STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101546 (Berkeley County 08-F-42)

Henry N. Hale, Jr.
Defendant Below, Petitioner

FILED
April 29, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Henry N. Hale, Jr. files this timely appeal following his convictions on five counts of second degree sexual assault, five counts of incest, and five counts of sexual abuse by a parent, guardian, or custodian following a jury trial. The trial court imposed the maximum sentences of imprisonment for each of the convictions and then ordered those sentences to run consecutively. Petitioner raises various procedural and evidentiary errors below and challenges his sentencing. Petitioner seeks either a reversal of his convictions and a new trial or, in the alternative, a remand with directions that his sentences be ordered to run concurrently. Respondent State of West Virginia has filed a 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 six counts of sexual abuse by a parent, guardian or custodian, seven counts of second degree sexual assault, and seven counts of incest. The victim was petitioner's minor stepdaughter, who appears to have been fifteen to sixteen years old at the time of the offenses, which occurred over an approximately twenty-month period. The victim was eighteen years old at the time of trial.

The State filed a notice of Rule 404(b) evidence asserting that petitioner had previously sexually assaulted and sexually abused two former stepchildren when they were minors. The State provided petitioner with the victim's recorded interview from the Child Advocacy Center where she reported petitioner's offenses against her. The trial court conducted a *McGinnis*[1] hearing and found the State's 404(b) evidence to be admissible. The State moved to preclude evidence of other sexual conduct of the victim on the basis that it was barred by the rape shield law. The trial court granted the State's motion.

The State obtained a competency evaluation of the victim, which was performed by Dr. Chanin Kennedy, whose report was provided to petitioner and the trial court. The State contends that during a hearing held on August 21, 2009, petitioner withdrew his prior motion for an independent psychiatric evaluation of the victim, but adds that the record does not contain an order from that hearing.

The trial court reviewed the medical and psychological records of the victim and, after a hearing, found that she was competent to testify. In the pre-trial order entered on March 8, 2010, the trial court stated that Dr. Kennedy's psychological evaluation of the victim revealed that she exhibited no undue influence or contamination from others; that she was not significantly suggestible to the questioning of others; that she was attentive and did not exhibit significant impairments in concentration; and that she was consistent in her report of the details of the sexual abuse.

At trial, the evidence reflected that the victim was sexually assaulted by petitioner in the home where she lived with him on Scrabble Road and in his blue truck parked near the home's driveway. State Trooper David Boober testified at trial that the residence on Scrabble Road is in Berkeley County.

The jury returned its verdict finding petitioner guilty of five counts of second degree sexual assault, five counts of incest, and five counts of sexual abuse by a parent, guardian, or custodian. The jury acquitted petitioner on the five remaining counts in the indictment. The trial court sentenced petitioner to the maximum period of incarceration allowed by law on each conviction and then ordered those sentences to run consecutively for an effective sentence of 115 to 300 years. Petitioner's post-trial motions for acquittal and a new trial were denied by the trial court.

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[1] *State v. McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994).

Competency of the Victim

Petitioner asserts that he was denied his Fourteenth Amendment right to due process of law and his Sixth Amendment right to have a "meaningful opportunity" to cross-examine the victim. Petitioner states that the trial court denied a competency hearing of the victim on the basis that the evaluation conducted by Dr. Kennedy, the State's expert, was comprehensive and her report reflected that the victim was competent to testify. Citing Syllabus Point 2 of *Burdette v. Lobban*, 174 W.Va. 120, 323 S.E.2d 601 (1984), petitioner asserts that while the trial court was satisfied with the competency of the alleged victim, he should have been allowed to obtain an *independent* evaluation of the victim. Petitioner asserts that it became apparent during the victim's testimony that she suffered from "significant mental defects" impacting her ability to recall information. Citing *State v. Stacy*, 179 W.Va. 686, 371 S.E.2d 614 (1988), petitioner asserts that when a victim will not effectively respond to cross-examination seeking to elicit more detail of an incident of abuse or evidence relevant to impeachment, a defendant's right to confrontation may be raised.

The State asserts that the trial court properly ruled that the victim was competent to testify based on the victim's medical and psychological records before the court and after petitioner had withdrawn his motion for a competency evaluation following his receipt of a copy of Dr. Kennedy's report. The State argues that even if petitioner had not withdrawn his motion, any additional evaluation would have been discretionary with the trial court under *State v. Ayers*, 179 W.Va. 365, 369 S.E.2d 22 (1988)(per curiam), and that petitioner has failed to demonstrate that the trial court abused its discretion in determining that the victim was competent to testify.

"'The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error.' Syllabus Point 8, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974)." Syl. Pt. 10, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001). The Court concludes that petitioner has not sustained his burden in this regard.

Sufficiency of the Indictment

Petitioner asserts that his indictment was constitutionally deficient warranting a reversal of his convictions. Petitioner asserts that an indictment is sufficient under Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure and Article III, §14 of the West Virginia Constitution "if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." Syl. Pt. 6, *in part*, State *v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999).

Petitioner argues that the alleged offenses in his indictment spanned a twenty-month period, which precluded him from presenting an alibi defense because there was no way to limit the time frame of the indictment. Petitioner states that West Virginia Code §62-2-11, which normally precludes hindsight in the construction of indictments, does not aid the State in this instance given the absence of "sufficient certainty for judgment to be given thereon."

