STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Tony Jean Walker,
Petitioner Below, Petitioner

vs.) No. 11-0122 (Kanawha County 09-MISC-313)

Adrian Hoke, Warden, Huttonsville Correctional Center, Respondent Below, Respondent

FILED
September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Tony Jean Walker appeals the circuit court's December 15, 2010 order dismissing his petition for a writ of habeas corpus. Petitioner argues, inter alia, that he was given a life sentence not authorized by the recidivist statute found at West Virginia Code §61-11-18. The appeal was timely perfected by the pro se petitioner, with petitioner's appendix accompanying his brief. The respondent warden has filed a summary response, to which petitioner has filed a reply.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. The case is mature for consideration. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner has been convicted of eleven felonies spanning from 1994 to 2008. These convictions were obtained in four different criminal cases: No. 94-F-419 (two counts of burglary, two counts of breaking and entering, and two counts of grand larceny); No. 96-F-462 (one count of breaking and entering); No. 08-F-89 (two counts of breaking and entering and one count of grand larceny); and No. 08-F-420 (one count of breaking and entering).

Petitioner has had a life sentence imposed upon him through the application of the recidivist statute found at West Virginia Code §61-11-18.[1] The triggering felony, in No.

[1] Subsection (c) of West Virginia Code §61-11-18 provides that "[w]hen it is determined, as provided in [West Virginia Code §61-11-19], that such person shall have been twice before convicted in the United States of a crime punishable by confinement in

08-F-420, was for breaking and entering, which arose out of an incident where petitioner and his accomplices attempted to break into a Rite Aid store after hours. The incident occurred without any contact between petitioner and his accomplices and anyone other than law enforcement. Petitioner and his accomplices were apprehended without resistence.

In his petition for a writ of habeas corpus, filed in No. 09-MISC-313, petitioner argued that his life recidivist sentence violates the constitutional mandate that all penalties "shall be proportioned to the character and degree of offence." W.Va. Const., art. III, § 5. In its order dismissing petitioner's petition for a writ of habeas corpus, the circuit court noted the applicable standard of review as set forth in Syllabus Point Seven, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981):

> The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.

Because the breaking and entering in 08-F-420 was the triggering offense, the circuit court considered it first and noted that this Court has stated that the crime of breaking and entering "carries the potentiality of violence and danger to life as well as to property." *State v. Vance*, 164 W.Va. 216, 233, 262 S.E.2d 423, 432 (1980) (rejecting the contention that a life recidivist sentence was disproportionate in a case where there was a breaking and entering of a store in the early hours of the morning). The circuit court acknowledged that this Court later stated, in *State v. Davis*, 189 W.Va. 59, 427 S.E.2d 754 (1993) (*per curiam*), that when the breaking and entering is committed after hours and on property that is not a dwelling, there is no inherent risk of violence.

The circuit court concluded as follows:

> While [petitioner's triggering] felony did not involve violence,

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a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life."

> it is the opinion of this Court that [petitioner]'s prior record of felony convictions is so extensive that any added weight that may be placed on the most recent conviction cannot cause the Court to disregard the picture of glaring criminality that emerges upon examination of [petitioner]'s criminal history.

The circuit court noted that among petitioner's prior felonies were two convictions for burglary, which is a "serious [crime and involve[s] the threat of violence against persons (quoting *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 515 n. 12, 583 S.E.2d 800, 812 n. 12 (2002) (*per curiam*) (Internal quotations and citations omitted.), *cert. denied*, 539 U.S. 948, 123 S.Ct. 2618, 156 L.Ed.2d 638 (2003))." The circuit court further noted that petitioner's eleven felonies occurred over a period of fourteen years, which is a shorter time span than in *State v. Miller*, 184 W.Va. 462, 400 S.E.2d 897 (1990) (*per curiam*) (Twenty-five years), and *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981) (Sixteen years). The circuit court distinguished *Miller* and *Wanstreet* from petitioner's case "on the ground that the number of felonies for which he stands convicted are nearly three times the number of felonies that were before the consideration of the West Virginia Supreme Court in the above authority." Accordingly, the circuit court dismissed petitioner's habeas petition based on his claim that his recidivist life sentence is disproportionate.

Petitioner filed a notice of appeal from the circuit court's December 15, 2010 order dismissing his habeas petition on January 18, 2011. Petitioner thereafter filed his Petitioner's Brief on April 7, 2011, along with an appendix. Petitioner's appendix included an amended petition for a writ of habeas corpus that raised three additional issues: (1) Ineffective assistance of counsel; (2) Whether a life recidivist sentence cannot be applied to an indeterminate term of imprisonment; and (3) Whether the circuit court violated the West Virginia Trial Court Rules by failing to act on his habeas petition in a timely manner. According to the Circuit Clerk's office, petitioner did not file his amended habeas petition until April 12, 2011, almost four months after the circuit court's order dismissing his habeas case. On June 7, 2011, the respondent warden filed a summary response to petitioner's brief. Petitioner then filed a reply brief on June 23, 2011.

STANDARD OF REVIEW FOR HABEAS CASES

This Court set forth the governing standard of review in Syllabus Point One, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006):

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate

> disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

WHETHER PETITIONER'S LIFE RECIDIVIST SENTENCE WAS DISPROPORTIONATE

Petitioner argues that the circuit court abused its discretion in dismissing his habeas petition when he was given a life sentence not authorized by the recidivist statute found at West Virginia Code §61-11-18 because neither the triggering felony nor the prior felonies were violent, citing *Davis*, supra. The respondent warden argues that the *Davis* Court did not hold that breaking and entering could never be defined as a crime of violence in order to justify the imposition of a life recidivist sentence. The circuit court distinguished *Davis* because of petitioner's more extensive criminal history that included two prior felony convictions for burglary. The circuit court also considered *Miller*, supra, and *Wanstreet*, supra, and distinguished those cases on the ground that petitioner had committed many more felonies over a shorter period of time. After careful consideration, this Court concludes that the circuit court did not abuse its discretion in dismissing petitioner's habeas petition based on his claim that his life recidivist sentence is disproportionate.

ADDITIONAL ISSUES RAISED IN PETITIONER'S AMENDED HABEAS PETITION

Petitioner argues that the respondent warden's summary response should have addressed two of the additional issues petitioner raised in his amended petition for a writ of habeas corpus: (1) Ineffective assistance of counsel and (2) Whether a recidivist life sentence cannot be applied to an indeterminate term of imprisonment. Those are issues that the circuit court did not decide in the proceedings below because petitioner did not file his amended habeas petition until almost four months after the circuit court had dismissed his habeas case. "'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)." Syl. Pt. 4, *State v. Redman*, 213 W.Va. 175, 578 S.E.2d 369 (2003) (*per curiam*). Because the circuit court did not have an opportunity to decide the two additional issues petitioner wants addressed on appeal, this Court will not pass on them in the first instance.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:

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