

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

vs) No. 11-0317 (Ohio County 10-F-49)

**Shawn McCamick,
Defendant Below, Petitioner**

FILED

January 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Ohio County, wherein the petitioner was sentenced to two consecutive one to three year terms of incarceration after pleading “no contest” to attempted kidnapping and attempted malicious assault. One term was suspended for home confinement and probation. The appeal was timely perfected by counsel, with petitioner’s appendix from the circuit court accompanying the petition. The State of West Virginia has filed its response.

This Court has considered the parties’ briefs and the record on appeal. 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 petitioner argues that his sentence was an abuse of discretion and that it violates the proportionality clause of the West Virginia Constitution. However, petitioner does not challenge the constitutionality of the sentence imposed, but instead challenges the circuit court’s decision to deny him alternative sentencing on both crimes. Petitioner cites Article III Section 5 of the West Virginia Constitution, providing that “[p]enalties shall be proportioned to the character and degree of the offense.” He argues that his sentence should be deemed constitutionally impermissible as applied to the present case to the extent that, given the circumstances, it is unduly harsh.

Petitioner was arrested after an argument broke out with his wife while they were transporting his two-year-old son to the hospital for examination after falling from a crib. Petitioner produced a knife, locked the car doors, and told his wife he was going to kill her after ordering her to remove her pants. Petitioner would not let the wife exit the vehicle, so she grabbed the blade to gain control of the knife, injuring herself in the process. She

eventually escaped from the moving vehicle, again injuring herself, and petitioner left with the child. As noted above, petitioner was sentenced to two consecutive one to three year terms of incarceration, though the sentence for attempted kidnapping was suspended for home confinement and probation.

“‘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.’ Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 4, *State ex. rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). To begin, the decision to deny petitioner alternative sentencing is well within the discretion of the circuit court pursuant to West Virginia Code § 62-12-3, and the Court declines to find an abuse of that discretion in the instant matter. Further, per West Virginia Code § 61-11-8, petitioner received the statutory one to three year sentence for an attempt to commit the crime of malicious assault, which is punishable by less than life in prison per West Virginia Code § 61-2-9(a). It was well within the circuit court’s discretion to implement this sentence, and the same is not subject to appellate review. Further, petitioner has misstated the holding in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), arguing that the proportionality standard can apply to any criminal sentence. This Court has held that “[w]hile 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.” Syl. Pt. 4, *Wanstreet, supra*. As such, we decline to apply the constitutional proportionality standards analysis to the instant matter.

For the foregoing reasons, we find no error in the decision of the circuit court and the sentencing order is hereby affirmed.

Affirmed.

ISSUED: January 18, 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