STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 101549 (Berkeley County 10-F-33)

Stacey M. Stanley,
Defendant Below, Petitioner

FILED
June 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Stacey M. Stanley was convicted by guilty plea of grand larceny. She appeals the circuit court's order sentencing her to one to ten years in prison. Respondent State of West Virginia has filed a response to the petition for appeal.

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.

The facts surrounding the crime charged in the current matter are not disputed. In July 2009, petitioner and three co-defendants were "driving around doing drugs and looking for a friend's house when they came upon a residence with an open garage and various tools lying in the driveway." Petitioner and a female co-defendant went to knock on the door of the house while the male co-defendants entered the unopened garage, removed items and placed them into petitioner's vehicle. Petitioner stated that she initially objected, but eventually acquiesced. Petitioner and her co-defendants were seen by the homeowner's daughter as they drove away from the house. They were arrested a short distance away and all of the stolen items were returned to the owner.

Petitioner was indicted on one count of burglary, one count of grand larceny, and one count of conspiracy. Petitioner agreed to plead guilty to the grand larceny charge. The State

agreed to dismiss the other counts, not to file a recidivist enhancement, and to remain silent at sentencing.

Probation Officer Elaine Miller prepared the pre-sentence investigation report. Petitioner asserts that "conspicuously absent from the report was any information regarding [petitioner's] behavior on a previous probationary sentence." Petitioner filed a sentencing memorandum in support of her request for alternative sentencing, arguing that her drug addiction caused her to become involved in criminal behavior, that she had begun receiving treatment, and that she was seeking a sentence that would allow her to continue receiving the drug addiction treatment that she needed. At the combined plea and sentencing hearing, petitioner's counsel indicated to the circuit court that "we received a copy of the [pre-sentence] report on July 15; had an opportunity to present a copy to [petitioner]; she's had an opportunity to review it. There are no corrections in the report."

Chief Probation Officer Mark Hofe appeared at the combined plea and sentencing hearing, filling in for Probation Officer Elaine Miller, the author of the pre-sentence report. Following the portion of the hearing involving the taking of petitioner's guilty plea, the circuit court heard testimony from petitioner's mother and arguments of petitioner as to alternative sentencing. According to petitioner, after her counsel argued "vigorously" for alternative sentencing, the circuit judge requested that Chief Probation Officer Hofe come to the bench, after which the circuit judge had a discussion of about ten minutes with Hofe outside the presence of petitioner and her counsel. At the end of this discussion, the circuit court ordered petitioner to stand and imposed the statutory one to ten year prison sentence for grand larceny.

Petitioner asserts that the circuit court's stated reasoning for denial of alternative sentencing was based upon her "poor track record during her previously imposed probationary sentence." She also asserts that the "court then enumerated a number of specific violations and explained that the probation officer at the hearing, Mark Hofe, had told the court that [petitioner's] previous probation officer on her previous probationary sentence, Jose Perez, should have filed a revocation of her probation, even though her probation was never revoked."

Petitioner alleges that the circuit court never provided her with any of the factual assertions made by the probation officer, and never allowed petitioner an opportunity to contest or address her probationary record or the factual assertions of the probation officer. According to the petition, at the time that this information reached the circuit court, it had gone through three probation officers. Petitioner alleges that her original probation officer, Jose Perez, had written notes regarding petitioner's behavior during her prior probation period. Elaine Miller who authored the current pre-sentence report, allegedly read Perez's written notes, which were not disclosed to petitioner, and based her decision not to

recommend alternative sentencing on them. Petitioner alleges that Chief Probation Officer Hofe, who was filling in for Elaine Miller at the plea and sentencing hearing, then provided an account of these written notes to the court in either oral or written form. Petitioner asserts that "at no point in this process of this information passing between the multiple probation officers and [the circuit court] was this information disclosed to [petitioner]...."