The State asserts that the trial court properly found that the indictment was sufficient. The State notes that petitioner has not alleged that any of the required elements of the charged offenses are missing, only that the range of dates provided made it difficult for him to construct an alibi defense. The State asserts that such argument is inadequate to sustain a motion to quash because the time of the commission of a crime is immaterial where time is not of the essence of the crime charged. The State relies, in part, upon *State v. Miller*, 195 W.Va. 656, 664, 466 S.E.2d 507, 515 (1995)(per curiam), wherein the Court stated that "[b]ecause time is not an essential element of the charged offenses . . . the defendant was not exposed to the danger of being put in jeopardy to the same offenses. . . ."

"'Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.' Syl. Pt. 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.d2d 535 (1996)." Syl. Pt. 3, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). Under the facts and circumstances of this case, the Court finds that the indictment was sufficient.

Rule 404(b) Evidence and the Rape Shield Law

Petitioner asserts that the State utilized evidence under Rule 404(b) of the West Virginia Rules of Evidence as the basis to convict him. Petitioner states that the trial court refused his request that the State be ordered to present its 404(b) material *after* the testimony of the victim so as to avoid undue prejudice. Petitioner adds that the trial court also disallowed any evidence related to the sexual relations between the victim and another perpetrator. Petitioner asserts that such evidence was admissible under Rule 404(a)(3) of the West Virginia Rules of Evidence, which provides that in a case charging criminal sexual misconduct, evidence of the victim's prior sexual conduct with persons other than the defendant is admissible "where the court determines at a hearing out of the presence of the jury that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice. . . ." Petitioner states that there was no such hearing. Petitioner argues that the inability of the jury to assess the competency of the victim coupled with her prior reporting of molestation by another perpetrator were "so inextricably intertwined that manifest injustice occurred."

With regard to the 404(b) issue, the State notes that the trial court conducted a *McGinnis* hearing and found the State's 404(b) evidence to be admissible. The State asserts that petitioner did not cite any authority to support his oral motion seeking to compel the State to present its 404(b) evidence after the State presented its evidence against petitioner. The State argues that petitioner has failed to demonstrate how the trial court abused its discretion in denying his oral motion.

Regarding the State's motion to preclude evidence of other sexual conduct of the victim, the State asserts that not only did petitioner not object to the State's motion, but the rape shield law (West Virginia Code §61-8B-11) prohibits such evidence. The State argues that under *State v. Wears*, 222 W.Va. 439, 665 S.E.2d 273 (2008)(per curiam), petitioner was required to make an evidentiary proffer of the victim's sexual history so as to afford the trial court a meaningful opportunity to balance the interest of the State against petitioner's interest in the context of the rape shield law, but petitioner failed to do so. The State asserts that petitioner has also failed to demonstrate that the trial court abused its discretion in granting the State's motion to preclude such evidence.

"'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion[.]' Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)." Syl. Pt.4, *State v. Biehl*, 224 W.Va. 584, 687 S.E.2d 367 (2009)(per curiam). "The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion." Syl. Pt. 6, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999). Petitioner fails to state in his petition for appeal exactly what evidence was excluded. The Court cannot state that the trial court abused its discretion under the facts and circumstances of this case.

Venue

Petitioner asserts that the State failed to elicit "comprehensive" or "reliable"evidence that the unlawful acts actually occurred in Berkeley County and that "supposition and innuendo" were insufficient to meet the applicable preponderance of the evidence standard. Petitioner states that the victim, due to her prior "closed head injury," was unable to report accurately the contact that purportedly occurred in Berkeley County.

The State asserts that the victim's trial testimony reflects that she was sexually assaulted by petitioner several times in the home on Scrabble Road where she lived with petitioner and in his truck parked near the home's driveway. The State notes that West Virginia State Trooper David Boober testified at trial that the residence on Scrabble Road is in Berkeley County. The State argues that the evidence at trial was sufficient to establish venue under the preponderance of the evidence standard.

"'The State in a criminal case may prove the venue of the crime by a preponderance of the evidence, and is not required to prove the same beyond a reasonable doubt.' Syllabus Point 5, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979)." Syl. Pt. 4, *State v. Sprague*, 214 W.Va. 471, 590 S.E.2d 664 (2003)(per curiam). The Court concludes that the State met its burden of proof in this regard.

Sentencing

Petitioner asserts that the trial court's decision to impose his prison sentences consecutively means that a person convicted of seven murders in the second degree with the maximum sentence imposed for each will be eligible for a quicker release date than he will under his current sentence of imprisonment. Petitioner argues that his sentence is disproportionate and excessive and should be modified so that all sentences run concurrently with each other or, in the alternative, that his sentences be modified as this Court deems appropriate under principles of justice.

The State asserts that under West Virginia Code §61-11-21, sentences for two or more convictions shall be consecutive unless the sentencing court orders them to run concurrently. The State argues that the trial court properly imposed the statutory indeterminate sentences upon petitioner for his convictions and that petitioner has not identified any impermissible purpose in the trial court's sentencing. The State argues that the trial court did not abuse its discretion in sentencing petitioner.

"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). Under these standards, the Court finds no error in sentencing.

Conclusion

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 by the trial court. Accordingly, we affirm.

Affirmed.

ISSUED: April 29, 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