

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

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

vs) No. 11-0556 (Marshall County 11-F-5)

**Shelley Ray Guthrie,
Defendant Below, Petitioner**

FILED

March 9, 2012

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

MEMORANDUM DECISION

Petitioner Shelley Ray Guthrie, by counsel, Paul J. Harris and Shawn L. Fluharty, appeals her conviction following her guilty plea to felony grand larceny. Respondent State of West Virginia, by counsel, Desiree Halkias Divita, has filed a summary response. Petitioner has filed a reply. Petitioner seeks the withdrawal of her guilty plea and a trial.

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 of Appellate Procedure.

Facts

On March 9, 2010, petitioner was charged in a seven-count indictment with embezzling funds from her employer, the Marshall County Federal Credit Union ("Credit Union"), located in Moundsville, West Virginia. On February 3, 2011, petitioner pled guilty to a one-count information charging embezzlement. She was later allowed to withdraw her guilty plea because the plea agreement misstated the sentence for the crime. Pursuant to a second plea agreement with the State, on February 25, 2011, petitioner pled guilty to a new one-count information charging her with felony grand larceny in violation of West Virginia Code §61-3-13(a) and in the same dollar amount as contained in the original seven-count indictment.

In its order entered on February 28, 2011, the trial court accepted petitioner's guilty plea, adjudged her guilty of the felony offense of grand larceny, and sentenced her to one to ten years with a recommendation that she serve a minimum of two years of actual incarceration. The trial court also ordered petitioner to satisfy restitution in the amount of \$37,359.82 and to pay the cost of the prosecution of the case.

Conflict of Interest

In a hearing held before the trial court on July 1, 2010, petitioner's counsel represented to the court that there might be a conflict because his father served as legal counsel to the Credit Union, but that petitioner had advised him that she did not have any problem with that representation. The hearing transcript reflects that upon questioning by the trial court, petitioner stated on the record that she did not have any problem and that she was satisfied with her counsel representing her. Thereafter, the trial court stated, "There is an affirmative waiver of potential conflict on the record." In the trial court's order entered on July 2, 2010, the trial court again stated that "[petitioner] waived affirmatively on the record the potential conflict presented to this Court."

Petitioner now argues that there are circumstances where an attorney cannot properly ask for consent to waive a conflict and that even if she wanted her court-appointed counsel to continue representing her, the conflict was so extensive that consent could not be given. Petitioner states that such a situation existed when the father of her court-appointed counsel represented the Credit Union at her unemployment compensation hearing and cross-examined her gaining knowledge of facts that she contends were later used in the case-at-bar.¹

We have observed that "[a]n indigent criminal defendant may demand different counsel for good cause, such as the existence of a conflict of interest, (citation omitted), or, if the potential conflict is disclosed in a timely fashion, he may elect to waive his rights and keep the court appointed counsel." *State v. Reedy*, 177 W.Va. 406, 411, 352 S.E.2d 158, 163 (1986). In *State v. Reed*, 223 W.Va. 312, 318, 674 S.E.2d 18, 24 (2009) (per curiam), this Court noted that the defendant "could not agree to allow [his counsel] to represent him, notwithstanding a possible conflict of interest, and then complain about that representation because of the same possible conflict of interest. This tactic constitutes 'invited' error." (Citations omitted).

It appears from the record that the potential conflict of interest in the case-at-bar was raised in a timely fashion and that petitioner unequivocally waived the potential conflict on the record before the trial court. Accordingly, we find that to the extent a potential conflict of interest existed, it was waived by petitioner, who cannot invite error by now complaining of her waiver.

Ineffective Assistance of Counsel

Petitioner asserts that her counsel provided ineffective assistance by failing to request a psychiatric exam to test her competency; by failing to retain an accounting expert to review the financial documents at issue; and by providing assurances to her that she would receive probation

¹ The Court is also persuaded by the State's argument that it is difficult to see how information from the unemployment proceeding could have been used against petitioner by her own counsel—particularly since a transcript from the unemployment hearing was produced in discovery in the case-at-bar, which the State asserts is how petitioner's counsel learned that his father represented the Credit Union.

if she pled guilty. This Court's ability to review a claim of ineffective assistance of counsel is very limited on direct appeal. Such a claim is more appropriately developed in a petition for writ of habeas corpus. Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995); Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Accordingly, we decline to rule on any claims of ineffective assistance of counsel in the context of this direct appeal. If petitioner desires, she may pursue a petition for writ of post-conviction habeas corpus. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

Sentencing

Petitioner raised a new issue in her reply brief regarding whether her sentence violates the proportionality principle in Article III, Section 5 of the West Virginia Constitution when it is compared with other sentences imposed for embezzlement offenses within the same jurisdiction.² Petitioner cites *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), in support of her argument.

Criminal sentences within statutory limits are generally not subject to appellate review unless the sentence is based on some impermissible factor. Syl. Pt. 4, *State ex. rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007) (per curiam) (quoting Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)). Here, petitioner's sentence is within the statutory limits for grand larceny. Further, "[w]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syllabus point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)." Syl. Pt. 3, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009) (per curiam). Here, grand larceny has a fixed maximum sentence of ten years. W.Va. Code §61-3-13(a).

Having reviewed the record, including the transcript of petitioner's plea and sentencing hearing and the reasons for the trial court's sentencing decision as set forth therein, the Court affirms petitioner's sentencing.

For the foregoing reasons, we affirm.

Affirmed.

² The Court will address this issue even though the State did not have an opportunity to respond since it was raised for the first time in petitioner's reply brief.

ISSUED: March 9, 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