

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

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

vs) **No. 11-0367** (Pleasants County 08-F-15, 09-F-1)

**Derrick P. Fore,
Defendant Below, Petitioner**

FILED

April 16, 2012

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Pleasants County, wherein the petitioner's motion for reconsideration of his sentence, brought pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, was denied by order entered on January 31, 2011. This pro se appeal was timely perfected by Petitioner Fore, with Petitioner Fore's appendix accompanying his petition. The State, by its attorney Laura Young, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix presented, the Court finds no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner Fore entered an *Alford* plea to second degree robbery and malicious assault. At sentencing, the circuit court considered the underlying circumstances of the petitioner's case. Consequently, the circuit court sentenced the petitioner to consecutive terms of ten to eighteen years, under the recidivism statute, and four to ten years, respectively. These sentences were ordered to run concurrently with current sentences the petitioner was serving from Wood County, with credit for 125 days served. The Honorable Judge Holland presided over the petitioner's plea and sentencing hearings. Following sentencing, the petitioner's counsel discussed filing a motion for reconsideration. However, before the petitioner's counsel could do so, he was hired by the prosecuting attorney's office and did not provide further assistance to Petitioner Fore in his case. Petitioner Fore filed his Rule 35(b) motion pro se. In his motion, Petitioner Fore requested a reduction so that his sentences run concurrently rather than consecutively, that he be appointed counsel to represent him on this matter, and that the circuit court hold an evidentiary hearing on the matter. He argued that a reconsideration of his original sentence was appropriate because he desired to have a relationship with his minor child and be able to better care of his father who was diagnosed with a serious illness. He further asserted that while incarcerated, he has taken advantage of several classes, such as substance abuse counseling. Before the circuit court made a ruling on this motion,

Judge Holland passed away and the Honorable Judge Stone was appointed to preside over the petitioner's case and accordingly, presided over the petitioner's pro se Rule 35(b) motion. The circuit court considered the petitioner's motion without a hearing and found that the petitioner did not present new grounds or facts that were previously unknown to the circuit court at his original sentencing. As such, the circuit court denied the petitioner's motion for reconsideration of his sentence. It is from this order that the petitioner appeals.

“‘In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.’ Syllabus point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).” Syl. Pt. 1, *State v. Arbaugh*, 215 W.Va. 132, 595 S.E.2d 289 (2004).

On appeal, Petitioner Fore argues that the circuit court abused its discretion when it summarily denied and dismissed his pro se Rule 35(b) motion for a reduction and/or reconsideration of his sentence without first appointing counsel and conducting a hearing on the matter. The petitioner argues that as a result, the circuit court deprived the petitioner of the opportunity to fairly present his case, to introduce evidence, and to call witnesses in his favor. Petitioner Fore argues that he was entitled to an evidentiary hearing because he had witnesses who would provide testimony to show that his original sentence was not appropriate.

The State responds, arguing that the circuit court properly denied the petitioner's Rule 35(b) motion for reconsideration. The State argues that the petitioner was not entitled to an evidentiary proceeding under *State v. King*, 205 W.Va. 422, 518 S.E.2d 663 (1999), a decision in which this Court held that where the circuit court held lengthy hearings when the defendant pled guilty and when he was sentenced, the circuit court was not required to hold another hearing to consider his motion for a reduction of sentence. The State asserts that because several hearings were held in court, the circuit court did not abuse its discretion when it made a ruling without an evidentiary hearing. The State argues that therefore, the petitioner's petition for appeal should be denied.

In his reply, the petitioner contrasts his case to *King*. The petitioner argues that unlike in *King*, the circuit court judge who presided over the petitioner's Rule 35(b) motion was *not* the same circuit court judge who had presided over the petitioner's initial proceedings. Accordingly, the petitioner contends that he is entitled to an evidentiary hearing on this motion.

The Court finds that a circuit court has the discretion in deciding whether or not an evidentiary hearing is necessary on a Rule 35(b) motion. For this, the circuit court did not err in making a ruling without holding a hearing. The circuit court's order reveals that it reviewed the petitioner's prior sentencing and found nothing new in the petitioner's circumstances to warrant granting his Rule 35(b) motion. Accordingly, the circuit court did not commit error in this decision.

Affirmed.

ISSUED: April 16, 2012

CONCURRED IN BY:

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

DISSENTING:

Chief Justice Menis E. Ketchum