

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

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

vs) **No. 11-0548** (Gilmer County 05-F-35)

**Henry Howard Jenkins,
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 Gilmer County, wherein the circuit court denied the petitioner's motion for alternative sentencing. This appeal of the order denying his motion for alternative sentencing was timely perfected by counsel, with Petitioner Jenkins's appendix accompanying the petition. The State responds in support of the circuit court order and also files an appendix.

This Court has considered the parties' briefs and the appendices on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendices 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 appendices 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.

Petitioner was indicted for seven counts of incest against his daughter. He entered a no contest plea to the first two counts and by agreement with the State, the State dismissed the remaining counts with prejudice. At sentencing, the circuit court denied the petitioner's motion for alternative sentencing and ordered the petitioner to serve two consecutive sentences of five to fifteen years, making his total sentence a period of ten to thirty years imprisonment. The petitioner's counsel failed to file a timely appeal. Consequently, the petitioner filed a Petition for Post-Conviction Habeas Corpus on this ground and the circuit court granted the petitioner's petition for relief. Accordingly, the circuit court set aside the petitioner's sentence and scheduled the matter for re-sentencing. At re-sentencing, the petitioner again requested alternative sentencing through probation or home confinement. However, the circuit court again sentenced the petitioner to two consecutive sentences of five to fifteen years for each of his two convictions for incest.

On appeal, the petitioner argues that the circuit court abused its discretion in denying the petitioner's request for either probation or home confinement. In support, the petitioner argues that he has not been heavily involved in the legal system within the last fifteen years;

since 1996, he has not gone more than a few months without being gainfully employed; and his sex offender evaluation indicated that he is capable of participating in outpatient sex offender counseling behaviorally oriented with individual and group components to address his inappropriate sexual activities. Accordingly, the petitioner argues that he should have received either probation or home confinement in lieu of ten to thirty years imprisonment.

The State argues that the circuit court did not abuse its discretion. For a conviction of incest under West Virginia Code § 61-8-12, the circuit court may sentence an offender to a term of not less than five, nor more than fifteen years, with a possible fine of not less than \$500.00, nor more than \$5,000.00. The plea agreement between the petitioner and the State further provided that the petitioner acknowledged that “he may appeal if the sentence imposed by the [c]ourt upon his plea of ‘no contest’ exceeds the lawful limits” The circuit court was justified in weighing any factors argued by the petitioner against the harm inflicted on the victim and was justified in taking into account the petitioner’s lack of remorse and attempt to shift blame to his young teenage daughter.

“‘The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.’ Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). The directives provided in West Virginia Code § 61-8-12 are clear; the petitioner’s plea agreement as it pertains to his waiver of issues on appeal and the possibility of receiving the penitentiary sentence provided in West Virginia Code § 61-8-12 is clear. Nothing new developed in between the petitioner’s two sentencing hearings and the circuit court considered the petitioner’s pre-sentence investigation report in its decision. Accordingly, the circuit court did not exceed the lawful limits of West Virginia Code § 61-8-12 and did not abuse its discretion when it sentenced the petitioner to two consecutive terms of five to fifteen years imprisonment for his two convictions for incest.

For the foregoing reasons, we affirm the circuit court decision.

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