposed a $5,000 fine and court costs.

## I. Sufficiency of the Evidence

Petitioner asserts that the only evidence at trial was that the marijuana plants were found growing approximately 100 yards from his residence. The trial court instructed the jury that the "manufacture" of marijuana means, "the production, preparation, propagation, compounding, conversion or processing" of a controlled substance . . . and that "production includes manufacture, planting, cultivation, growing or harvesting of a controlled substance." Petitioner asserts that there was no evidence at trial that he engaged in any of these activities. Petitioner adds that even when viewed in the light most favorable to the prosecution, the evidence was insufficient to support a prima facie case of manufacturing nor was there substantial evidence upon which a jury might justifiably find him guilty beyond a reasonable doubt.

The State responds that the evidence at trial was sufficient evidence to support a guilty verdict beyond a reasonable doubt. The State asserts that no one disputed at trial that petitioner was an owner of the property in question or that the "garden" where the marijuana was being manufactured was within eyesight of his residence. The State also notes that a disinterested lay witness, Lloyd Nichols, as well as petitioner's brother, Barry Stewart, both testified that the garden where the marijuana was growing was petitioner's garden located forty to fifty yards from, and within plain view of, petitioner's residence.

In addressing challenges to the sufficiency of the evidence, this Court has held:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995); Syl. Pt. 7, *State v. White*, 227 W.Va. 231, 707 S.E. 2d 841 (2011). Upon a review of the record under this standard of review, this Court finds that there was sufficient evidence to support the jury's verdict.

## II. Ineffective Assistance of Counsel

Petitioner next asserts that his trial counsel was ineffective for his refusal to call witnesses or present evidence during petitioner's case-in-chief. Petitioner asserts that he made his counsel aware of certain witnesses and their testimony sufficiently in advance of trial, yet his counsel failed to make a proper investigation of those witnesses. Petitioner contends that had his counsel done so, he would have realized the value of these witnesses to petitioner's defense that he had no dominion or control over the marijuana plants in question.

Petitioner also asserts that his trial counsel did not present any evidence to rebut the State's contention that the proximity of the plants to petitioner's residence was sufficient to demonstrate that he manufactured the marijuana. Petitioner states that while great deference is given to strategy decisions made by trial counsel, the failure of his counsel to present witnesses who could establish, in petitioner's opinion, that he had not participated in the manufacture of the marijuana, clearly demonstrates that his counsel's performance was deficient under an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different.

The State responds that any argument that petitioner's trial counsel was ineffective is premature. The State notes that because the issue was not raised below, there is no factual record developed from which this Court could determine whether petitioner's counsel was

ineffective. The State adds that although it is impossible to determine what motivated trial counsel's actions based upon the record before this Court, it appears that petitioner's trial counsel was not ineffective.

This Court's ability to review a claim of ineffective assistance of counsel is very limited on direct appeal. Such a claim is more appropriately developed in a petition for writ of habeas corpus. Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995); Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Accordingly, we decline to rule on any claims of ineffective assistance of counsel in the context of this direct appeal. If petitioner desires, he may pursue a petition for writ of post-conviction habeas corpus. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

## III. Sentencing

Lastly, petitioner asserts that the prison sentence imposed upon him by the trial court was excessive and that alternative sentencing was warranted. Petitioner contends that his criminal history reflects that he had not been convicted of any crime, except for a hunting related incident in 1996, and "matters occurring in the State of Florida in the 1970s." Petitioner argues that the trial court ignored his counsel's argument regarding petitioner's on-going treatment and therapy as part of recovery from his stroke. Petitioner argues that under the facts of this case, an alternative sentence is more appropriate and a period of incarceration is unreasonable.

The State responds that the prison sentence imposed by the trial court is neither excessive nor erroneous and is within the statutory limits provided in West Virginia Code §60A-4-401. The State contends that the trial court considered the severity of petitioner's crime, his history of convictions, and his failure to accept responsibility for the instant crime before imposing sentence. The State adds that what petitioner refers to as a "limited criminal history" includes convictions for breaking and entering, grand larceny, negligent shooting, and making or issuing worthless checks, all of which the trial court found to be significant.

"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). Petitioner does not contend that impermissible factors were considered in arriving at his sentence, which was within statutory limits. Accordingly, we find no error.

## IV. Conclusion

For all of the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** June 24, 2011

**CONCURRING:**

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