

**State of West Virginia
Supreme Court of Appeals**

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

vs.) No. 11-0334 (Putnam County 10-C-299)

**Grover Lee Breeding
Defendant below, Petitioner**

FILED

**September 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner appeals, pro se, the Circuit Court of Putnam County's denial of his motion for correction of illegal sentence made pursuant to West Virginia Rule of Criminal Procedure 35(a). In ruling on the motion, the circuit court treated the same as a petition for habeas corpus relief. Petitioner is currently serving a seventy-five year sentence for aggravated robbery imposed in 1996. The appeal was timely perfected, with portions of the record from the circuit court accompanying the petition.

This Court has considered the petition 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 petition and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review 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 challenges the circuit court's order denying his Rule 35(a) motion, which the circuit court treated as a petition for habeas corpus relief. Petitioner argues that reclassifying his motion was error, that the circuit court also erred in failing to re-sentence him under the revised version of West Virginia Code § 61-2-12, and that it was error to deny his motion for appointment of counsel. "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). Further, this Court has held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). To begin, it is

important to address the circuit court's decision to treat petitioner's motion for correction of illegal sentence as a petition for habeas corpus relief. Rule 35(a) of the Rules of Criminal Procedure states that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence." Clear from this language is the fact that the rule governs only illegal sentences or sentences imposed in an illegal manner. The nature of petitioner's argument, however, is not that his is an illegal sentence or that his sentence was imposed in an illegal manner. Rather, petitioner believes that he is entitled to re-sentencing under revised statutory language that was enacted after his 1996 sentencing.

Petitioner argues that West Virginia Code § 2-2-8 entitles him to choose whether he wants to be sentenced for aggravated robbery under West Virginia Code § 61-2-12 (1993), the statute in effect at the time of the commission of his crime, or under the subsequent revised language of West Virginia Code § 61-2-12 (2000). This Court has addressed the changes implemented to this statute, stating that the major difference is that "the Legislature added language that required the actual presentment of a weapon as an essential element of first degree robbery." *State of West Virginia v. Johnson*, 219 W.Va. 697, 699, 639 S.E.2d 789, fn. 2 (2006). Petitioner argues that the State never recovered the alleged firearm used in the crime, and as such could not satisfy the elements of first degree robbery under the revised statute. As such, he argues that he is entitled to re-sentencing for second degree robbery and a sentence not to run more than eighteen years. However, we agree with the circuit court's decision to treat this motion as one for habeas relief, due to the fact that the sentence was not illegal or imposed in an illegal manner. Petitioner was appropriately sentenced pursuant to the statute as it was in effect at the time of his sentencing, and the fact that petitioner believes he is entitled to re-sentencing does not make the sentence illegal. As such, we find no error in the circuit court's decision to treat this motion as a petition for habeas corpus relief.

As for petitioner's specific arguments on the issue of re-sentencing, petitioner himself concedes that eyewitness testimony established that he presented a firearm during the commission of the underlying crime. Witness Jacob Persinger testified that the weapon "looked like a small semi-automatic pistol, nickel plated." However, petitioner contends that the jury never decided on the issue of whether a firearm was presented, and therefore seeks re-sentencing for the lesser crime of second degree robbery under the revised statutory language. However, according to the order from which this appeal arises, the jury verdict form from the underlying criminal prosecution shows that the jury found that "while committing the offense of aggravated robbery, [the petitioner]... used a firearm." Because the jury did decide on the issue of petitioner's use of a firearm during this crime, petitioner will be unable to receive a sentence for second degree robbery. The revised statute under which petitioner seeks re-sentencing, reads as follows:

“Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.”

W.Va. Code § 61-2-12(a) (2011). Clear from this language is the fact that by presenting a firearm, which the jury found petitioner had done, he is guilty of first degree robbery and would therefore be re-sentenced under the language quoted above.

The pertinent statute related to re-sentencing following revisions to statutes provides that “...if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect.” W.Va. Code 2-2-8 (2011). It is clear that the jury has previously ruled on this specific issue, and that the evidence would support a conviction for first degree robbery. Therefore, re-sentencing would be inappropriate since petitioner presented a firearm during the robbery. Because petitioner’s punishment would be the same under either version of West Virginia Code § 61-2-12, West Virginia Code § 2-2-8 is irrelevant; the punishment has not been mitigated within the contemplation of the re-sentencing statute. Accordingly, we find no error in the circuit court’s decision to deny habeas relief.

Lastly, petitioner argues that it was error for the circuit court to deny his motion for appointment of counsel because a Rule 35(a) motion constitutes a continuation of his criminal prosecution and because West Virginia Code § 53-4A-1, et seq., requires that such counsel be appointed because petitioner presented a colorable claim. To begin, it is unnecessary to address petitioner’s claims that the nature of a Rule 35(a) motion dictated that he be provided counsel. As addressed above, the circuit court properly treated this motion as one for habeas relief. As for petitioner’s claims that he was entitled to counsel because he presented a colorable claim for habeas relief, the circuit court was also within its discretion to deny counsel in this instance. We have previously held that “[a] court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.” Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973). Petitioner argues that the circuit court’s decision to direct the prosecution to file a response to his motion necessitated appointing counsel, but we disagree. Based upon our prior rulings, it was within the circuit court’s discretion to make this determination.

For the foregoing reasons, we find no error in the decision of the circuit court and the

conviction is hereby affirmed.

Affirmed.

ISSUED: September 13, 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