

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

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

vs) No. 101509 (Mason County No. 09-F-93)

**Arthur Ray Petrie,
Defendant Below, Petitioner**

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Arthur Ray Petrie files this timely appeal from his sentence of one to five years in prison following his guilty plea to one count of possession with intent to deliver a controlled substance (marijuana). Petitioner asserts that the circuit court erred in sentencing him to serve the statutory punishment of one to five years in prison, because it is disproportionate to the character and degree of the offense. He also argues that the circuit court erred in not following the recommendation in the pre-sentence evaluation report that Petitioner be placed on probation with required placement at a day report center. Petitioner seeks a reversal of his sentence and a remand for imposition of an alternative sentence. Respondent State of West Virginia has 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.

In addressing petitioner's arguments, the Court notes that "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 contends that his statutory one to five year prison sentence violates the Eighth Amendment protection against cruel and unusual punishment and the West Virginia constitutional requirement that penalties be proportionate to the character and degree of the offense. As applied in his case, petitioner argues that a prison term of one to five years "is so offensive that it cannot pass a societal and judicial sense of justice and it shocks the conscience..." particularly given his age and his poor physical and mental health. The State responds that the circuit court properly considered all the relevant circumstances in rendering

its sentence in this case. The Court does not find petitioner's constitutional arguments to be persuasive. "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.' Syllabus point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)." Syl Pt. 3, *State v. Booth*, 224 W.Va. 307, 685 S.E. 2d 701 (2009) (per curiam).

Next, petitioner argues that the circuit court erred in not following the recommendation of the pre-sentence evaluation that he receive probation with the highest level of supervision and placement at a day report center. The State responds that the circuit court acted appropriately within its discretion in denying petitioner's motion for an alternative sentence and in sentencing him to the statutory one to five year prison term applicable to his crime. The State notes that the Department of Corrections evaluator concluded that petitioner was at a high risk to re-offend without treatment and supervision.

At sentencing, the circuit court considered the pre-sentence investigation report from the probation department and the 60-day evaluation report from the Diagnostic Center. The circuit court heard from petitioner, his counsel and the State. Information before the circuit court included the facts that petitioner had failed a drug test at the time he entered his plea, he had previously been convicted of felonies on two occasions; and he had been placed on probation several times in the past. In considering the appropriate sentence, the circuit court observed that "over the years [petitioner] has been granted a significant amount of leniency from the system..." but he had not been rehabilitated or changed his behavior. The circuit court denied petitioner's motion for alternative sentencing and sentenced him to the statutory sentence, finding that the crime in question was serious and that petitioner was a drug dealer who would not be successful if given an alternative sentence.

In reviewing a sentencing order, the Court utilizes a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. *State v. Lucas*, 201 W. Va. 271, 276, 496 S.E. 2d 221, 226 (1997). The Court finds no error in the circuit court's sentencing decision. For the foregoing reasons, 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