STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0586 (Fayette County 08-F-69)

James L. Whitlow,
Defendant Below, Petitioner

FILED
November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James Whitlow appeals from his felony convictions following a jury trial on twenty-one counts of sex-related offenses involving his step-daughter. Petitioner was sentenced by the trial court to 135 to 440 years in prison. Petitioner seeks a reversal of his convictions and a new trial on all counts. The State of West Virginia has filed a response.

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.

On January 9, 2008, petitioner was charged in an indictment with seven counts of first degree sexual assault in violation of West Virginia Code §61-8B-3, seven counts of sexual abuse by a parent, guardian or custodian in violation of West Virginia Code §61-8D-5, and seven counts of incest in violation of West Virginia Code §61-8-12, all of which arose from seven separate acts involving his step-daughter, J.T., occurring in each of the first seven months of 2007.

At trial, Sandra Whitlow testified that she had been married to petitioner for eleven years[1] when, on July 29, 2007, she discovered petitioner with her eleven-year-old daughter J.T. in a back room of their home. The trial transcript reflects Sandra Whitlow's testimony that she observed petitioner in a prone position above her daughter, who was lying on a mattress, with the front of his sweat pants pulled below his genitals revealing his erection.

[1] It appears from the record that Sandra Whitlow and petitioner are now divorced.

Sandra Whitlow further testified that her daughter later revealed to her that "it had been going on" for a long time. During Sandra Whitlow's testimony at trial, she identified various letters that she had received from petitioner while he was in jail awaiting trial, which letters included language such as, "I know what I am accused of and that this is all my fault . . ." and "I don't expect you to trust me around your kids ever again . . . ."

Petitioner challenges J.T.'s trial testimony regarding the incident occurring in January of 2007. Petitioner contends that J.T. testified that he had pulled her shorts aside thereby providing him with access to her "private parts," but that she did not specifically testify that he engaged in any sex act with her on that occasion. The trial transcript reflects, however, that J.T.'s immediately preceding testimony was that petitioner had placed his penis in her vagina at least once in each of the months of January through July of 2007. The trial transcript also contains the testimony of Fred Akerberg, M.D., who testified that his sexual assault examination of J.T. showed "no evidence of a hymen or hymenal remnants" which, in a majority of times, is caused by something penetrating the vagina.

The jury returned a verdict finding petitioner guilty on all twenty-one counts of the indictment. The Pre-Sentence Investigation Report reflects that petitioner showed no remorse and did not accept responsibility for his conduct. The Report further reflects petitioner's criminal history, including multiple prior convictions for grand theft, battery, robbery, and burglary, as well as a history of probation and parole violations. Based on these factors, the trial court found that there was a substantial risk that petitioner would re-offend. The trial court sentenced petitioner within the statutory limits for each of his convictions and, after ordering certain sentences to be served concurrently and others consecutively, the overall sentence is 135 to 440 years in prison.

Petitioner asserts that under a subjective test, if a sentence shocks the conscience and offends fundamental notions of human dignity, it is unconstitutionally disproportionate and violates Article III, §5 of the West Virginia Constitution. Petitioner asserts that his sentence shocks the conscience and offends fundamental notions of human dignity. Petitioner adds that under an objective test, consideration must be given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted by other jurisdictions, and a comparison with the offenses within the same jurisdiction. Petitioner adds that had he killed J.T. and been convicted of first degree murder with a recommendation of mercy, he could have been paroled in fifteen years, and if he had been convicted of second degree murder, he could have been paroled in ten years. Petitioner notes his own troubled childhood and adds that while he "stole her (J.T.'s) innocence," she has suffered no other harm, has not acted out, and is doing well in school.

The State argues that a sentence of 135 to 440 years for multiple instances of sexual abuse, including multiple instances of vaginal intercourse, committed before the victim reached the age of twelve, is hardly shocking to the conscience of the court and society. The State adds that the sentence is proportionate to the offense and is not excessive. The State highlights the trial court's comment during sentencing that petitioner has a "long history of criminal activity, and no reform of conduct, a total failure to abide by the rules and regulations of authority . . . ." The State further notes that a forensic counselor who evaluated petitioner found that he is a high risk to re-offend and that his target population is pre-adolescent females.

"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). "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). "'While 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).

While petitioner's sentence is lengthy, it does have a fixed maximum set by statute and is not a recidivist life sentence. *Id.* Further, as we noted in *State v. Cook*, No. 35465, 2010 WL 4275253, at *9 (W.Va. Oct. 28, 2010) (per curiam) (footnotes omitted), "[g]iven the clear legislative decision to impose stiff penalties on specified individuals who commit acts of sexual abuse on children under their care, supervision, or trust, we find no basis for determining that Appellant's sentence was constitutionally disproportionate to the grievous offenses for which he was convicted." Here, the sentence imposed by the trial court was within statutory limits and was based, *inter alia*, upon petitioner's criminal history and the substantial risk that he would re-offend. Upon a review of the record and the parties' arguments under the standards of review set forth above, we conclude that the trial court did not abuse its discretion in sentencing.

Next, petitioner asserts that there was no testimony that he had vaginal intercourse with J.T. in January 2007, therefore, the guilty verdicts on the three counts arising from the January 2007 incident must have been motivated by the jury's passion and prejudice.[2] Petitioner argues that the relevant inquiry is whether, after reviewing the evidence in a light

[2] Petitioner does not challenge the evidentiary sufficiency of his other convictions.

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompson*, 220 W.Va. 246, 647 S.E.2d 526 (2007) (per curiam). Petitioner asserts that he has been denied due process of law because he was convicted of three crimes without evidence to support those convictions thereby entitling him to a new trial by a fair and impartial jury.

The State responds that there was sufficient evidence for the jury to convict petitioner for the three felony offenses that occurred in January of 2007. The State cites to J.T.'s trial testimony that petitioner had placed his penis in her vagina at least once in each of the months of January through July of 2007.

All evidence is viewed in the light most favorable to the prosecution and "a jury verdict should only be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt" Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). The Court "must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt." *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996). Here, J.T.'s testimony supports the jury's factual finding that petitioner had vaginal intercourse with her in January of 2007, and the verdict as to the three counts involving the January 2007 incident should not be disturbed.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 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