STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0406 (Roane County 09-F-32)

Christopher Shane Delaney,
Defendant Below, Petitioner

FILED
October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Christopher Shane Delaney appeals his convictions and sentences for felony Conspiracy to Commit Robbery, misdemeanor Petit Larceny, and misdemeanor Conspiracy to Commit Petit Larceny. The State filed a summary response.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on May 10, 2011. 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 State asserted that petitioner and three accomplices stole a vehicle and then drove to the home of Mr. and Mrs. Burdette, an older couple. The State asserted that the perpetrators invaded the Burdettes' home during the nighttime, physically assaulted the couple, and stole money. Petitioner testified at trial that he was involved in stealing the car, but he asserted that the others had dropped him off at his grandparents' home before they went to the Burdette home. Petitioner denied any involvement in the crimes against the Burdettes. The jury found petitioner guilty of three crimes: felony Conspiracy to Commit a Felony, *to-wit* Robbery, West Virginia Code § 61-10-31; misdemeanor Petit Larceny, West Virginia Code § 61-3-13(b); and misdemeanor Conspiracy to Commit a Misdemeanor, *to-wit* Petit Larceny, West Virginia Code § 61-10-31. He was acquitted of several other counts.

Petitioner was sentenced to one to five years in prison for Conspiracy to Commit Robbery, one year in jail for Petit Larceny, and one year in jail for Conspiracy to Commit Petit Larceny. The court imposed the sentences consecutively and ordered that the jail sentences are to be served prior to the prison sentence. Petitioner was given credit for pre-conviction time served of 573 days.

In his first assignment of error, petitioner argues that the circuit court committed plain error by allowing the prosecutor to make an improper comment to the jury during closing argument, *to wit*, that petitioner had "changed his story" in his trial testimony. Petitioner argues that this comment suggested that petitioner had given a prior inconsistent statement, when there was no evidence that petitioner had given any prior statements whatsoever. The State argues that this issue was waived by the failure to object and that, in any event, this was a single, isolated comment.

Because petitioner did not object to the prosecutor's comment at trial, we apply a plain error analysis. In order for the Court to find plain error occurred in this case, "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, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The record on appeal does not contain a transcript of the parties' closing arguments. However, even accepting that the prosecutor's comment was exactly as petitioner sets forth in his appellate brief, we cannot conclude that this comment affected petitioner's substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The parties explain that, during its deliberations, the jury asked to see petitioner's "initial statement." In response, the judge instructed, "[t]here is no such statement. You must make your decision/verdicts based on the evidence that was presented." We find that this instruction cleared up any confusion that might have been caused by the prosecutor's remark.

In his second assignment of error, petitioner argues that the court's instruction that there "is no such statement" was error in that it amounted to a comment on petitioner's right to remain silent. As petitioner did not object to this instruction at trial, this issue is also reviewed under a plain error analysis. Again, we find no plain error. The court was clearing up a point of confusion and was directing the jury to consider only the evidence presented at trial. The court made no comment about, and drew no conclusions from, the absence of an initial statement so as to infringe on petitioner's right to remain silent before trial. Moreover, petitioner chose to testify on his own behalf, thus he did not invoke his right to remain silent at trial.

In his third assignment of error, petitioner argues that the circuit court erred by refusing his request to impose his felony prison sentence prior to his misdemeanor jail sentences. Petitioner argues that by imposing the jail sentences first, the jail sentences will be reduced by his credit for time served and he will be deprived of the opportunity to "work off" up to twenty-five percent of his misdemeanor time in accordance with West Virginia Code § 17-15-4. Pursuant to subsection (a) of that statute, these work credits are available to convicted persons who are sentenced to jail and who meet certain criteria.

"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 circuit court imposed the sentences specified by statute and gave petitioner credit for his pre-trial time served. The circuit court had the discretion to decide in what order the sentences would be served. Moreover, there is no guarantee that petitioner, who was also convicted of a felony, would have been permitted to participate in the jail work program.[1] Upon a review of the record and the parties' arguments, we find that the circuit court did not abuse its discretion.

Petitioner makes a cursory argument that his right to equal protection was violated because he is being treated worse than a defendant who could afford to make pre-trial bail and could "work off" some jail time after conviction. This Court has previously stated that "issues . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) (citations omitted). This Court declines to address this issue because it has not been sufficiently developed by petitioner.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 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

[1] West Virginia Code § 17-15-4(a) sets forth the criteria for eligibility in the jail work program.