The transcript of the plea and sentencing hearing was evidently not prepared until after the filing of the petition for appeal. A review of the transcript shows that petitioner's counsel indicated that he had received a copy of the pre-sentence report, that petitioner reviewed it and counsel stated "there are no corrections in the report." Petitioner's counsel represented to the circuit court at the hearing that he had "an opportunity to meet with Chief Probation Officer Hofe in compliance with Rule 22 [sic], to discuss the sections that are not mentioned in the report that the Defendant has a right to hear about and may be before the Court so we can address them thoroughly on sentencing...." Petitioner's counsel presented argument for alternative sentencing in which he recognized "the probation office's concerns regarding the Defendant's prior history on probation" and added that: "[a]s the Court knows from the record, there has been a relapse after treatment on one prior felony charge that had probation and–and was in front of the Court for five years for and [petitioner] had some problems adjusting to the probation and successfully completing it. Ultimately, she was discharged successfully." Petitioner's counsel also stated to the court: "[h]er adjustment on probation was not smooth, and that's a strike against her as well. We recognize that. She ultimately discharged from probation without—without being terminated or sent to the penitentiary, so that—that speaks somewhat in her favor for her ability to adjust and successfully complete probation."

When petitioner's counsel finished his presentation in support of alternative sentencing and prosecutor indicated in response that the State was standing silent due to the plea agreement, the circuit court stated: "All. right. Counsel, any objection if I speak to my probation officer for about one minute—" Petitioner's counsel responded: "No, Your Honor." The Court continued: "here at the bench, and then we'll move forward, since he's[1] had the opportunity to hear more than we read before. And you're welcome to be seated while we do that. Thank you." When this bench conference ended, the circuit court proceeded directly to the pronouncement of sentence. In denying petitioner's request for alternative sentencing, the circuit court noted that Probation Officer Miller, who authored the pre-sentence report, had opined that petitioner was "an extremely poor candidate for alternative sentencing." The circuit court discussed petitioner's previous difficulties while on probation for her prior crime. This Court's review of the plea and sentencing hearing transcript reveals no objection was

[1] The circuit judge appears to be referencing Chief Probation Officer Hofe in this statement.

posed by petitioner to the consideration of the information alleged to have been provided by Chief Probation Officer Hofe.

Standard of Review

"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 Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997) "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. pt. 2, *State ex. rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E. 2d 162 (1996)**.** "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E. 2d 114 (1995).

Petitioner's prior probationary record

Petitioner argues that her constitutional rights, including due process rights and right to effective assistance of counsel, were violated when the circuit court determined her sentence based upon facts that were not disclosed to her or her counsel prior to the imposition of her sentence. As such, the petitioner seeks vacation of her sentence and a new sentencing hearing to correct the due process violation. Petitioner relies upon *State v. Maxwell*, 174 W.Va. 632, 328 S.E. 2d 506 (1985), which held at syllabus point 3, "Any facts which would have a bearing on the sentencing should be brought out in the presentence report or by witnesses called in open court, in the presence of the defendant, so that the defendant has an opportunity to refute any derogatory statements and to cross-examine the witnesses."

In *Maxwell*, the defendant appealed his jury conviction of multiple offenses involving the possession and sale of controlled substances. Among other arguments, Maxwell asserted that he was denied due process of law because matters were considered during his sentencing hearing which were not brought out on the record. On this issue, the Court concluded that Maxwell had a meritorious claim. The Court noted:

> Before denying the appellant's motion for probation the court heard witnesses, both for and against the defendant. However, one incident on which the court placed great weight was not brought out by any of the witnesses, either in the sentencing hearing or in the trial of the case, nor was it found anywhere in the presentencing report. The incident, which involved a fifteen-year-old girl who

> was found drinking beer and smoking marijuana at the appellant's tavern, was apparently an event made known to the court outside the sentencing proceeding. The court referred to this incident repeatedly and it was apparent that this was a major factor in the court's consideration of whether the appellant was entitled to probation.

Maxwell at 635. Based upon the Court's conclusion that there was a prejudicial error in the sentencing hearing, the *Maxwell* Court vacated the sentence imposed by the lower court and remanded the case for a new sentencing hearing. Likening her sentencing hearing to the one in *Maxwell*, petitioner seeks vacation of her current sentence and remand for a new sentencing hearing.

The State responds that petitioner has failed to identify to this Court where she objected to the circuit court's actions, which she now challenges on appeal. Further, the State contends that petitioner was well aware that her prior probation was twice revoked by the circuit court and that her assertion that her probation was not previously revoked is "patently false." A probation revocation hearing was held by Circuit Court Judge Christopher Wilkes on December 17, 2004 in the petitioner's prior criminal case. Petitioner was represented by attorney David Downes. Petitioner admitted multiple violations of probation, although the relevant misconduct was not specified in the order. Petitioner was reinstated to the previously ordered probation but, as a term of that probation, she was remanded to the Eastern Regional Jail to serve three months and, upon her release, was ordered to abide by the terms of her probation.

