STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0563 (Berkeley County 09-F-172)

Scott E. Minnick, 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 Berkeley County, wherein the petitioner was sentenced to a term of five to twenty-five years of incarceration for one count of first degree sexual abuse and a term of ten to twenty years of incarceration for one count of sexual abuse by a custodian after he entered a plea pursuant to *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987), said sentences to run consecutively. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed a response.

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 committed plain and prejudicial error and abused its discretion in denying his various motions for alternative sentencing, and also that the circuit court committed plain and prejudicial error by imposing a sentence so disproportionate to the crimes as to be unconstitutional. Petitioner admits that his sentence was within the statutory limits of his crimes, but nevertheless argues that the circuit court did not give adequate consideration to alternative sentencing. He argues that the circuit court seemed to base its decision upon petitioner's inability to adequately admit his role in the crimes, even though he admitted his guilt in open court under his plea. "'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).

A review of the record clearly indicates that the circuit court gave adequate consideration to alternative sentencing, but in exercising its discretion chose to sentence petitioner to consecutive terms of incarceration for his serious sexual crimes. As we have held, "'[t]he decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court's discretion.' *State v. Duke*, 200 W.Va. 356, 364, 489 S.E.2d 738, 746 (1997)." *State v. Shaw*, 208 W.Va. 426, 429, 541 S.E.2d 21, 24 (2000) (per curiam). Therefore, "[t]he decision of a trial court to deny probation will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion." Syl. Pt. 2, *State v. Shafer*, 168 W.Va. 474, 284 S.E.2d 916 (1981). Prior to denying petitioner his requested alternative sentencing, the circuit court made reference to the petitioner's psychological report and the testimony of Dr. Pate, which petitioner relies upon in arguing that mitigating factors were present that supported alternative sentencing. Further, the record shows that the circuit court was even actively engaged in questioning Dr. Pate during his testimony. These facts indicate that the circuit court was aware of, and considered, any alleged mitigating factors to which Dr. Pate testified.

As for petitioner's argument that the circuit court erroneously relied upon an impermissible factor in denying his motions, we find no merit to the argument. While it is true that petitioner entered his plea pursuant to *Kennedy v. Frazier*, *supra*, following *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970), the record below clearly shows that petitioner failed to accept responsibility for his actions by placing the blame on the child throughout the course of the proceedings. Under *Kennedy*, "[a]n accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him." Syl. Pt. 1, *Kennedy*, supra. Pursuant to this language, it is clear that the nature of petitioner's plea did not encompass a total admission of guilt in open court, as petitioner has argued. Quite the contrary, Dr. Pate's report indicates that the petitioner blamed the seven-year-old victim of his crimes, claiming that she initiated sexual activity with him and that he asked her to stop but that she would not. As such, it is clear that the circuit court did not consider any impermissible factors in coming to a decision with regard to sentencing, and sentenced petitioner within the statutory limits for the offenses of conviction.

Petitioner next argues that the circuit court committed plain error by imposing a sentence so disproportionate to the crimes of conviction as to be unconstitutional. He argues that consecutive sentences, even given the nature of the crimes, shocks the conscience and offends fundamental notions of human dignity in light of the mitigating factors in his case. He argues that the circuit court clearly failed to consider any mitigating factors, and that even if the Court were not to find that the sentence shocks the conscience, that it is disproportional. "'Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it

shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.' Syllabus point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983)." Syl. Pt. 5, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009) (per curiam). Simply put, we find no merit in petitioner's argument. As noted above, the petitioner was sentenced to terms of incarceration within the statutory guidelines for his crimes. Further, the nature of petitioner's crimes clearly warrants such punishment, as petitioner was found guilty of sexually abusing a seven-year-old girl whose parents had left the child in petitioner's care in order to obtain medicine for her. The petitioner had watched the child previously and had built trust with the family, and the record shows that he victimized the child on other occasions. Considering the seriousness of the offenses and the tender age of the victim, this sentence does not shock the conscience. Neither is the sentence disproportionate to the crimes. The legislature clearly enacted West Virginia Code § 61-8D-5 as a specifically separate and distinct offense from other sexual crimes in order to address victimization of children by parents, guardians, and custodians. This Court has also noted that West Virginia is not alone in the severity of its punishments for sexual offenses. See *State v. Goff*, 203 W.Va. 516, 524, 509 S.E.2d 557, 565 (1998). For these reasons, the petitioner's sentence is not unconstitutional.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court's sentencing order is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

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