STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0458 (Harrison County 05-F-163-1)

Roger A. McKinney,
Defendant below, Petitioner

FILED
February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Harrison County, wherein the petitioner was sentenced to sixty years of incarceration after entering a plea agreement whereby he pled guilty to first degree robbery. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed a response brief and supplemental appendix, to which petitioner filed a reply.

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 substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On appeal, petitioner argues that the circuit court abused its discretion in denying his motion in arrest of judgment pursuant to Rule 34 of the West Virginia Rules of Criminal Procedure as untimely and without merit. Petitioner contends that, per this Court's holding in *State v. Johnson*, 219 W.Va. 697, 639 S.E.2d 789 (2006), he is entitled to file his motion out of time because it alleges a defective indictment. He further argues that it was improper for the State to present a charge of first degree robbery to the grand jury because at most he could only have been charged with second degree robbery because he used a toy gun in the commission of his crime. "'In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.' Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997)." Syl., *In re Dandy*, 224 W.Va. 105, 680 S.E.2d 120 (2009) (per curiam).

To begin, it is important to note that this matter is entirely distinguishable from the *Johnson* matter. In that case, we stated as follows:

> Rule 34 of the West Virginia Rules of Criminal Procedure requires that a "motion in arrest of judgment shall be made within ten days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the ten-day period." Here, the motion for arrest of judgment was made 61 days after the verdict was rendered. Johnson argues that while the motion was filed well outside the time limit set by Rule 34, the basis for the motion was insufficiency of the indictment, an issue which was raised twice during the trial. We find that, though the motion in arrest of judgment was not timely made as required by Rule 34, the defects in the indictment are such that they cannot be ignored on the basis of a technicality such as timeliness. Even the State and the trial court itself questioned the sufficiency of the indictment. We agree with Johnson that the indictment simply did not reflect the language of the law of first degree robbery at the time that the crime was committed. Accordingly, the indictment was so defective as not to charge an offense under West Virginia law, and one can raise such a defect at any time.

State v. Johnson, 219 W.Va. 697, 702, 639 S.E.2d 789, 794 (2006). Clear from this language is the fact that a party may raise an argument as to a defective indictment at any time, so long as it was so defective as not to charge an offense under the laws of the state. In *Johnson*, the petitioner argued that the indictment with which he was charged was insufficient because it charged an offense which no longer existed in the state at the time of his arrest. The State even conceded in *Johnson* that the indictment misstated the essential elements of first degree robbery. *Id*. 219 at 700, 639 at 792. However, in the present case, petitioner does not allege any mistake in the indictment beyond his argument that his use of a toy gun precludes his being guilty of first degree robbery because he could not have presented a firearm.

Petitioner previously appealed his conviction to this Court on the grounds that the evidence was insufficient to support his guilty plea to first degree robbery. The Court found that argument to be without merit and refused the same in West Virginia Supreme Court Case Number 091051. Further, looking at the indictment in this matter, it is clear that the language used therein mirrors the version of West Virginia Code § 61-2-12 in effect at the time petitioner committed the crime in question. Because the indictment was not so defective as to fail to charge petitioner with a crime under the laws of our state, the holding in *Johnson* is inapplicable and the circuit court was correct in denying petitioner's motion in arrest of judgment as untimely.

For the foregoing reasons, we find no error in the decision of the circuit court and the order denying petitioner's motion in arrest of judgment is hereby affirmed.

Affirmed.

ISSUED: February 14, 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