On June 9, 2006, Judge Wilkes held another probation revocation hearing during which petitioner was represented by Attorney Kevin Mills. The State and petitioner reached an agreement in which she would admit to a violation of her probation for failing to report to her probation officer and for relapsing into drug use. In return, her probation would be reinstated and extended for another 24 months, she would enroll in a long-term drug treatment facility, and she would successfully complete the rehabilitation program. Judge Wilkes ordered that any further violations of probation would result in immediate revocation of her probation and immediate incarceration without the necessity of further court order. Petitioner was ordered released from jail and placed directly in a drug treatment facility.

The State contends that petitioner's counsel was "well aware that her prior probation was revoked, twice, as Mr. Mills represented the petitioner...during the second revocation." The State argues that it would be of no surprise to either the petitioner or her counsel that such information would be considered in determining the appropriate sentence in the present case. The State argues that there were no violations of the petitioner's due process rights or her right to effective assistance of counsel as to her sentencing.

The Court notes that the record provided by the circuit court does not contain either the pre-sentence investigation report prepared by Probation Officer Miller nor the memorandum in support of alternative sentencing prepared by petitioner's counsel. The Court cannot determine from the record presented that the circuit court committed error or that petitioner's due process rights or her right to effective assistance of counsel[2] were violated at her sentencing hearing. Further, the Court notes that the alleged error was not preserved by objection and does not arise to the level of plain error. Even if an objection had been raised, the Court believes that the facts of the current case are distinguishable from those set forth in *Maxwell* and do not necessitate a new sentencing hearing.

Circuit Court Communication with Probation Officer

Petitioner next argues that the circuit court erred in communicating at sentencing with Chief Probation Officer Hofe, in a manner that petitioner characterizes as *ex parte*. Petitioner alleges that this communication violated her due process rights to be present at all critical stages of the trial, including her sentencing.

The State notes that petitioner cites no authority to support her assertion that the circuit court's communication with its own probation office was an *ex parte* communication. The State argues that the probation office is not a party to the criminal case and is part of the judicial branch. *See* W.Va. Code § 62-12-5. The Court concludes that no objection was made to the bench conference between the circuit court and the probation officer; therefore, this assignment of error was not preserved and does not arise to the level of plain error.

Alleged Violation of Rule 32(c)(3)(A)

Petitioner argues that the circuit court violated Rule 32(c)(3)(A) of the West Virginia Rules of Criminal Procedure by failing to summarize information, which was not required to be disclosed in the presentence report, but upon which it relied in determining the sentence, and by failing to give petitioner a reasonable opportunity to comment on that information.

Rule 32(c)(3)(A) provides:

(3) Imposition of sentence. - Before imposing sentence, the court must:

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[2] The Court declines to reverse the sentence imposed by the circuit court on the grounds of ineffective assistance of counsel. However, the petitioner is not foreclosed in a future habeas corpus proceeding from asserting and developing further the issue of ineffective assistance of counsel. We express no opinion on the merits of any future habeas petition.

> (A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court in lieu of making that information available must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information[.]

Petitioner states that she is not objecting to the fact that the probation officer's recommendation was not disclosed, but because "the probation officer...also provided *ex parte* factual information to the circuit court and that the circuit court used that information in determining petitioner's sentence." Petitioner cites *State v. Roberson*, 752 N.E. 2d 984, 988 (Ohio App. 2001)and argues that there is a difference between the disclosure required as to a probation officer's recommendation and "factual information," which must be disclosed.

The Court notes the transcript of the sentencing hearing indicates that petitioner's counsel represented to the circuit court that he had "an opportunity to meet with Chief Probation Officer Hofe in compliance with Rule 22 [sic], to discuss the sections that are not mentioned in the report that the Defendant has a right to hear about and may be before the Court so we can address them thoroughly on sentencing. . . ." Based upon the record presented, the Court can find that no error occurred which violated Rule 32(c)(3)(A).

For the foregoing reasons, we find no error in the decision of the circuit court and petitioner's sentence is hereby affirmed.

Affirmed.

ISSUED: June 15, 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